Cabrillo Pacific University
College of Law
3620 AERO COURT, SAN DIEGO, CA. 92123

NATIONAL UNIVERSITY LIBRARY

SAN DIEGO

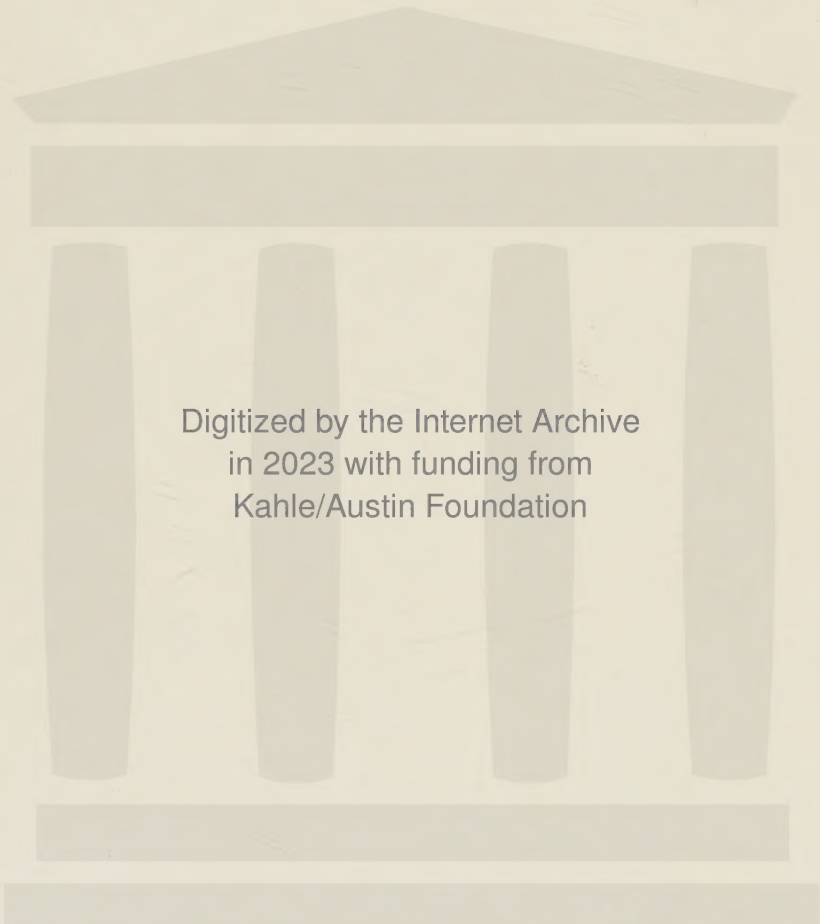
NON-CIRCULATING

CALIFORNIA REPORTER REFERENCES

101 CALIFORNIA APPELLATE REPORTS, 2d SERIES

Cal.App. Page	P.2d Vol.	P.2d Page
1	224	907
7	224	900
10	224	904
15	224	702
26	224	824
31	224	848
33	224	808
41	224	765
44	224	870
47	224	913
49	224	899
50	224	878
54	224	778
62	224	885
70	224	911
71	224	748
80	224	488
83	224	754
93	224	902
96	224	884
99	224	744
105	224	849
108	224	783
123	225	14
125	224	914
129	225	238
140	225	1
140	225	913
151	225	255
163	225	293
168	225	8
171	225	247
179	225	291
184	225	3
190	225	282
193	225	11
197	225	10
200	225	283
205	225	229
208	225	590
215	225	276
221	225	303
226	225	554
233	225	314
238	225	312
242	225	270
245	225	310
248	225	617
253	225	235
257	225	273
262	225	668
271	225	663
275	225	231
278	225	233
282	225	297
292	225	614
297	225	279
300	225	665
305	225	600
314	225	606
322	225	645
329	225	307
333	225	245
338	225	317
345	225	570
349	225	573
361	225	625
375	225	929
390	225	597
396	225	558
416	225	272
417	225	307
418	225	594
423	225	253
427	225	634
438	225	920
449	225	993
457	225	674
476	225	660
480	225	539
491	225	545
500	225	950
509	225	289
512	225	585
520	225	973
526	225	620
533	225	955
544	225	927
548	225	997
555	225	652
558	225	988
566	225	580
568	225	966
572	225	649
576	225	613
579	225	962
586	225	656
592	225	1002
597	225	978
606	225	641
612	225	969
618	225	918
621	225	943
624	226	9
631	225	938
638	226	50
643	226	14
652	225	976
656	225	1005
658	225	945
665	226	53
674	226	58
678	226	60
681	226	73
684	226	350
699	226	65
700	226	38
704	226	74
709	226	359
716	226	66
720	226	80
727	226	46
733	226	20
740	226	647
744	226	385
748	226	78
753	226	363
756	226	373
760	226	372
763	226	763
770	226	62
772	226	41
777	226	369
782	226	5
788	226	34
790	226	32
795	226	69
801	226	44
805	226	712
811	226	728
816	226	348
819	226	613
825	226	620
831	226	662
840	226	380
841	226	723
846	226	657
855	226	380
856	226	381
862	226	650
869	226	668
871	226	694
884	226	739
890	226	702
907	225	536
912	226	87
918	226	91
927	226	376
932	226	85

Cal.App. Page	P.2d Vol.	P.2d Page
1	226	636
8	226	751
28	226	722
30	226	617
34	226	736
39	226	716
44	226	624
53	226	605
60	226	609
63	226	726
67	226	742
81	226	644
87	226	619
88	226	641
94	226	655
97	226	669
100	226	611
104	226	672
114	226	732
120	226	633
126	226	767
132	227	285
141	227	25
147	227	36
149	227	38
159	227	48
166	227	31
169	227	33
170	227	57
174	227	278
179	227	34
183	227	272
188	227	53
195	227	28
198	227	306
206	227	43
209	227	51
211	227	62
215	227	45
220	227	270
223	227	17
233	227	64
241	227	480
249	227	477
254	227	555
260	227	564
270	227	500
285	227	290
288	227	303
293	227	473
298	227	515
302	227	470
308	227	521
314	227	281
320	227	461
323	227	484
338	227	559
345	227	524
353	227	867
374	227	550
382	227	546
385	227	539
395	227	494
404	227	468
408	227	509
418	227	529
435	227	517
440	227	545
442	227	841
449	227	857
453	227	916
464	227	923
484	227	900
489	227	847
493	227	909
506	227	894
509	227	845
513	227	850
515	227	881
526	227	892
529	227	860
541	227	889
545	227	851
548	227	838
552	227	896
559	228	323
566	228	307
583	228	33
586	228	13
593	228	56
597	228	35
602	228	17
608	228	333
612	228	62
619	228	29
622	228	98
624	228	54
626	228	69
627	228	42
635	228	99
643	228	70
653	228	68
655	228	95
660	227	881
662	228	58
666	228	26
672	228	66
675	228	51
680	228	83
689	228	37
696	228	93
700	228	21
708	228	46
712	228	296
730	228	327
736	228	60
738	228	89
738	229	491
742	228	55
743	228	317
750	228	76
754	228	79
760	228	31
762	228	91
765	228	336
774	228	600
778	228	331
781	228	611
785	228	857
789	229	13
800	228	583
808	229	46
814	228	827
821	228	872
827	228	593
831	228	867
839	228	341
849	228	293
854	228	321
857	228	588
859	228	347
861	229	128
872	228	578
875	228	620
878	228	898
884	228	841
894	228	599
896	229	38
909	228	577
911	228	889
919	228	847
926	229	27
935	226	587
943	227	463
952	228	104
954	228	349



Digitized by the Internet Archive
in 2023 with funding from
Kahle/Austin Foundation

https://archive.org/details/californiareport2312vari_231-232.2d

CALIFORNIA REPORTER

COVERING CASES REPORTED IN

PACIFIC REPORTER
SECOND SERIES

WEST KEY NUMBER SYSTEM

231 P. 2d – 232 P. 2d

CITE BY VOLUME AND PAGE
OF THE
PACIFIC REPORTER
SECOND SERIES

Thus:
231 P.2d 1

ST. PAUL, MINN.
WEST PUBLISHING CO.
1951

COPYRIGHT, 1951, BY WEST PUBLISHING CO.
Pacific Reporter, Second Series, Vol. 231, Nos. 1-3;
Vol. 232, Nos. 1-4.

COPYRIGHT, 1951, BY WEST PUBLISHING CO.

JUDGES AND OFFICERS

SUPREME COURT

CHIEF JUSTICE

PHIL S. GIBSON ..... San Francisco

DEPARTMENT ONE

PRESIDING JUDGE

JOHN W. SHENK ..... San Francisco

ASSOCIATE JUSTICES

JESSE W. CARTER ..... San Francisco
B. REY SCHAUER ..... Los Angeles

DEPARTMENT TWO

PRESIDING JUSTICE

DOUGLAS L. EDMONDS ..... San Francisco

ASSOCIATE JUSTICES

ROGER J. TRAYNOR ..... Berkeley
HOMER R. SPENCE ..... San Francisco

CLERKS

WILLIAM I. SULLIVAN	Clerk	San Francisco
HARRY M. GARDISER	Chief Deputy Clerk	San Francisco
LOREN F. WHITE	Deputy Clerk	San Francisco
A. ROBERT FAIRWELL	Deputy Clerk	San Francisco
RAYMOND J. BELL	Deputy Clerk	San Francisco
A. F. BRADOVICH	Deputy Clerk	Sacramento
HENRY P. CRABTREE	Deputy Clerk	Los Angeles
DAVID BLOMGREN	Deputy Clerk	Los Angeles

DISTRICT COURTS OF APPEALS

FIRST DISTRICT—SAN FRANCISCO

Division 1

PRESIDING JUSTICE

RAYMOND E. PETERS ..... San Francisco

ASSOCIATE JUSTICES

A. F. BRAY ..... San Francisco
FRED B. WOOD ..... San Francisco

Division 2

PRESIDING JUSTICE

JOHN T. NOURSE ..... San Francisco

ASSOCIATE JUSTICES

C. J. GOODELL ..... San Francisco
MAURICE T. DOOLING, Jr. ..... Hollister

CLERKS

WALTER S. CHISHOLM ..... Clerk ..... San Francisco
L. R. ELKINGTON ..... Deputy Clerk ..... San Francisco
PAUL DINOIA ..... Deputy Clerk ..... San Francisco

SECOND DISTRICT—LOS ANGELES

Division 1

PRESIDING JUSTICE

THOMAS P. WHITE ..... Los Angeles

ASSOCIATE JUSTICES

WILLIAM C. DORAN ..... Los Angeles
LOUIS C. DRAPEAU ..... Los Angeles

Division 2

PRESIDING JUSTICE

MINOR MOORE ..... Los Angeles

ASSOCIATE JUSTICES

MARSHALL F. McCOMB ..... Los Angeles
EMMET H. WILSON ..... Los Angeles

DISTRICT COURTS OF APPEALS—Cont'd.

Division 3

PRESIDING JUSTICE

CLEMENT L. SHINN ..... Los Angeles

ASSOCIATE JUSTICES

PARKER WOOD ..... Los Angeles
PAUL VALLÉE ..... Los Angeles

CLERKS

JAMES E. BROWN ..... Clerk ..... Los Angeles
WM. E. DORAN ..... Deputy Clerk ..... Los Angeles
EUGENE B. STANLEY ..... Deputy Clerk ..... Los Angeles

THIRD DISTRICT—SACRAMENTO

PRESIDING JUSTICE

ANNETTE ABBOTT ADAMS ..... Sacramento

ASSOCIATE JUSTICES

PAUL PEEK ..... Long Beach
B. F. VAN DYKE ..... Sacramento

CLERKS

L. A. ENDRES ..... Clerk ..... Sacramento
THOMAS J. DILLON ..... Deputy Clerk ..... Sacramento

FOURTH DISTRICT

Fresno—San Bernardino—San Diego

PRESIDING JUSTICE

CHARLES R. BARNARD ..... Fresno

ASSOCIATE JUSTICES

LLOYD E. GRIFFIN ..... San Diego
STANLEY MUSSELL ..... San Bernardino

CLERKS

EARL J. VERDECKBERG ..... Clerk ..... San Diego
LLOYD E. HIDDEN ..... Deputy Clerk ..... San Bernardino
ROY M. BOSTWICK ..... Deputy Clerk ..... Fresno
GEORGE J. KOBELIN ..... Deputy Clerk ..... San Diego

APPELLATE DEPARTMENT, SUPERIOR COURT

LOS ANGELES COUNTY

PRESIDING JUDGE

HARTLEY SHAW ..... Los Angeles

JUDGES

EDWARD T. BISHOP ..... Los Angeles
JESS E. STEPHENS ..... Los Angeles

CLERK

J. J. MACGREGOR ..... Los Angeles

SAN FRANCISCO COUNTY

PRESIDING JUDGE

FRANKLIN A. GRIFFIN ..... San Francisco

JUDGES

PRESTON DEVINE ..... San Francisco
HERBERT C. KAUFMAN ..... San Francisco

CLERK

WHITMAN, JOSEPH F. ..... San Francisco

SAN DIEGO COUNTY

PRESIDING JUDGE

L. N. TURRENTINE ..... San Diego

JUDGES

ROBERT B. BURCH ..... San Diego
WILLIAM A. GLEN ..... San Diego

CLERK

BRUCE ROBINSON ..... San Diego

SACRAMENTO COUNTY

PRESIDING JUDGE

RAYMOND T. COUGHLIN ..... Sacramento

JUDGES

MALCOLM C. GLENN ..... Sacramento
GROVER W. BEDEAU ..... Sacramento

ALAMEDA COUNTY

PRESIDING JUDGE

S. VICTOR WAGLER ..... Oakland

JUDGES

RALPH HOYT ..... Oakland
THOMAS J. LEDWICH ..... Oakland

ATTORNEY GENERAL

EDMUND G. BROWN ..... San Francisco

CASES REPORTED

	Vol.		Page
Aday; Ronayne v., App.	231	P.2d	105
Allen; People v., App.	231	P.2d	896
Allstot v. City of Long Beach, App.	231	P.2d	498
American Bridge Co.; Fernandez v., App.	231	P.2d	548
Anderson v. Souza, App.	232	P.2d	274
Atha v. Bockius, App.	232	P.2d	312
Ault v. Ross General Hospital, App.	232	P.2d	528
Autrand v. Superior Court in and for Lake County, App.	231	P.2d	546
Bailey; People v., App.	232	P.2d	518
Barr's Estate, In re, App.	231	P.2d	876
Bass; Eberhardt v., App.	231	P.2d	144
Bates; Clarke v., App.	232	P.2d	33
Bauer; Campbell v., App.	232	P.2d	590
Baumgardner v. City of Hawthorne, App.	231	P.2d	864
Beber; People v., App.	231	P.2d	516
Beck v. Unruh, Sup.	231	P.2d	13
Bennetts; Champion v., App.	231	P.2d	108
Benvenuto v. Smith, App.	232	P.2d	286
Berg; Schumm by Whyner v., Sup.	231	P.2d	39
Biffle v. Social Welfare Bd. of Cal., App.	231	P.2d	869
Bigelow; People v., App.	231	P.2d	881
Billeter v. Rhodes & Jamieson, App.	231	P.2d	93
Black-Foxe Military Institute; Brokaw v., Sup.	231	P.2d	816
Board of Ed. of Palo Alto Unified School Dist.; Holbrook v., Sup.	231	P.2d	853
Board of Sup'rs; Buckman v., Sup.	231	P.2d	496
Board of Sup'rs of Placer County v. Rechenmacher, App.	232	P.2d	514
Bobst v. Sacks, Sup.	231	P.2d	473
Bockius; Atha v., App.	232	P.2d	312
Borchers Bros.; Wysock v., App.	232	P.2d	531
Boylan v. Marine, App.	231	P.2d	92
Bradbeer v. England, App.	232	P.2d	308
Bright's Estate v. Western Air Lines, App.	232	P.2d	523
Brokaw v. Black-Foxe Military Institute, two cases, Sup.	231	P.2d	816
Broome v. Broome, App.	231	P.2d	171
Brotherhood of R. R. Trainmen; State v., Sup.	232	P.2d	857
Brown v. Copp, App.	232	P.2d	868
Brown; Green v., Sup.	232	P.2d	487
Brown; McGrath v., App.	232	P.2d	43
Brown; Rice v., App.	231	P.2d	65
Bryant v. Industrial Acc. Commission, Sup.	231	P.2d	32
Buckman v. Board of Sup'rs, Sup.	231	P.2d	496
Busteed's Estate, In re, App.	232	P.2d	881
Butler v. City and County of San Francisco, App.	231	P.2d	75
Caffrey v. Tilton, App.	232	P.2d	496
Caglia v. Sargeant, App.	232	P.2d	878
Caine; Hindin v., App.	231	P.2d	83
Caldwell v. Russell, App.	232	P.2d	258
California Employment Stabilization Commission; Vollman v., App.	231	P.2d	137
Cameron; Spaulding v., App.	231	P.2d	921
Campbell v. Bauer, App.	232	P.2d	590
Carr v. Schomberg, App.	232	P.2d	597

	Vol.		Page
Cason v. Glass Bottle Blowers Ass'n of U. S. and Canada, Sup.	231	P.2d	6
Cecala's Estate, In re, App.	232	P.2d	48
Champion v. Bennetts, App.	231	P.2d	108
Christensen, Petition of, App.	231	P.2d	152
Christensen; Hall v., App.	231	P.2d	152
City and County of San Francisco; Butler v., App.	231	P.2d	75
City and County of San Francisco; Quirk v., App.	232	P.2d	893
City and County of San Francisco v. Superior Court in and for City and County of San Francisco, Sup.	231	P.2d	26
City and County of San Francisco v. Superior Court in and for City and County of San Francisco, App.	231	P.2d	583
City of Hawthorne; Baumgardner v., App.	231	P.2d	864
City of Long Beach; Allstot v., App.	231	P.2d	498
City of Los Angeles; Jones v., App.	231	P.2d	167
City of Los Angeles; Oppenheimer v., App.	232	P.2d	26
City of Los Angeles; Oppenheimer v., App.	232	P.2d	30
City of Santa Monica v. Jones, App.	232	P.2d	55
Clark; People v., App.	232	P.2d	290
Clarke v. Bates, App.	232	P.2d	33
Coahran; People v., Super.	231	P.2d	592
Coca Cola Bottling Co. of Fresno; Zentz v., App.	232	P.2d	507
Cohn; Pacific Turf Club v., App.	231	P.2d	527
Coker; People v., App.	231	P.2d	81
Connor v. Pacific Greyhound Lines, App.	232	P.2d	500
Consigli; People v., App.	232	P.2d	526
Contra Costa County; Rains v., Sup.	231	P.2d	55
Copp; Brown v., App.	232	P.2d	868
Costa v. Riddle, Sup.	231	P.2d	17
Costa's Estate, In re, Sup.	231	P.2d	17
Counter v. Counter, App.	232	P.2d	551
Covell; Kuitems v., App.	231	P.2d	552
Cox; People v., App.	231	P.2d	91
Cox; Severin v., App.	231	P.2d	134
Crandell v. Sullivan, App.	232	P.2d	881
Cross v. Superior Court in and for Santa Clara County, App.	232	P.2d	255
Cross v. Tustin, App.	231	P.2d	59
Cue; Gardner v., App.	232	P.2d	64
Cue; Newt Olson Lumber Co. v., App.	232	P.2d	64
Curtis Pub. Co.; Gill v., App.	231	P.2d	565
Dabney v. Philleo, Sup.	232	P.2d	481
Dabney's Estate, In re, Sup.	232	P.2d	481
Danziger; Peebler v., App.	231	P.2d	894
Danziger; Peebler v., App.	231	P.2d	895
Danziger; Peebler v., App.	232	P.2d	301
Dei Tos v. Dei Tos, App.	232	P.2d	873
Dickenson v. Samples, App.	231	P.2d	530
Dobrzensky's Estate, In re, App.	232	P.2d	886
Downey; Tamble v., App.	232	P.2d	543
Dribin v. Superior Court in and for Los Angeles County, Sup.	231	P.2d	809
Eberhardt v. Bass, App.	231	P.2d	144
England; Bradbeer v., App.	232	P.2d	308
Esquer v. Teresi, App.	232	P.2d	895
Evarts v. Jones, App.	231	P.2d	74
Faires v. Pappmeier, App.	232	P.2d	41
Fejer v. Paonessa, App.	231	P.2d	507
Fernandez v. American Bridge Co., App.	231	P.2d	548
Fidelity & Cas. Co. of N. Y.; Whitehurst v., App.	232	P.2d	64
First Thrift of Los Angeles; Karrell v., App.	232	P.2d	1

	Vol.		Page
Fong; Malloy v., Sup.	232	P.2d	241
Ford v. Sargeant, App.	232	P.2d	878
Fuller v. I. Magnin & Co., App.	232	P.2d	36
Furtado; Saso v., App.	232	P.2d	583
Gammill v. Nunes, App.	231	P.2d	86
Gardner v. Cue, App.	232	P.2d	64
Gateway Stables; O'Brien v., App.	231	P.2d	524
Gill v. Curtis Pub. Co., App.	231	P.2d	565
Gill v. Hearst Pub. Co., App.	231	P.2d	570
Glass Bottle Blowers Ass'n of U. S. and Canada; Cason v., Sup.	231	P.2d	6
Goodale; Roscoe v., App.	232	P.2d	879
Goodall; People v., App.	231	P.2d	119
Goodson v. Goodson, App.	232	P.2d	876
Gramas; Pilibos v., App.	231	P.2d	502
Grebe; People v., App.	232	P.2d	564
Green v. Brown, Sup.	232	P.2d	487
Greene v. Superior Court in and for City and County of San Francisco, Sup.	231	P.2d	821
Gschwend v. Stoll, App.	232	P.2d	494
Guidotti; Nealis v., App.	232	P.2d	902
Hadden v. Moran, App.	232	P.2d	594
Hall v. Christensen, App.	231	P.2d	152
Hamblen; McCaslin v., Sup.	231	P.2d	1
Hamblen; Pailing v., Sup.	231	P.2d	1
Hamilton v. Hamilton, App.	231	P.2d	69
Hannon; Popejoy v., Sup.	231	P.2d	484
Hardy; Herbold v., App.	231	P.2d	910
Harper v. Vallejo Housing Authority, App.	232	P.2d	262
Harris; Jones v., App.	231	P.2d	561
Hartley v. Weller, App.	231	P.2d	133
Hearst Pub. Co.; Gill v., App.	231	P.2d	570
Hector; People v., App.	231	P.2d	916
Hendershott v. Shipman, Sup.	231	P.2d	481
Heple v. Kluge, App.	231	P.2d	505
Herbold v. Hardy, App.	231	P.2d	910
Hiller v. King, App.	232	P.2d	905
Hindin v. Caine, App.	231	P.2d	83
Hirschman v. Los Angeles County, App.	231	P.2d	140
H. Moffat Co. v. Koftinow, App.	232	P.2d	15
Holbrook v. Board of Ed. of Palo Alto Unified School Dist., Sup.	231	P.2d	853
Hoops v. Tate, App.	231	P.2d	560
Howard v. Howard, two cases, App.	232	P.2d	530
Howser ex rel. Levin, People by v. Santa Clara County, Sup.	231	P.2d	826
Hurd; Shivell v., App.	231	P.2d	595
Idaho Md. Mines Corp. v. Industrial Acc. Commission, App.	232	P.2d	11
I. Magnin & Co.; Fuller v., App.	232	P.2d	36
Industrial Acc. Commission; Bryant v., Sup.	231	P.2d	32
Industrial Acc. Commission; Idaho Md. Mines Corp. v., App.	232	P.2d	11
Jones v. City of Los Angeles, App.	231	P.2d	167
Jones; City of Santa Monica v., App.	232	P.2d	55
Jones; Evarts v., App.	231	P.2d	74
Jones v. Harris, App.	231	P.2d	561
Karrell v. First Thrift of Los Angeles, App.	232	P.2d	1
Kilmartin v. Naso, App.	232	P.2d	48
King; Hiller v., App.	232	P.2d	905
King; People v., App.	231	P.2d	156
Kingsley; Monogram Co. of Cal. v., App.	231	P.2d	925
Kirker v. Shell Oil Co., App.	231	P.2d	905

	Vol.		Page
Kluge; Heple v., App.	231	P.2d	505
Koftinow; H. Moffat Co. v., App.	232	P.2d	15
Kraintz; Lagiss v., App.	232	P.2d	541
Krieger v. Krieger, App.	231	P.2d	526
Kuchel v. McCormack, App.	231	P.2d	876
Kuitems v. Covell, App.	231	P.2d	552
Kunz; Lowenthal v., App.	231	P.2d	62
Lagiss v. Kraintz, App.	232	P.2d	541
Lannin v. Sargeant, App.	232	P.2d	878
Latham v. Santa Clara County Hospital, App.	231	P.2d	513
Lefranc's Estate, In re, App.	232	P.2d	4
Lenahan v. Poole, App.	232	P.2d	20
Lesser; Weitzenkorn v., App.	231	P.2d	889
Levin, People by Howser ex rel. v. Santa Clara County, Sup.	231	P.2d	826
Los Angeles County; Hirschman v., App.	231	P.2d	140
Los Angeles County Flood Control Dist.; Weck v., App.	232	P.2d	293
Lowell Ave. Mut. Water Co.; Turner v., App.	231	P.2d	115
Lowenthal v. Kunz, App.	231	P.2d	62
Lukasik, Ex parte, App.	232	P.2d	520
McCaslin v. Hamblen, Sup.	231	P.2d	1
McCollister; Stewart v., Sup.	231	P.2d	48
McCord Co. v. Plotnick, App.	231	P.2d	880
McCormack; Kuchel v., App.	231	P.2d	876
McGrath v. Brown, App.	232	P.2d	43
Mac Monnies v. Pacific Elec. Ry. Co., App.	222	P.2d	55
Malloy v. Fong, Sup.	232	P.2d	241
Marine; Boylan v., App.	231	P.2d	92
Masson v. Urbani, App.	232	P.2d	4
Mears; Wertheim v., App.	231	P.2d	89
Meichtry; People v., Sup.	231	P.2d	847
Merrill; People v., App.	231	P.2d	573
Metropolitan Life Ins. Co. v. Superior Court in and for City and County of San Francisco, App.	231	P.2d	592
Middleworth; People v., App.	232	P.2d	549
Moffat Co. v. Koftinow, App.	232	P.2d	15
Monogram Co. of Cal. v. Kingsley, App.	231	P.2d	925
Moore; Shimmon v., App.	232	P.2d	22
Moorehead; People v., App.	232	P.2d	248
Moran; Hadden v., App.	232	P.2d	594
Mortgage Finance Corp. v. Watson, App.	232	P.2d	54
Mulli v. Mulli, App.	232	P.2d	556
Naso; Kilmartin v., App.	232	P.2d	48
National Auto. & Cas. Ins. Co. of Los Angeles; Reachi v., App.	232	P.2d	13
National Skyway Freight Corp.; Phalanx Air Freight v., App.	232	P.2d	510
Nealis v. Guidotti, App.	232	P.2d	902
Newt Olson Lumber Co. v. Cue, App.	232	P.2d	64
Nixt; People v., App.	232	P.2d	915
Noffsinger; Pensa v., App.	232	P.2d	521
Nole v. Sixty-Five O Four, Inc., App.	232	P.2d	288
Norris v. San Mateo County Title Co., Sup.	231	P.2d	493
Nunes; Gammill v., App.	231	P.2d	86
O'Brien v. Gateway Stables, App.	231	P.2d	524
Olson Lumber Co. v. Cue, App.	232	P.2d	64
One 1941 Chevrolet Coupe; People v., Sup.	231	P.2d	832
Oppenheimer v. City of Los Angeles, App.	232	P.2d	26
Oppenheimer v. City of Los Angeles, App.	232	P.2d	30
Osborn; People v., Sup.	231	P.2d	850
Pacific Elec. Ry. Co.; Mac Monnies v., App.	232	P.2d	55

	Vol.		Page
Pacific Greyhound Lines; Connor v., App.	232	P.2d	500
Pacific Greyhound Lines; Zelayeta v., App.	232	P.2d	572
Pacific Turf Club v. Cohn, App.	231	P.2d	527
Pagan v. Spencer, App.	232	P.2d	323
Pailing v. Hamblen, Sup.	231	P.2d	1
Paonessa; Fejer v., App.	231	P.2d	507
Pappmeier; Faires v., App.	232	P.2d	41
Parry; People v., App.	232	P.2d	899
Pearman v. Pearman, App.	231	P.2d	101
Peebler v. Danziger, App.	231	P.2d	894
Peebler v. Danziger, App.	231	P.2d	895
Peebler v. Danziger, App.	232	P.2d	301
Pensa v. Noffsinger, App.	232	P.2d	521
Penzner; Santa Barbara Lodge No. 605, Loyal Order of Moose v., App.	231	P.2d	595
People v. Allen, App.	231	P.2d	896
People v. Bailey, App.	232	P.2d	518
People v. Beber, App.	231	P.2d	516
People v. Bigelow, App.	231	P.2d	881
People v. Clark, App.	232	P.2d	290
People v. Coahran, Super.	231	P.2d	592
People v. Coker, App.	231	P.2d	81
People v. Consigli, App.	232	P.2d	526
People v. Cox, App.	231	P.2d	91
People v. Goodall, App.	231	P.2d	119
People v. Grebe, App.	232	P.2d	564
People v. Hector, App.	231	P.2d	916
People v. King, App.	231	P.2d	156
People v. Meichtry, Sup.	231	P.2d	847
People v. Merrill, App.	231	P.2d	573
People v. Middleworth, App.	232	P.2d	549
People v. Moorehead, App.	232	P.2d	268
People v. Nixt, App.	232	P.2d	915
People v. One 1941 Chevrolet Coupe, Sup.	231	P.2d	832
People v. Osborn, Sup.	231	P.2d	850
People v. Parry, App.	232	P.2d	899
People v. Ramirez, App.	232	P.2d	31
People v. Serrano, App.	231	P.2d	512
People v. Swinehart, App.	231	P.2d	497
People v. Williams, App.	231	P.2d	554
People v. Wochnick, App.	231	P.2d	933
People v. Ynostroza, App.	232	P.2d	913
People by Howser ex rel. Levin v. Santa Clara County, Sup.	231	P.2d	826
Phalanx Air Freight v. National Skyway Freight Corp., App.	232	P.2d	510
Philleo; Dabney v., Sup.	232	P.2d	481
Pilibos v. Gramas, App.	231	P.2d	502
Plotnick; McCord Co. v., App.	231	P.2d	880
Polk; Schohr v., App.	231	P.2d	164
Poole; Lenahan v., App.	232	P.2d	20
Popejoy v. Hannon, Sup.	231	P.2d	484
Quirk v. City and County of San Francisco, App.	232	P.2d	893
Rains v. Contra Costa County, Sup.	231	P.2d	55
Ramirez; People v., App.	232	P.2d	31
Reachi v. National Auto. & Cas. Ins. Co. of Los Angeles, App.	232	P.2d	13
Rechenmacher; Board of Sup'rs of Placer County v., App.	232	P.2d	514
Reilly; Rutherford v., App.	232	P.2d	34
Reynolds; Security-First Nat. Bank of Los Angeles v., App.	232	P.2d	318
Rhodes & Jamieson; Billeter v., App.	231	P.2d	93
Rice v. Brown, App.	231	P.2d	65

	Vol.		Page
Riddle; Costa v., Sup.	231	P.2d	17
Roberts v. Wachter, App.	231	P.2d	534
Roberts v. Wachter, App.	231	P.2d	540
Roberts v. Western Pac. R. Co., App.	232	P.2d	560
Roberts v. Western Pac. R. Co., App.	232	P.2d	563
Ronayne v. Aday, App.	231	P.2d	105
Ronayne's Estate, In re, App.	231	P.2d	105
Roscoe v. Goodale, App.	232	P.2d	879
Ross General Hospital; Ault v., App.	232	P.2d	528
Ruby v. Superior Court in and for City and County of San Francisco, Dept. No. 10, App.	231	P.2d	868
Russell; Caldwell v., App.	232	P.2d	258
Rutherford v. Reilly, App.	232	P.2d	34
Sabo; Simone v., Sup.	231	P.2d	19
Sacks; Bobst v., Sup.	231	P.2d	473
Safeway Stores, Application of, App.	232	P.2d	306
Safeway Stores v. Vagim Packing Co., App.	232	P.2d	306
Samples; Dickenson v., App.	231	P.2d	530
San Francisco, City and County of, v. Superior Court in and for City and County of San Francisco, Sup.	231	P.2d	26
San Francisco, City and County of v. Superior Court in and for City and County of San Francisco, App.	231	P.2d	583
San Mateo County Title Co.; Norris v., Sup.	231	P.2d	493
Santa Barbara Lodge No. 605, Loyal Order of Moose v. Penzner, App.	231	P.2d	595
Santa Clara County; People by Howser ex rel. Levin v., Sup.	231	P.2d	826
Santa Clara County Hospital; Latham v., App.	231	P.2d	513
Santa Monica, City of, v. Jones, App.	232	P.2d	55
Sargeant; Caglia v., App.	232	P.2d	878
Sargeant; Ford v., App.	232	P.2d	878
Sargeant; Lannin v., App.	232	P.2d	878
Saso v. Furtado, App.	232	P.2d	583
Schnider v. State, App.	231	P.2d	177
Schohr v. Polk, App.	231	P.2d	164
Schomberg; Carr v., App.	232	P.2d	597
Schumm by Whyner v. Berg, Sup.	231	P.2d	39
Security-First Nat. Bank of Los Angeles v. Reynolds, App.	232	P.2d	318
Security-First Nat. Bank of Los Angeles v. Superior Court of State, in and for Los Angeles County, App.	231	P.2d	124
Serrano; People v., App.	231	P.2d	512
Severin v. Cox, App.	231	P.2d	134
Shell Oil Co.; Kirker v., App.	231	P.2d	905
Shimmon v. Moore, App.	232	P.2d	22
Shipman; Hendershott v., Sup.	231	P.2d	481
Shivell v. Hurd, App.	231	P.2d	595
Shostak; Three Sixty Five Club v., App.	232	P.2d	546
Simone v. Sabo, Sup.	231	P.2d	19
Sixty-Five O Four, Inc.; Nole v., App.	232	P.2d	288
Smith; Benvenuto v., App.	232	P.2d	286
Social Welfare Bd. of Cal.; Biffle v., App.	231	P.2d	869
Souza; Anderson v., App.	232	P.2d	274
Spaulding v. Cameron, App.	231	P.2d	921
Spencer; Pagan v., App.	232	P.2d	323
State v. Brotherhood of R. R. Trainmen, Sup.	232	P.2d	857
State; Schnider v., App.	231	P.2d	177
State Bd. of Equalization; Takcta v., App.	231	P.2d	873
Stewart v. McCollister, Sup.	231	P.2d	48
Stoll; Gschwend v., App.	232	P.2d	494
Sullivan; Crandell v., App.	232	P.2d	881

	Vol.		Page
Superior Court in and for City and County of San Francisco; City and County of San Francisco v., Sup.	231	P.2d	26
Superior Court in and for City and County of San Francisco; City and County of San Francisco v., App.	231	P.2d	583
Superior Court in and for City and County of San Francisco; Greene v., Sup.	231	P.2d	821
Superior Court in and for City and County of San Francisco; Metropolitan Life Ins. Co. v., App.	231	P.2d	592
Superior Court in and for City and County of San Francisco, Dept. No. 10; Ruby v., App.	231	P.2d	868
Superior Court in and for Lake County; Autrand v., App.	231	P.2d	546
Superior Court in and for Los Angeles County; Dribin v., Sup.	231	P.2d	809
Superior Court of State, in and for Los Angeles County; Security-First Nat. Bank of Los Angeles v., App.	231	P.2d	124
Superior Court in and for Santa Clara County; Cross v., App.	232	P.2d	255
Swinehart; People v., App.	231	P.2d	497
Taketa v. State Bd. of Equalization, App.	231	P.2d	873
Tamble v. Downey, App.	232	P.2d	543
Tarrant's Estate, In re, App.	232	P.2d	43
Tate; Hoops v., App.	231	P.2d	560
Teresi; Esquer v., App.	232	P.2d	895
Three Sixty Five Club v. Shostak, App.	232	P.2d	546
Tilton; Caffrey v., App.	232	P.2d	496
Turner v. Lowell Ave. Mut. Water Co., App.	231	P.2d	115
Tustin; Cross v., App.	231	P.2d	59
Unruh; Beck v., Sup.	231	P.2d	13
Urbani; Masson v., App.	232	P.2d	4
Vagim Packing Co.; Safeway Stores v., App.	232	P.2d	306
Vallejo Housing Authority; Harper v., App.	232	P.2d	262
Van Amersfoort v. Young, App.	232	P.2d	569
Vollman v. California Employment Stabilization Commission, App.	231	P.2d	137
Wachter; Roberts v., App.	231	P.2d	534
Wachter; Roberts v., App.	231	P.2d	540
Walters, Guardianship of, Sup.	231	P.2d	473
Watson; Mortgage Finance Corp. v., App.	232	P.2d	54
Weck v. Los Angeles County Flood Control Dist., App.	232	P.2d	293
Weitzenkorn v. Lesser, App.	231	P.2d	889
Weller; Hartley v., App.	231	P.2d	133
Wertheim v. Mears, App.	231	P.2d	89
Western Air Lines; Bright's Estate v., App.	232	P.2d	523
Western Pac. R. Co.; Roberts v., App.	232	P.2d	560
Western Pac. R. Co.; Roberts v., App.	232	P.2d	563
Whitehurst v. Fidelity & Cas. Co. of N. Y., two cases, App.	232	P.2d	64
Whyner, Schumm by, v. Berg, Sup.	231	P.2d	39
Williams; People v., App.	231	P.2d	554
Wilson v. Wilson, App.	231	P.2d	128
Wochnick; People v., App.	231	P.2d	933
Wysock v. Borchers Bros., App.	232	P.2d	531
Ynostroza; People v., App.	232	P.2d	913
Young; Van Amersfoort v., App.	232	P.2d	569
Zelayeta v. Pacific Greyhound Lines, App.	232	P.2d	572
Zentz v. Coca Cola Bottling Co. of Fresno, App.	232	P.2d	507

*

37 Cal.2d 196

McCASLIN v. HAMBLEN et al.

PAILING v. HAMBLEN et al.

L. A. 21239, 21240.

Supreme Court of California

May 15, 1951.

Action by Lowry B. McCaslin and Sterling M. Pailing against Stuart Hamblen, and others, to quiet title of plaintiffs to contiguous unimproved parcels of land in the City of Arcadia. The defendant Hamblen claimed both parcels pursuant to tax deeds from the city. From adverse judgments in the Superior Court, Los Angeles County, John Gee Clark, J., determining the validity of tax deed titles the plaintiffs appeal. The Supreme Court, Shenk, J., held that the statute involved was a statute of limitations and not a curative act and that the actions involved were barred by the provisions thereof and that a claimant was not entitled to the benefit of the Soldiers' and Sailors' Civil Relief Act.

Judgment affirmed.

Prior opinion, 223 P.2d 326.

1. Taxation ⇐791, 805(1)

The statute respecting presumption of validity of delinquency tax deeds issued to the state or to any taxing agency including agencies having their own system for levying and collection of taxes is a statute of limitation as distinguished from a "curative act" and the time factor of one year mentioned in the statute for determining the validity of the deed is reasonable. Revenue and Taxation Code, § 175.

See publication Words and Phrases, for other judicial constructions and definitions of "Curative Act".

2. Municipal corporations ⇐982

Where plaintiffs took conveyances of parcels from tax-delinquent owners after sale to the city for delinquent taxes and subject to the city's rights, they must have been deemed to have had knowledge of the city's rights and that successors to the rights might acquire title to the parcels adverse to them. Revenue and Taxation Code, § 175.

3. Vendor and purchaser ⇐232(2)

The rule respecting notice of rights of an owner in possession has no application to cases of unimproved and unoccupied land where the only possession is that which is presumed from fact of conveyance.

4. Stipulations ⇐14(10)

A stipulated conclusion that plaintiffs were in sole and exclusive possession of tax-delinquent land had no efficacy to bring them within the rule which did not apply under the stipulated probative facts especially where the parties stipulated that the stipulated effect of agreed facts was not to be considered binding.

5. Municipal corporations ⇐982

Where plaintiffs took conveyance of tax delinquent lands from tax-delinquent owners after sale to city for taxes and subject to the city's rights, but action to test validity of the tax proceedings was not commenced until 15 years after the sale to the city, five years after the tax deed to the city and nearly a year after the statutory bar applied, plaintiffs' actions to quiet title to the land were barred under the statute providing that delinquency tax deed under certain circumstances shall be conclusively presumed to be valid unless held invalid in a proceeding to determine the validity of the deed commenced within one year after the execution thereof. Revenue and Taxation Code, § 175.

6. Municipal corporations ⇐980(7)

Under an ordinance providing for sale at public auction of tax delinquent property sold to the city and dealing with property which remained undeeded for five years or more after sales to the city and property which was deeded to and unsold by the city prior to the effective date of the ordinance, intent was to include in the first class all property which remained undeeded to the city for any reason.

7. Taxation ⇐696

The law in effect at time of sale to the state for taxes does not govern the redemption of the property where legislature has provided otherwise and the legislature may make reasonable retroactive changes in the method of redemption.

8. Municipal corporations ⇐981

The ordinance providing for annual publication on or before June 8 of delinquent list and for notice of sale at public auction of tax-delinquent property sold to city in the fifth preceding calendar year or prior thereto and providing for mailing of notice to the assessee of time when redemption might be made is not invalid on the ground that the provision for notice of termination of the right of redemption is unreasonable.

9. Army and navy ⇐14, 24

Period of redemption from sale of land for delinquent city taxes was not continued as to claimant because of his military service where no affidavit to claim the benefits of the Soldiers' and Sailors' Civil Relief Act was filed pursuant to the Act. Revenue and Taxation Code, § 175; Soldiers' and Sailors' Civil Relief Act of 1940, § 1 et seq., 50 U.S.C.A.Appendix, § 501 et seq.

10. Army and navy ⇐14, 24

That a later amendment to the Soldiers' and Sailors' Civil Relief Act eliminated the provision requiring the filing of an affidavit in order to claim the benefits of the act was of no avail so as to extend the period of redemption from sale of land for delinquent city taxes as to a claimant, where prior to its operation, period of redemption was terminated by a deed of the land to the city. Revenue and Taxation Code, § 175; Soldiers' and Sailors' Civil Relief Act of 1940, § 1 et seq., 50 U.S.C.A. Appendix, § 501 et seq.

Robt. E. Rosskopf, Beverly Hills, John F. Bender and Gizella M. Allen, Los Angeles, for appellants.

Dailey S. Stafford, Los Angeles, T. Guy Cornyn, Arcadia, Burke, Marshall & Burke, and Daniel G. Marshall, all of Los Angeles, for respondents.

SHENK, Justice.

These actions were brought to quiet the plaintiffs' title to contiguous unimproved parcels each containing five acres of land in the City of Arcadia. The defendants Hamblen claimed both parcels pursuant to tax deeds from the city. The plaintiffs appealed from adverse judgments determining the validity of the tax deed titles. The actions were consolidated for trial and a single record is presented on appeal.

The causes were submitted to the trial court on a stipulation of facts. The City of Arcadia is a city of the sixth class and levies and collects its own taxes. In 1931 Anita M. Baldwin was the owner of contiguous lots 14 and 15 of Los Robles de Santa Anita tract, which were included within a fenced and unimproved parcel of 35 acres. The acreage at all times involved was used for grazing purposes at nominal rental or in consideration of weed abatement.

The second half of the 1931 city taxes on each lot became delinquent and on June 30, 1932, the lots were marked sold to the City of Arcadia for nonpayment of the 1931 taxes. On December 20, 1935, Anita M. Baldwin conveyed Lot 15 to plaintiff Pailing, one of her nephews, by gift deed recorded April 13, 1945. On March 24, 1936, she conveyed lot 14 to plaintiff McCaslin, another nephew, by gift deed recorded April 16, 1936. Tax deeds to the city were executed September 28, 1942. Efforts by the plaintiffs to redeem the property between 1944 and 1947 were unsuccessful. The tax deeds to the defendants Hamblen were issued on June 16, 1947.

The actions were commenced June 26, 1947. A first trial resulted in judgments for the plaintiffs which were set aside on the defendants' motion for a new trial. Thereupon the defendants amended their answers to include the plea that the actions were barred because they were not commenced within one year after September 15, 1945, the effective date of section 175 of the Revenue and Taxation Code.

The conclusion of the court was that the tax deeds to the defendants were valid and that the plaintiffs had no right, title or interest in or to the property.

[1] Questions concerning the sufficiency of the evidence to support the findings of validity become material only if section 175 of the Revenue and Taxation Code does not bar the actions. That section, effective September 15, 1945, provides that all delinquency tax deeds theretofore or thereafter issued to the state or to any taxing agency, including taxing agencies which have their own system for the levying and collection of taxes, shall be conclusively presumed to be valid unless held to be invalid in an appropriate court proceeding to determine the validity of the deed commenced within one year after the execution of the deed or within one year after the effective date of the section, whichever is later.

It may not be questioned that the section is a statute of limitations as distinguished from a curative act, and that the time factor is reasonable so as to bar these actions commenced almost two years after the effective date. See Rand v. Bossen, 27 Cal.2d 61, 65, 162 P.2d 457; Tannhauser v. Adams, 31 Cal.2d 169, 171 et seq, 187 P.2d 716, 5 A.L.R.2d 1015; Davault v. Essig, 80 Cal.App.2d 970, 972–973, 183 P. 2d 39 and cases cited; Rombotis v. Fink, 89 Cal.App.2d 378, 386, 201 P.2d 588 and cases cited, unless it may be said that the plaintiffs were owners in possession as against whom the statute would not apply.

The plaintiffs rely on Tannhauser v. Adams, supra. In that case the problem of whether a similar statute (Section 3521 Revenue and Taxation Code, operative June 1, 1941) applied to owners in possession was discussed but not determined. It was held that a right to raise a question of jurisdictional or other defects in delinquent tax proceedings may be cut off or terminated by a statute of limitations which affords a reasonable time within which to pursue the remedy; and that the statute applied there in any event since the defendant, the tax title purchaser, had been in continuous uninterrupted possession from January 1, 1941; that the plaintiff had knowledge of the defendant's possession, was himself out of possession, and did not bring the action until more than three and one half years after the operative date of the statute.

As the discussion in the Tannhauser case indicates, the rule of inapplicability of statutory limitation has been said to apply as to owners who because of their possession could not be assumed to have actual knowledge of claims of adverse interest by persons not in possession. As the discussion also shows, that rule, borrowed from cases involving mortgages, trusts and the like, has been applied in some jurisdictions where the original owner of land sold to the state remains in undisturbed possession. In the Tannhauser case the plaintiff, the original tax-delinquent owner, was out of possession and was held to be at no greater disadvantage than other litigants who by reason of their lack of promptness in asserting their claims find themselves either without remedy or without right.

[2–5] Assuming that the rule might have application in a case where the plaintiff is the original tax-delinquent owner in undisturbed possession, it would seem right to conclude that a generalization applicable merely to "owners in possession" is too broad. The plaintiffs are not the original tax-delinquent owners. They took conveyances of the parcels from the tax-delinquent owner after sale to the city and subject to the city's rights. They must therefore be deemed to have had knowledge of the city's rights and that successors to those rights might acquire title adverse to them. In fact their efforts to redeem beginning in 1944 showed actual knowledge of hostile claims, but action to test the validity of the tax proceedings was not commenced until fifteen years after sale to the city, five years after the tax deed to the city, and nearly a year after the statutory bar applied. Furthermore it has been held that, whatever might be the rights of an owner in possession, the rule has no application in cases of unimproved and unoccupied land where the only possession is that which is presumed from the fact of conveyance. Luberco, Ltd. v. Kipp, 94 Cal.App.2d 409,

210 P.2d 901; Jones v. Bartlett, 94 Cal.App. 2d 418, 210 P.2d 903; Union Title Ins. & Trust Co. v. Thorp, 94 Cal.App.2d 421, 210 P.2d 905; Wilson v. Kipp, 94 Cal.App. 2d 426, 210 P.2d 908; Central Valley Equip. Co. v. State of Cal., 98 Cal.App.2d 778, 220 P.2d 811. Lots 14 and 15 were unimproved and there was no actual occupancy by the plaintiffs. The stipulated conclusion that the plaintiffs were in the sole and exclusive "possession" of the land has no efficacy to bring them within the rule which does not apply under the stipulated probative facts. This is so also because of the parties' express reservation that the stipulated legal effect of agreed facts was not to be considered binding. The conclusion follows that the actions were barred by the provisions of section 175 of the Revenue and Taxation Code.

The plaintiffs contend that the foregoing conclusion is not controlling because their efforts to redeem were timely and proper. The city was made a party defendant and a cause of action was included for declaratory relief. The stipulated facts indicate that beginning in 1944 the plaintiffs made offers and tenders of sufficient amounts to redeem the property and now make similar offers, which it may be assumed would entitle them to redeem and place upon the city the obligation to reimburse the defendants unless the period of redemption was terminated as contended by the city.

In 1932 city ordinance 33 provided that the owner or any person having an interest in tax delinquent property sold to the city might redeem within five years from the date of sale and thereafter at any time prior to sale by the city. Commencing in 1937 various ordinances were adopted to encourage redemption during the depression by permitting payments of required amounts in installments and thereby in effect to extend the mandatory period of redemption, all of which were repealed in 1941.

In 1941 the city by ordinance 460 adopted a new taxing procedure. The ordinance includes provisions for annual publication on or before June 8 of the delinquent list and for notice of sale at public auction of tax-delinquent property sold to the city in the fifth preceding calendar year or prior thereto. Provision is also made for the mailing of notice to the assessee to include a statement of when redemption may be made. In accordance therewith and on June 30, 1942, a public auction for sale of tax sold property including lots 14 and 15 was held but no bids were received for the lots. On September 28, 1942, the lots were deeded to the city and the deeds recorded on November 24, 1942. Section 999 of the ordinance provides that the execution of the last mentioned deeds terminates the right of redemption.

As noted the foregoing provisions apply to property sold but not deeded to the city and as to which the five year mandatory period of redemption had expired. Section 1000 makes special provision for termination of the right of redemption on notice as to property which was deeded to the city before the effective date of the 1941 ordinance, if the property is not redeemed pursuant to such notice.

The plaintiffs argue that the lots should have been tax-deeded to the city in 1937 and therefore the provisions of section 1000 requiring special notice to terminate the right of redemption should apply. The defendants counter with the argument that the various ordinances enacted prior to 1941 in effect extended the mandatory period of redemption and operated to delay compliance with the provision requiring a deed to the city at the close of the five year period following sale to the city. The city relies on section 999 of the ordinance which provides for termination of the right of redemption upon the execution of the deed to the city when there has been no sale at the public auction held pursuant to notice.

[6] Ordinance 460 deals with two classes of tax-sold property, namely property which remained undeeded for five years or more after sale to the city and property which was deeded to and unsold by the city prior to the effective date of the ordinance. It would seem that it was intended to include in the first class all property which remained undeeded to the city for

any reason. The ordinance should be held operative in accordance with its terms unless the plaintiffs are entitled to prevail in their contention that the law in force at the time of sale to the city controlled the period of redemption, in which event the period did not terminate until sale by the city.

[7] It is now settled, however, that the law in effect at the time of the sale to the state does not govern the redemption of the property when the Legislature has provided otherwise and that the Legislature may make reasonable retroactive changes in the method of redemption. Mercury Herald Co. v. Moore, 22 Cal.2d 269, 274, 138 P.2d 673, 147 A.L.R. 111. The Mercury Herald case involved a similar problem arising from the 1941 amendments in the state tax law which changed the procedure for terminating the period of redemption following the close of the five year period. As to property not tax-deeded at a determined date the deed to the state, following publication and sending of notice for sale of the land at public auction, terminated the right of redemption. As to previously tax-deeded property special provisions applied governing notice of termination of the right. This court distinguished between the absolute right to redeem within the five year period, and the continuing right during the period of grace which could be terminated at any time on sale by the state. It was held that there was no contract right or vested interest in the continuance of the right after the five year period but that the continuing redemption privilege could be revoked by the state upon compliance with due process; that due process was afforded by the provision for notice prior to sale at public auction or tax deed to the state if no sale had been made, and that such notice provided reasonable opportunity for redemption.

[8] The changes in the state and the city tax procedures were fundamentally similar. Unlike the state procedure the city ordinance enacted in May 1941 did not contain specific provision for one year's delay in its operation, but the practical result was the same for the reason that the first notice thereunder could not be given until June of 1942. Regardless of minor differences in time provisions and other factors, the rule established by a majority of this court in Mercury Herald v. Moore governs a like result in the present case. The controlling factor here is the provision for published and mailed notice of the contemplated public sale which together with the provisions of the ordinance concerning termination of the right of redemption put the plaintiffs on notice that the right of redemption would terminate by the execution of the tax deeds to the city. There is no merit in the contention that, if the law as determined in Mercury Herald v. Moore controls, the provision for notice of the termination of the right of redemption was unreasonable. See also Assets Reconstruction Corp. v. Munson, 81 Cal.App. 2d 363, 184 P.2d 11.

[9, 10] It is contended that the period of redemption was nevertheless continued as to plaintiff McCaslin by reason of his military service. McCaslin was in the naval forces from June 22, 1942, until April 25, 1945. The applicable statute was the Soldier's and Sailor's Civil Relief Act of October 17, 1940, 54 Stat. 1178, c. 888, 50 U.S.C.A.Appendix, § 501 et seq. The act applied to real property owned and occupied for dwelling, agricultural or business purposes by a person in military service, and required the filing of an affidavit showing the existence of the factual conditions in order to claim the benefits. It is not necessary to consider the question whether here the agricultural lands were "occupied" by the owner for agricultural purposes by the rental thereof for grazing cattle. The determinative factor is that no affidavit to claim the benefits was filed pursuant to the act. A later amendment, October 6, 1942, 56 Stats. 769, 770, c. 581, eliminated the provision requiring the filing of an affidavit. It is of no assistance here since prior to its operation and on September 28, 1942, the period of redemption was terminated by the deed to the city.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

CASON v. GLASS BOTTLE BLOWERS ASS'N OF UNITED STATES AND CANADA et al.

L. A. 21143.

Supreme Court of California, in Bank.

May 11, 1951.

As Modified on Denial of Rehearing June 7, 1951.

Action by Alfred B. Cason against The Glass Bottle Blowers Association of the United States and Canada, an unincorporated, voluntary association and international labor union, and an inferior tribunal, James McDonald, William Endicott, Anthony Frederick, Local Union No. 190, and others, for damages for wrongful suspension from the union in denying the plaintiff a fair hearing and seeking a writ of mandate directing his reinstatement. From a judgment in the Superior Court for Los Angeles County, Allen W. Ashburn, J., the named defendants appealed. The Supreme Court, Gibson, C. J., held that plaintiff was denied a fair trial and that he was properly awarded damages but that the writ of mandate directing defendants to set aside the expulsion and to restore and reinstate the plaintiff as a member was too broad and that the matter should be remanded for further proceedings.

Judgment modified and affirmed.

Prior opinion, see 220 P.2d 34.

1. Mandamus ⇐122

Mandate is available against an unincorporated association.

2. Appearance ⇐20, 24(5)

Motions to quash service of summons or to dismiss mandate proceedings which were not made until the close of the trial were properly refused in view that defendants' general appearance was a waiver of service of summons and of any defects therein. Code Civ.Proc. §§ 406, 416.

3. Mandamus ⇐187(9)

Overruling motion to dismiss proceeding based on ground that alternative writ of mandate was defective as to damages was harmless where defendants making the motion were not injured in that no damages were awarded against them.

4. Judgment ⇐566, 590(2)

A prior judgment in so far as it held that union member's original suspension by the national president was wrongful and that he was entitled to damages resulting therefrom was res judicata as to member's subsequent action for damages but was not res judicata as to any matters which court expressly refused to determine and which it directed should be litigated in another forum or in another action.

5. Judgment ⇐731

In action by a member against union for alleged wrongful suspension and resulting discharge by employer, judgment that the court would not be warranted in interfering with proceedings in the union for a further hearing and that an injunction or immediate restoration to membership was not necessarily left open the question of the member's right to ultimate reinstatement and contemplated that the member would have a cause of action for damages or injunction in case of any wrongful denial of reinstatement.

6. Judgment ⇐592

In action by member against trade union for wrongful suspension and resulting discharge by employer where prior judgment determined that a wrongful refusal by union to reinstate member would constitute a new and independent wrong giving rise to a new cause of action, rule that a party cannot split his cause of action and obtain a piecemeal recovery was inapplicable.

7. Trade unions ⇐9

Where there was a closed shop contract between national union and the employer of president of the local union, he was entitled to sue in tort if the union wrongfully expelled him and at the same time refused to let him work because he was not a union member.

8. Trade unions ⇐4.2, 9

A member of a union had contract rights by reason of his membership in the union, and he was entitled to bring an action for breach of that contract if he was wrongfully expelled from the union.

9. Trade unions ⇐9

Where action of the union in wrongfully expelling a member from membership partook of the nature of both tort and contract and final decision denying reinstatement occurred when national convention approved the grievance committee's report on August 5, 1946, and complaint by the member was filed December 17, 1947 action of the member was not barred insofar as it was based on contract since it was

brought within the prescribed two-year period. Code Civ.Proc. § 339.

10. Trade unions ⇐4.10

The courts will interfere with the decision of a trade union expelling a member if the rules of the union governing expulsion have not been observed or if the member has not been afforded those rudimentary rights giving him reasonable opportunity to defend against the charges made.

11. Trade unions ⇐4.9

The fundamental principle that no man may be condemned or prejudiced in his rights without an opportunity to make his defense is applicable not only to courts but also to labor unions and similar organizations.

12. Trade unions ⇐4.9

The refined and technical practices which have developed in courts cannot be imposed upon the deliberations of workingmen in trade unions and the form of procedure is ordinarily immaterial if accused member is accorded a fair trial.

13. Trade unions ⇐4.9

The union's procedure, in expelling a member must be such as will afford the accused member substantial justice, and requirements of fair trial will be imposed even though the rules of the union fail to provide therefor.

14. Trade unions ⇐4.9

The requirements of a "fair trial" respect to the expulsion of a union member includes the right to notice of the charges, to confront and cross-examine the accusers, and to examine and refute the evidence.

See publication Words and Phrases, for other judicial constructions and definitions of "Fair Trial".

15. Trade unions ⇐4.9

Where telegrams were sufficiently explicit to inform union member of the nature of charges contained therein no other notice of such charges was necessary in expelling the member where the rules of the union did not require any formal written accusation.

16. Trade unions ⇐4.9

Evidence established that an expelled union member was denied a fair hearing before the grievance committee where although he was allowed to appear and testify, he was not permitted to confront the only witness against him, to hear his evidence or to refute it, nor was he given an opportunity to examine the file of national union, which was considered by the committee.

17. Trade unions ⇐4.9

Under certain circumstances where the facts are not disputed, a labor union may discipline a member without affording him a trial.

18. Trade unions ⇐4.9

In action against a trade union for wrongful suspension from membership and for reinstatement, findings were not objectionable where they established that the trial court proceeded on theory that the plaintiff was not expelled until the union refused to reinstate him which constituted a new and independent wrong and that the damages were caused by such expulsion.

19. Interest ⇐38(1)

In action against a trade union for damages for wrongful suspension and for reinstatement, judgment providing that it should bear interest at seven per cent from date of entry was not improper, though part of the allowance of damages was for future loss of wages, since the judgment was one for money which would normally carry interest at seven per cent from date of entry and an express provision in the judgment to that effect was properly incorporated. Const. art. 20, § 22; Gen.Laws, Act 3757, § 1.

20. Trade unions ⇐4.9

Where union rules did not provide for any fixed penalty for the alleged offenses of expelled union member, he was entitled to a proper hearing so that he could present mitigating evidence and minimize any evidence against him indicating guilt of the charges or which have a bearing on the punishment to be imposed.

21. Mandamus ⇐125

A writ of mandate directing defendants to set aside suspension and expulsion of a union member and to restore and reinstate him as a member of the union was too broad, where the imposition of such a penalty by the union after fairly conducted hearing which was not afforded the ex-

pelled member, might be justified on the basis of the charges of insubordination.

22. Mandamus ⇐190

In action by an expelled union member for reinstatement and for damages for loss of wages where the judgment was modified, each side was to bear its costs upon appeal.

V. P. Lucas, Los Angeles, for appellants.

J. Albert Woll, James A. Glenn and Herbert S. Thatcher, all of Washington, D. C., and Charles P. Scully, San Francisco, as amici curiae on behalf of appellants.

George D. Higgins, Los Angeles, for respondent.

GIBSON, Chief Justice.

Defendants—a national labor union, an affiliated local, and certain union officials—appeal from a judgment which awarded plaintiff damages as against the national union and granted a peremptory writ of mandate directing plaintiff's reinstatement to membership.

Plaintiff was president of a local union composed of employees of the Maywood Glass Company. Prior to May 6, 1945, plaintiff and a committee gave notice to the company that the local had voted not to work on Sundays, and the plant was not in operation on Sunday, May 6. The men reported for work on Monday, May 7, but they did not work until the following day because they found that their machines had been made ready and glass had been placed therein by nonunion workers. The company's general manager telegraphed the national union, complaining that plaintiff had refused to allow the local's upkeep men or operators to put the machines in order and had refused to permit the men to work on Sunday and Monday.

In voting not to work on Sundays, plaintiff and the local relied on a ruling made in 1944 by Maloney, the national president, that under the contract between the employers and the national union it was "optional" with the locals whether the men would work on Sundays. So far as appears from the record, this construction of the contract remained in effect until May 11, 1945, at which time Maloney sent a telegram to the local union stating that the refusal to keep the plant in operation was a violation of the agreement with the employers and instructing the local to comply with the contract and keep the factory in operation seven days a week. The plant, however, was not in operation the next two Sundays, May 13 and 20, and on the latter date Maloney sent plaintiff the following telegram: "I am informed by our national representatives that regardless of instructions contained in my telegram of May eleven the plant of the Maywood Glass Company is not in operation today Sunday stop I am holding you as president of Local one ninety responsible for this condition of affairs and by the authority vested in me as president do hereby suspend you from membership in our union the Glass Bottle Blowers Association of the United States and Canada."

Four days later on May 24 Maloney sent plaintiff a second telegram reading: "My recent telegram suspending you from membership in our organization was primarily because you refused as president of Local 190 to permit our upkeep men to come in the factory on Sunday May 6 for the purpose of placing machines in condition to work the following Monday; a violation of section one of our wage contract. Second, because the Maywood Glass Company opened their machines with foremen you stopped the plant for twenty-four hours by not allowing the operators to work in violation of section thirteen of our wage contract."

As a result of his suspension, plaintiff was discharged by his employer. Prior to commencement of the present suit, plaintiff brought an action against the national union, its president, and a local representative to enjoin them from enforcing the suspension order and to compel them to reinstate him to membership, and also to recover damages for loss of wages. The trial court in that case found that the suspension was wrongful and awarded plaintiff damages for loss of wages from the date of suspension to December 17, 1945, the date of trial, but denied an injunction

on the ground that it was improper for the court to order immediate restoration and thereby interfere with the procedure prescribed by the union for review of the disciplinary order. No appeal was taken, and the judgment became final.

During the pendency of the action above referred to, the president's order of suspension was approved by the executive board of the national union on March 2, 1946, and plaintiff then appealed to the national convention. In August, 1946, the matter was referred to the grievance committee of the convention, and plaintiff presented evidence and argued his case before it, but he was not allowed to confront or cross-examine his accusers or to rebut the evidence against him. The committee ruled against plaintiff, and its report was adopted and approved by the convention.

Thereafter, on December 17, 1947, plaintiff commenced the present action. The trial court found that he had been denied a fair hearing, and its judgment awarded him damages as against the union and granted a writ of mandate directing his reinstatement.

[1] It is clear that mandate is available in this state against an unincorporated association. Von Arx v. San Francisco Gruetli Verein, 113 Cal. 377, 45 P. 685; Otto v. Journeyman Taylors', etc., Union, 75 Cal. 308, 17 P. 217; Smetherham v. Laundry Workers' Union, Local No. 75, 44 Cal.App.2d 131, 111 P.2d 948; see also Dotson v. International Alliance, etc., Employes, 34 Cal.2d 362, 210 P.2d 5; Elevator Operators, etc., Union v. Newman, 30 Cal.2d 799, 186 P.2d 1; Smith v. Kern County Medical Ass'n, 19 Cal.2d 263, 120 P.2d 874; Levy v. Magnolia Lodge, No. 29, I.O.O.F., 110 Cal. 297, 42 P. 887; Dingwall v. Amalgamated Ass'n, etc., 4 Cal.App. 565, 88 P. 597.

[2, 3] The trial court did not err in refusing to quash service of summons or to dismiss the writ proceedings as to the local union and three individual defendants. The motions were not made until the close of the trial, and it is obvious that defendants' general appearance was a waiver of service of summons and of any defects therein. Code Civ.Proc. §§ 406, 416; Harrington v. Superior Court, 194 Cal. 185, 228 P. 15. Moreover, the motion to dismiss the proceedings was based on the ground that the alternative writ was defective as to damages, and the defendants who made the motion could not have been injured because no damages were awarded against them.

The principal contentions made by defendants are as follows: (1) that the prior judgment is res judicata and bars any relief to plaintiff herein; (2) that the present action is barred by the statute of limitations; (3) that plaintiff received a fair hearing and was accorded every privilege to which he was entitled under the constitution and by-laws of the national union; and (4) that certain damages were improperly allowed.

The prior judgment held that plaintiff's suspension by the national president without notice and a hearing was wrongful and that plaintiff was entitled to damages resulting therefrom. The court, however, denied an injunction on the ground that reinstatement would constitute an interference with the functions of the union in considering plaintiff's case. The correctness of this judgment is not before us, no appeal having been taken therefrom, but we must determine its scope.

[4–6] The judgment is clearly res judicata insofar as it held that plaintiff's original suspension by the national president was wrongful and that he was entitled to damages resulting therefrom. It is not res judicata, however, as to any matters which the court expressly refused to determine and which it directed should be litigated in another forum or in another action. Stark v. Coker, 20 Cal.2d 839, 843, 129 P.2d 390; Watson v. Poore, 18 Cal.2d 302, 309, 115 P.2d 478; Rest., Judgments, § 67. As we have seen, the trial court there found that a further hearing properly lay within the union and that it was not warranted in interfering with those proceedings, and it concluded that an injunction or immediate restoration to membership was not necessary at that time to the granting of adequate relief. It is apparent, therefore, that the court left open and re-

fused to determine the question of plaintiff's right to ultimate reinstatement and that it contemplated that plaintiff would have a cause of action for damages or injunction in case of any wrongful denial of reinstatement. In view of the fact that the correctness of the prior judgment is not before us, we need not determine whether the trial court in that action was justified in limiting the issues to the propriety of the original suspension by the national president, and we likewise need not determine whether a union may properly provide for suspension of a member without a hearing, for a reasonable time, pending determination of the charges against him. As noted above, however, it is clear that the prior judgment in effect determined that a wrongful refusal by the union to reinstate plaintiff would constitute a new and independent wrong giving rise to a new cause of action. Accordingly, the rule that a party cannot split his cause of action and obtain piecemeal recovery is inapplicable.

Defendants contend that the action is barred by section 340 of the Code of Civil Procedure, which provides a one-year period for tort actions for injury to a person by the wrongful act of another, or, in any event, by section 339 of that Code, which provides a two-year period for actions on contracts not in writing.

Plaintiff's second amended complaint alleged that the suspension was wholly illegal and void as held in the prior action, that he had exhausted his remedies within the union, and that he had been denied reinstatement without being afforded a fair hearing or trial before the national convention. He prayed for a writ of mandate directing his reinstatement in the union and for damages. The trial court in effect found that the original action of the president was merely a suspension, and that the subsequent refusal to grant reinstatement constituted an expulsion. If wrongful, the denial of reinstatement gave rise to a new cause of action.

[7–9] The record shows that there was a closed shop contract between the national union and plaintiff's employer, and plaintiff was entitled to sue in tort if the union wrongfully expelled him and at the same time refused to let him work because he was not a union member. See James v. Marinship Corp., 25 Cal.2d 721, 155 P.2d 329, 160 A.L.R. 900; Dotson v. International Alliance, etc., Employes, 34 Cal.2d 362, 210 P.2d 5. Plaintiff likewise had contract rights by reason of his membership in the union, and he was entitled to bring an action for breach of that contract if he was wrongfully expelled. Lawson v. Hewell, 118 Cal. 613, 618–619, 621, 50 P. 763, 49 L.R.A. 400; see De Mille v. American Federation of Radio Artists, 31 Cal. 2d 139, 146, 153–154, 187 P.2d 769, 175 A. L.R. 382; Chaffee, The Internal Affairs of Associations Not for Profit, 43 Harv.L.Rev. 993, 1001, 1007. Thus the trial court correctly determined that the action partook of the nature of both tort and contract. The final decision of the union, denying reinstatement, occurred when the national convention approved the grievance committee's report on August 5, 1946, and the complaint was filed on December 17, 1947, which was more than one year but less than two years thereafter. It follows, therefore, that plaintiff's action is not barred insofar as it is based on contract because it was brought within the two-year period prescribed by section 339.

The trial court found that plaintiff had been denied the right to know the charges against him, to confront his accusers, to cross-examine them and to refute their evidence, and it concluded that he had been wrongfully expelled. Defendants contend that the findings are not supported by the evidence and that the record shows that plaintiff was accorded a fair trial by the union. We must first determine what kind of hearing the law requires and in what circumstances the courts will intervene in these matters.

[10–14] In cases of this type we must strive both to protect the rights of individual members and to avoid impairing the right of the union to govern itself. The courts will interfere with the decision of an association expelling one of its members if the rules of the association governing

expulsion have not been observed or if the accused member has not been afforded those rudimentary rights which will give him a reasonable opportunity to defend against the charges made. See Otto v. Journeyman Taylors' etc., Union, 75 Cal. 308, 314, 17 P. 217; Taboada v. Sociedad Espanola De Beneficencia Mutua, 191 Cal. 187, 192, 215 P. 673, 27 A.L.R. 1503; McConville v. Milk Wagon Drivers' Union, 106 Cal.App. 696, 697–698, 289 P. 852; Bricklayers', etc., Union v. Bowen, Sup., 183 N.Y.S. 855; Chaffee, The Internal Affairs of Associations not for Profit, 43 Harv.L.Rev. 993, 1014–1020. It is a fundamental principle of justice that no man may be condemned or prejudiced in his rights without an opportunity to make his defense, and this principle is applicable not only to courts but also to labor unions and similar organizations. Taboada v. Sociedad Espanola De Beneficencia Mutua, 191 Cal. 187, 191, 215 P. 673, 27 A.L.R. 1508; Ellis v. American Federation of Labor, 48 Cal.App.2d 440, 443, 120 P.2d 79. It is, of course, true that the refined and technical practices which have developed in the courts cannot be imposed upon the deliberations of workingmen, and the form of procedure is ordinarily immaterial if the accused is accorded a fair trial. See McConville v. Milk Wagon Drivers' Union, 106 Cal.App. 696, 701, 289 P. 852; 30 Columb.L.Rev. 847, 852; 4 Am.Jur. 471–472; 7 C.J.S., Associations § 25, page 61. The union's procedure, however, must be such as will afford the accused member substantial justice, and the requirements of a fair trial will be imposed even though the rules of the union fail to provide therefor. Taboada v. Sociedad Espanola De Beneficencia Mutua, 191 Cal. 187, 192, 215 P. 673, 27 A.L.R. 1508; Von Arx v. San Francisco Gruetli Verein, 113 Cal. 377, 379, 45 P. 685; Ellis v. American Federation of Labor, 48 Cal.App.2d 440, 443–444, 120 P. 2d 79; see Dangel and Shriber, Labor Unions [1941] 204–206; Martin, Law of Labor Unions [1910] 384–386. The authorities recognize that such a trial includes the right to notice of the charges, to confront and cross-examine the accusers, and to examine and refute the evidence. Taboada v. Sociedad Espanola De Beneficencia Mutua, 191 Cal. 187, 191, 215 P. 673, 27 A.L.R. 1508; Ellis v. American Federation of Labor, 48 Cal.App.2d 440, 443–444, 120 P.2d 79; Harmon v. Matthews, Sup., 27 N.Y.S.2d 656, 659; Brooks v. Engar, 259 App.Div. 333, 19 N.Y.S.2d 114; see Bartone v. Di Pietro, Sup., 18 N.Y.S.2d 178; Dangel and Shriber, Labor Unions [1941] 204–206; 44 Ill.L.Rev. 631, 661–663, 673; Witner, Civil Liberties and the Trade Union, 50 Yale L.J. 621, 632–633; 41 Mich.L.Rev. 99, 101; Taboada v. Sociedad Espanola De Beneficencia Mutua, 191 Cal. 187, 215 P. 673, 27 A.L.R. 1512.

[15] In the present case, the telegrams of May 20 and 24, 1945, were sufficiently explicit to inform plaintiff of the nature of the charges contained therein. No other notice of those charges was necessary since the rules of the union did not require any formal written accusation.

At the national convention, as provided in the union's constitution and in accordance with its rules and practices, the matter was referred to the grievance committee for hearing. The committee allowed plaintiff to appear and present evidence, but it did not permit him to hear the testimony of Minton, the new national president, who was the only witness against plaintiff. No record was kept of what Minton said, but there was testimony that he spoke for about 30 minutes and that he left papers and telegrams for consideration. The committee had also been given the national union's file of the case, but plaintiff was not informed of its contents or afforded an opportunity to examine it. After some deliberation the committee concluded that the national president acted within his authority in suspending plaintiff.

When the report of the grievance committee was presented to the convention, the chairman refused to admit plaintiff on the ground that the union's rules did not allow suspended members to appear before the convention. Other members, however, were permitted to speak in his behalf, and Minton argued in reply, asserting that plaintiff had been rightfully suspended.

Thereafter the committee report was adopted and approved by the convention.

[16] The foregoing evidence is clearly sufficient to support the trial court's conclusion that plaintiff was denied a fair hearing before the grievance committee. Although he was allowed to appear and testify, he was not permitted to confront Minton, to hear his evidence or to refute it. Also, plaintiff was not given any opportunity to examine the file of the national union, which was considered by the committee, and it does not appear that he knew what was in the file or that it had been presented to the committee. We cannot tell, of course, if additional charges were contained in President Minton's testimony before the grievance committee or in the file used by the committee, but this possibility is simply another aspect of plaintiff's claim that he was denied the right to hear the evidence presented against him. Under the circumstances, it is apparent that he did not receive a fair trial within the meaning of the cases discussed above.

It may be that the deficiencies in the proceedings before the grievance committee would have been cured if plaintiff had received a hearing in the convention itself, but he was not allowed to appear before that body. We do not, however, wish to imply that the union's practice of denying suspended members the right to appear before the entire convention was unreasonable, since it would obviously be impracticable for that body to try charges against members. That function was properly assigned to the grievance committee, and a fair hearing by the committee would be sufficient to protect the rights of an accused member.

[17, 18] Under certain circumstances, where the facts are not disputed, a labor union may discipline a member without affording him a trial. For example, in De Mille v. American Federation of Radio Artists, 31 Cal.2d 139, 154–155, 187 P.2d 769, 175 A.L.R. 382, it was held that the enforcement of a by-law providing for automatic suspension of a member upon failure to pay an assessment did not contravene the requirements of due process. See also Brown v. Lehman, 141 Pa.Super. 467, 15 A.2d 513, 516–517. The present case, however, does not fall within this rule, since plaintiff denied most, if not all, of the charges against him. He controverted the accusations made in the telegram of May 24, 1945, that he refused to permit the upkeep men to come into the factory on Sunday, May 6, and that he caused the shutdown which occurred when the company used foremen to prepare the machines. Further, he presented evidence tending to show that, prior to the telegram of May 11 directing the local union to keep the plant in operation on Sundays, the local had an optional right to refrain from working on Sundays. With respect to the charge in the telegram of May 20, plaintiff did not claim that he took any affirmative steps toward keeping the plant in operation, but he did assert that he did not keep any one from working at any time. In view of his denials it was clearly improper to refuse reinstatement without affording him a fair hearing. Moreover, the union rules did not provide for any fixed, automatic penalty for the offenses charged here, and plaintiff was entitled to a proper hearing so that he could present mitigating evidence and also refute or minimize any evidence against him which might indicate guilt of the charges or have a bearing on the punishment to be imposed.

Defendants complain that the trial court erroneously admitted hearsay testimony as to statements made by William Gable, an officer of the national union, who was originally made a party defendant but who died before trial. In view of our conclusion that plaintiff was not afforded a fair hearing, we need not determine whether this testimony was properly admitted under an exception to the hearsay rule since it does not appear that any prejudice resulted to defendants.

Plaintiff was awarded damages for loss of wages from August 5, 1946, when the convention refused to reinstate him, to March 21, 1949, the date of the judgment, and for prospective loss of wages for one year thereafter. Defendants contend that the recovery of damages in the prior action precludes an allowance in the present case, but, as we have seen, the prior judgment is

not a bar to the enforcement of any rights arising from the union's wrongful refusal to reinstate him.

[18, 19] It is next asserted in effect that some of the findings regarding damages were based on the original suspension by the president rather than on the subsequent refusal to reinstate plaintiff, and defendants argue that the court was referring to the original suspension when it found that plaintiff's damages were caused by the wrongful "expulsion." There is no merit in this position. The findings make it clear that the trial court proceeded on the theory that plaintiff was not expelled until the union refused to reinstate him, which constituted a new and independent wrong, and that his damages were caused by this expulsion. The only other complaint with reference to damages is likewise without merit. It is stated, without citation of authority, that the judgment improperly provided that it should bear interest at seven percent from the date of its entry because part of the allowance of damages was for future loss of wages. It is clear, however, that the judgment for damages for breach of contract was a judgment for money which would normally carry interest at that rate from the date of its entry, and there was no error in incorporating an express provision to that effect. See Const., art. XX, § 22 [second section]; Deering's Gen.Laws, 1944, Act 3757, § 1; Walters v. Bank of America, etc., Assn., 9 Cal.2d 46, 58, 69 P.2d 839, 110 A.L.R. 1259; Mulligan v. Wilson, 94 Cal.App.2d 286, 292, 210 P.2d 526; McNabb v. McNabb, 47 Cal.App.2d 623, 627, 118 P.2d 869; City of Los Angeles v. Aitken, 32 Cal.App.2d 524, 527, 90 P.2d 377, 94 P.2d 1045.

[20] The trial court properly refused to pass on the truth of the charges against plaintiff, but is nevertheless ordered issuance of a writ of mandate directing defendants to set aside the suspension and expulsion and to restore and reinstate plaintiff as a member of the union. This judgment is too broad since it appears that the imposition of such a penalty by the union after a fairly conducted hearing may be justified on the basis of the charges of insubordination. The matter should therefore be remanded to the union for further proceedings in accordance with the rules which we have discussed. Cf. English v. City of Long Beach, 35 Cal.2d 155, 217 P.2d 22; Steen v. City of Los Angeles, 31 Cal.2d 542, 190 P.2d 937; La Prade v. Department of Water and Power, 27 Cal.2d 47, 162 P.2d 13.

[21, 22] The judgment is modified by striking therefrom all of that paragraph relating to the issuance of a writ of mandate which commences with the words: "That the Clerk of this Court be and he is hereby directed," and closes with the words: "and without any prejudice whatsoever," and by inserting in lieu thereof the following: "That the Clerk of this Court is hereby directed to issue a peremptory writ of mandate commanding defendants to afford plaintiff a full and fair hearing or to reinstate him to membership in the Glass Bottle Blowers Association of the United States and Canada and in Local Union #190 thereof." As so modified, the judgment is affirmed. Each side is to bear its costs upon this appeal

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

37 Cal.2d 148

BECK v. UNRUH et al.

L. A. 21293.

Supreme Court of California.

May 11, 1951.

As Modified on Denial of Rehearing June 7, 1951.

Action by Max Beck against Ida W. Unruh and others, to quiet title to property in Los Angeles County. The Superior Court of Los Angeles County, Walter R. Evans, J., entered judgment for plaintiff and defendants appealed. The Supreme Court, Shenk, J.,

held that deed from state after discharge of trustee and termination of bankruptcy proceeding conveyed title to purchaser at tax sale regardless of fact that bankruptcy court more than 10 years thereafter re-opened bankruptcy proceedings and trustee sold the bankrupt's interest in the real property involved.

Reversed.

Prior opinion, see 222 P.2d 242.

1. Bankruptcy ⇐215
Taxation ⇐679(5)

Question as to whether state could issue a deed to purchaser at tax sale because of an invoked constructive possession and exclusive control by bankruptcy court, must be resolved apart from limitation provisions respecting commencement of actions based on alleged invalidities due to irregularities or defects in tax proceedings. Revenue and Taxation Code §§ 3521, 3725.

2. Bankruptcy ⇐152

Property belonging to bankrupt is in the lawful custody of the bankruptcy court from the time of the filing of petition, and from that time such court has either actual or constructive possession thereof.

3. Bankruptcy ⇐214

Real property in the constructive possession of a bankruptcy court generally may not be subject to foreclosure proceedings or sold by lienor under power of sale to satisfy the lien without the permission of the bankruptcy court.

4. Bankruptcy ⇐191(3)

Property of bankrupt comes to the trustee subject to valid existing liens, including liens for taxes.

5. Bankruptcy ⇐20(1)

Constructive possession of bankruptcy court does not interfere with the state court's jurisdiction in title controversy in absence of assertion of jurisdiction of bankruptcy court.

6. Bankruptcy ⇐417
Taxation ⇐679(5)

Deed from state of real property of bankrupt after discharge of trustee and termination of bankruptcy proceeding conveyed title to purchaser at tax sale regardless of fact that bankruptcy court reopened proceedings more than 10 years thereafter and trustee sold interest of bankrupt in such property.

Alfred L. Armstrong, Los Angeles, for appellants.

Chas. I. Rosin, Los Angeles, for respondent.

SHENK, Presiding Justice.

The plaintiff sought to quiet his title to real property in Los Angeles county. He claimed as the grantee of a trustee in bankruptcy. The defendant claimed as the grantee of the state pursuant to tax sale. The trial court concluded that the defendant's tax title was void and entered judgment for the plaintiff. The defendant appealed.

There is no dispute as to the facts. On November 4, 1927, the United Finance Company filed a voluntary petition in bankruptcy and on that date was adjudicated a bankrupt. Among the listed assets of the bankrupt was the real property described in the complaint. Prior to the filing of the petition in bankruptcy and in June 1927 the real property was sold to the state for non-payment of the 1926–1927 taxes and on December 1, 1932, the property was deeded to the state. On December 11, 1936, the bankruptcy court discharged the trustee in bankruptcy and terminated the bankruptcy proceeding without redemption or disposition of the property. On May 19, 1944, the property was sold and deeded by the state to Fred R. Salter and by mesne conveyances the defendant Unruh became the holder of the tax title. Subsequently, on May 2, 1947, the bankruptcy court reopened the bankruptcy proceedings, and on the following December 15 the trustee sold the bankrupt's interest to the plaintiff. The present action was commenced on March 15, 1948.

On the foregoing facts the trial court concluded that from November 4, 1927, to December 15, 1947, when the sale to the plaintiff by the trustee in bankruptcy oc-

curred, the real property was in the custody of the bankruptcy court, that the state had no power to sell the property and that the defendant's tax title was void.

[1] The defendant pleaded the bar of sections 3521 and 3725 of the Revenue and Taxation Code. These sections are inapplicable since they provide time limitations governing the commencement of actions based on alleged invalidities due to irregularities or defects in the tax proceedings and tax deeds. Such irregularities, defects and invalidities, which assume the power of the state to issue a deed, are not brought into question. Here the question is whether, because of an invoked constructive possession and exclusive control by the bankruptcy court, the state could issue a deed in any event. That question must be resolved apart from the limitation provisions.

[2, 3] The correctness of various basic propositions may be assumed. The courts of this state have recognized the general rule that property belonging to the bankrupt is in the lawful custody of the bankruptcy court from the time of the filing of the petition, and that from that time that court has either actual or constructive possession thereof. Nuckolls v. Bank of California, 10 Cal.2d 266, 274, 74 P.2d 264, 114 A.L.R. 708 citing cases; Wells v. California Tomato Juice, Inc., 47 Cal.App.2d 634, 636, 118 P.2d 916; Manter v. Howard, 94 Cal.App.2d 404, 408, 210 P.2d 880. Real property in the constructive possession of the bankruptcy court generally may not be subject to foreclosure proceedings, or sold by the lienor under a power of sale to satisfy the lien, without the permission of the bankruptcy court; and this rule has been applied to invalidate a sale by the state to a purchaser at a tax sale. Dayton v. Stanard, 241 U.S. 588, 36 S.Ct. 695, 60 L.Ed. 1190; In re Eppstein, 8 Cir., 156 F. 42, 17 L.R.A., N.S., 465; 5 Remington on Bankruptcy, 4th ed., sec. 2364; see also Straton v. New, 283 U.S. 318, 51 S.Ct. 465, 75 L.Ed. 1060; Isaacs v. Hobbs Tie & T. Co., 282 U.S. 734, 51 S.Ct. 270, 75 L.Ed. 645. Cf. Hiscock v. Varick Bank of New York, 206 U.S. 28, 27 S.Ct. 681, 51 L.Ed. 945; Heffron v. Western Loan & Building Co., 9 Cir., 84 F.2d 301, 112 A.L.R. 501; Hardt v. Kirkpatrick, 9 Cir., 91 F.2d 875; Griffin v. Smith, 177 Cal. 481, 171 P. 92. Where the general rule has been held applicable it has been because of the interest of the bankrupt's estate and claimants thereto in the excess of the value of the property over and above the amount necessary to discharge the lien.

[4] These principles however do not absolve the trustee in bankruptcy or the bankruptcy court of duties and obligations in the administration of the bankrupt's estate. The property comes to the trustee subject to valid existing liens including liens for taxes. Continental Illinois Nat. Bank & Trust Co. v. Chicago Rock Island & P. Ry. Co., 294 U.S. 648, 676, 55 S.Ct. 595, 79 L.Ed. 1110; Dayton v. Stanard, supra, 241 U.S. 588, 36 S.Ct. 695, 60 L.Ed. 1190; In re Knox-Powell-Stockton Co., 9 Cir., 100 F.2d 979, 982. The trustee has only the rights in the property which the bankrupt had. Since the tax sale to the state had already taken place, he succeeded to the possession and to the right to redeem. The cases herein cited indicate that thereby he had the power to dispose of the property for the benefit of the bankrupt's estate subject to the state's lien, or to sell it free of the lien by discharging the lien from the proceeds of the sale or otherwise from the funds of the bankrupt, and to prevent a tax sale by the state without the bankruptcy court's permission. (See 6 Remington on Bankruptcy, 4th Ed., sec. 2793.)

As noted, under the bankruptcy act the bankruptcy court has exclusive administration of the bankrupt's assets, but tax liens are preserved. And in the cases brought to our attention, or discovered through independent research, the courts were concerned with the actual invoked powers of the trustee and of the bankruptcy court then actively administering the bankrupt's estate. In the present case the trustee in bankruptcy is not seeking to set aside the tax sale, to discharge the lien, or to sell the property subject to the lien. The rec-

ord shows that after the trustee had been discharged and the bankruptcy proceeding terminated by the bankruptcy court, and after the sale by the state, the court reopened the bankruptcy proceeding to dispose of the real property by sale apparently without recognition or discharge of the tax lien. The plaintiff rests on the principle of constructive possession and exclusive control of the bankruptcy court. But he presents no authority that such possession and control obtains when the bankrupt's estate is not in the course of active administration by that court. On the contrary, the implication in the decisions clearly is that such possession and control attach when the estate is in the course of administration in a court of bankruptcy. The tax sales held invalid in the Dayton v. Stanard case were made at such a time; that is, they were of "real property belonging to a bankrupt estate then in the course of administration in a court of bankruptcy. The property was in *custodia legis* and was sold without leave of court. Because of this the [bankruptcy] court held the sales invalid, and entered a decree canceling the certificates of purchase, and enjoining the county treasurer from issuing tax deeds thereon."

The above noted discharge of the trustee and the termination of the bankruptcy proceeding occurred in 1936 when the country was still in the depths of the depression which had commenced shortly after the voluntary petition in bankruptcy was filed. The only reasonable conclusion is that the trustee abandoned the real property to the state as not worth the amount of the tax lien. Then more than ten years later and three years after the state had sold the property, he experienced a change of heart doubtless because of the increased value in real property following the close of the second world war, and sought to realize on the increased value for the benefit of the bankrupt's creditors. He proceeded without invoking the control of the bankruptcy court to set aside the deed and provide for reimbursement. He assumed to exercise his powers of administration merely by selling and conveying the property to the plaintiff. Thereby he left the parties claimant to litigate the controversy as to title in a state court.

[5] It is not suggested that the state court has no jurisdiction to resolve the issues as to title. The constructive possession invoked does not interfere with the state court's jurisdiction in title controversies in the absence of the assertion of jurisdiction by the bankruptcy court. See Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 60 S.Ct. 628, 84 L.Ed. 876; Saunders v. Given, 1934, Tex.Civ.App., 70 S.W.2d 310, certiorari denied 293 U.S. 599, 55 S.Ct. 116, 79 L.Ed. 692. In effect here the bankruptcy court has abandoned the matter to the state court for determination.

In view of the termination of the bankruptcy proceeding long prior to the time of the tax sale and in the absence of any intervention in the tax sale proceeding by the trustee or the bankruptcy court, it cannot be said on the record before us that the state was without power to resort to the only means at its disposal to return the property to the tax rolls. As implied in Hardt v. Kirkpatrick, supra, 91 F.2d 875, 879, the plaintiff is not in a position to complain of the flaunting of the claimed authority of the bankruptcy court which that court did not choose to exercise, or of invasions into the field of alleged exclusive control as to property which it in effect had abandoned. Under the circumstances, in the absence of active intervention, the result was to revest the state with the power to return the property to the tax rolls by means of the statutory tax sale proceedings. Cf. Harlow Realty Co. v. Cotter, 1933, 284 Mass. 68, 187 N.E. 118; Re North Star Ice & Coal Co., D.C.Tenn. 1918, 252 F. 301.

[6] The conclusion follows from the undisputed facts that the deed from the state conveyed the title to the purchaser at the tax sale.

The judgment is reversed.

GIBSON, C. J., EDMONDS, P. J., and CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

In re COSTA'S ESTATE.

COSTA v. RIDDLE et al.

L. A. 21493.

Supreme Court of California, in Bank.

May 11, 1951.

Rehearing Denied June 7, 1951.

Proceeding in the matter of the estate of Luigi Costa, deceased, Royal S. Riddle, administrator. Lorenzo Costa and Carmela Costa, residents of Italy and allegedly brother and sister of decedent, filed petition to determine heirship and interest in the estate. The Superior Court, Los Angeles County, Joseph M. Maltby, J., denied petition to determine heirship and ordered distribution of estate to estate of decedent's widow, and petitioners' appeal was opposed by administrator, and others. The Supreme Court, Shenk, J., held that evidence was insufficient to show relationship between decedent and petitioners.

Order affirmed.

Prior opinion 224 P.2d 851.

1. Judgment ⇐340

Trial court has inherent power either on its own motion, or on ex parte application, or on notice, to set aside an order or judgment taken through its own inadvertence or mistake, and a prematurely entered order is such an inadvertence, and application to court to set aside order is not necessary. Code Civ.Proc. § 473.

2. Descent and distribution ⇐71(7)

Where hearing on petition for distribution of estate was set for 2 P. M. on February 28, in register of actions, but hearing was called and heard at 10 A. M. that morning, hearing and orders occurring were premature and inadvertent, and trial court properly exercised its inherent power in setting aside those orders, and therefore appeal from denial of motion to set aside orders as premature was unnecessary. Code Civ.Proc. § 473.

3. Descent and distribution ⇐71(2)

Where hearing on petition for distribution of estate, scheduled in register of actions for 2 P. M. on February 28, was had at 10 A. M. of that day, but court set aside hearing and occurring orders as premature, pending objections were reopened, and alleged heirs could file objections and petition to determine heirship, since estate was not in condition to be closed. Code Civ.Proc. § 473; Probate Code, § 1080.

4. Descent and distribution ⇐71(6)

In proceeding to determine heirship and distribution of estate, unauthenticated birth, marriage, and death certificates and oral testimony as to relationship of decedent and alleged heirs was insufficient to show relationship between alleged heirs and decedent. Code Civ.Proc. §§ 473, 1918, subd. 8.

5. Descent and distribution ⇐71(6)

In proceeding to determine heirship and distribution of estate, evidence was insufficient to establish that reciprocal relations existed between Italy and United States as to distribution of estates, and did not entitle alleged heirs, residents of Italy, to share of estate. Probate Code, § 259.

Joseph D. Taylor, Los Angeles for appellants.

Alfred F. Baughn, Hollywood, for respondents.

SHENK, Justice.

Luigi Costa, a resident of Los Angeles county, died on February 19, 1947, leaving his wife, Peggy Rita Costa, who died on May 23, 1948. On January 17, 1949, Luigi's administrator filed a final account and report, and a petition for distribution of the whole estate to Peggy's executor. On February 4 the latter filed objections to the account. The hearing was set for February 14 and was continued to February 28. The continued hearing was called at 10 a. m. on February 28 and at that time a supplemental final account and petition was filed together with a stipulation withdrawing objections and agreeing that the account be settled and that distribution be ordered in accordance with the account and petition as amended and supplemented. A minute order was entered accordingly.

The foregoing proceedings were taken at the Long Beach Department of the superior court in Los Angeles county. The time when the hearing would be had on February 28 appeared only in the register

of actions in Los Angeles. The entry in the register was that the matter was set for 2 p. m. of that day. At that appointed time Lorenzo Costa and Carmela Costa, residents of Italy, claiming to be the brother and sister of the decedent Luigi Costa, through their attorney, filed objections to the distribution of the estate to the widow on the ground that they were entitled to a share thereof. The attorney then learned that the account and petition for distribution had been called and heard at 10 o'clock that morning. On March 3 he filed a notice of motion pursuant to section 473 of the Code of Civil Procedure to set aside the orders as premature. On the same day the court on its own motion set aside the minute order of February 28th, and continued the hearing on the final account and petition for distribution to March 28 at 10 a. m. Prior to that hour on that day a petition to determine heirship and interest in the estate was filed on behalf of Lorenzo and Carmela Costa and the hearing thereon was noticed for May 23, 1949. At the hearing on that day oral and documentary evidence was offered on the petition to determine heirship. Objections to birth, marriage and death certificates on the ground that they were not properly authenticated pursuant to section 1918, subd. 8 of the Code of Civil Procedure were taken under advisement by the court, and the hearing continued to June 6 to provide opportunity for counsel to submit proof of reciprocity between the United States and Italy as to the distribution rights of the claimants. On June 7 the court denied the petition to determine heirship, denied the motion to set aside the orders of February 28, overruled the objections to the final account and petition for distribution, approved the report and account as supplemented and ordered distribution to the widow's estate. Findings of fact and orders were made and entered accordingly. A motion for a new trial was denied. Lorenzo and Carmela Costa appealed from the order entered on the denial of their petition to determine heirship and from the order entered on the petition for distribution.

The respondents urge in support of the orders of June 7 that the court had no power to vacate the order of February 28, 1949, in that it was set aside for the correction of judicial as distinguished from clerical error.

[1–3] There is no merit in the contention. It is settled by abundant authority in this state that the court has inherent power either on its own motion, or on ex parte application, or on notice, to set aside an order or judgment taken through its own inadvertence or mistake; that a prematurely entered order is such an inadvertence, and that application pursuant to section 473 of the Code of Civil Procedure is not necessary. Holtum v. Greif, 144 Cal. 521, 524–525, 78 P. 11; Whitney v. Superior Court, 147 Cal. 536, 82 P. 37; Robson v. Superior Court, 171 Cal. 588, 591–593, 154 P. 8; Treat v. Superior Court, 7 Cal.2d 636, 640, 62 P.2d 147; Phillips v. Trusheim, 25 Cal.2d 913, 916, 156 P.2d 25; Harris v. Minnesota Investment Co., 89 Cal.App. 396, 265 P. 306; Raines v. Damon, 89 Cal.App.2d 812, 815, 201 P.2d 886. The latest expression in this respect by this court is contained in the recent case of Key System Transit Lines v. Superior Court, 36 Cal.2d 184, 222 P.2d 867. It cannot be questioned in the present case that since the matters were scheduled to be heard at 2 p. m. of February 28, the hearing and orders occurring and made at 10 a. m. of that day were premature and inadvertent. The court properly exercised its inherent power in setting aside those orders when attention was called to the inadvertence. The contentions respecting the denial of the motion pursuant to section 473 and the appellants' failure to appeal from that order are of no moment inasmuch as the order of March 3 setting aside the orders of February 28 was within the court's power. There is likewise no merit in the respondents' contention that the petition for determination of heirship was filed too late. The setting aside of the orders of February 28 reopened the pending objections, permitted the filing of appellants' objections to distribution, and therefore continued the time within which the petition to determine heirship could be filed. Section 1080, Probate Code Stats. 1931, p. 657. The argument of respondents that the time within

which the petition could be filed was closed on February 28th by reason of the court's orders pursuant to the morning hearing of that day erroneously assumes the lack of power in the court to set aside those orders for inadvertence. Because of the pending objections the estate was not in a condition to be closed within the meaning of section 1080 of the Probate Code.

The court therefore had jurisdiction to hear the objections and the petition to determine heirship and to make findings and decide the issues thus raised. The court concluded that the appellants were not entitled to succeed to the estate or to share in the distribution thereof. Thereby the court resolved adversely to the appellants both issues submitted, namely, whether the claimants were heirs of Luigi Costa and whether there were reciprocal rights existing between the United States and Italy as required by section 259 of the Probate Code pursuant to which distribution to them could be ordered. Support for either finding is sufficient to sustain the orders denying the petition to determine heirship and directing distribution.

[4, 5] On the record the court could properly conclude that there was not sufficient evidence to support the appellants' claims. The documentary evidence needed to substantiate the claims was deficient for the purpose. As hereinbefore noted the birth, marriage, and death certificates were not authenticated as required by section 1918, subd. 8 of the Code of Civil Procedure. There were unexplained differences in names which it is not necessary to note in detail. There was no connection in the proof between the persons named in the various certificates and the decedent except that afforded by the affidavit of Carmela Costa who was one of the claimants, and the oral testimony of one witness who stated that the decedent had mentioned a brother named Lorenzo and a sister named Carmela. The court afforded ample opportunity to procure the documentary proof but the appellants preferred to rely on a claimed identity of persons from an identity of names. A conclusion of lack of relationship was justified on the showing made. There was also ample time within which the appellants might direct the court's attention to possible treaties or to other conditions of the reciprocal relations with Italy which would support a conclusion that they had the right to a share of the estate. No contention is now made that there exists any basis for a conclusion that the reciprocal rights existed. If it be assumed that at the time here involved the burden was on Peggy's executor to prove that such reciprocal rights did not exist, see In re Estate of Reihs, 102 Cal.App.2d 260, 227 P.2d 564, it does not necessarily follow that some evidence was not required to be submitted by the petitioners in the heirship proceeding to support their claim.

The appellants failed to establish their claim which was heard on the merits after the orders of February 28 were set aside.

The orders appealed from are affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

37 Cal.2d 253

SIMONE v. SABO.

L. A. 21854.

Supreme Court of California, in Bank.

May 18, 1951.

Rehearing Denied June 14, 1951.

Action by Paul Simone against Victor O. Sabo for damages for malpractice. The Superior Court, Los Angeles County, Wilbur C. Curtis, J., entered judgment in favor of plaintiff, and defendant appealed. The Supreme Court, Edmonds, J., held that the evidence would not support the verdict.

Reversed.

Carter, J., dissented.

Prior opinion, 224 P.2d 487.

1. Physicians and surgeons ⇐18(10)

In malpractice action brought against dentist who was general practitioner, instruction that general practitioner who

undertakes service in special field when there are specialists available has duty to possess that degree of learning and skill ordinarily possessed by such specialists, was subject to criticism that it failed to state that there was duty to refer patient to specialist only if, under same circumstances, reasonably careful and skillful general practitioner would have done so.

2. Physicians and surgeons ⇐15(5)

General practitioner's duty to refer patient to specialist must always be measured in relation to facts in particular case, and in determining his course of action, such general practitioner may and should consider such elements as patient's mental and emotional condition, his known financial situation, and many other variants which physician meets in treating human ailments.

3. Physicians and surgeons ⇐18(8)

Question as to whether there was proper care in treatment of particular case is one to be determined by opinions of experts, and failure to use such care can be established only by their testimony. Code Civ.Proc. § 2055.

4. Physicians and surgeons ⇐18(6)

Negligence on part of physician or surgeon will not be presumed but must be affirmatively proved, and in absence of expert evidence it will be presumed that physician or surgeon exercised ordinary care and skill required of him in treating his patient.

5. Physicians and surgeons ⇐18(8)

In malpractice action brought against dentist, who was general practitioner, for allegedly damaging mandibular nerve in removing impacted second bicuspid tooth, evidence would not sustain finding of negligence.

Gibson, Dunn & Crutcher and Sherman Welpton, Jr., all of Los Angeles, for appellant.

Herbert Manasse, Hollywood, and Arthur J. Crowley, Los Angeles, for respondent.

EDMONDS, Justice.

A jury awarded Paul Simone damages for the asserted malpractice of Dr. Victor O. Sabo in removing an impacted tooth. The appeal from the judgment entered upon the verdict principally concerns the question as to whether it was a breach of duty for Dr. Sabo, as a general practitioner, to have undertaken such an extraction.

According to the testimony of Simone, when he consulted Dr. Sabo, his teeth were examined and x-rays taken. He was told that several of his teeth should be removed, one of which was the impacted left lower second bicuspid. Dr. Sabo said that the extraction of the impacted tooth would be "quite an operation" and "we may have to call in another surgeon on it, a man who is well known, who knows these things well". He was not told that a nerve might be severed as a result of the operation. Dr. Sabo "just said it was a dangerous operation and I should consult the other dentist; some name, I can't think of it".

Simone described the operation, which he said he could see by looking at the reflection in Dr. Sabo's glasses. He told the jury that he saw the dentist cut a "hole" in the gum, and cut around the tooth. Dr. Sabo then held a chisel against the bone or tooth while his wife, who was his dental assistant, struck the chisel with "a little silver hammer". Dr. Sabo told her that she was not hitting "hard enough", and finally said, "Go get the other hammer. That ought to knock it out". She then struck the chisel with a "regular nail hammer", using both hands. "She didn't dare to hit too hard and he was telling her to hit harder so finally she hit it real hard and something cracked and he said, 'Now, again,' and 'again,' and each time I was just almost going way over. * * * Then all of a sudden she hit it real hard and the hammer flew off, I mean the head, and just grazed me like that and hit me here (indicating), and when she hit me hard I passed out". When Simone recovered consciousness, Dr. Sabo continued using a hammer and chisel and removed the remaining pieces of the tooth. He then applied a packing.

Dr. Sabo, called as a witness under the provisions of section 2055 of the Code of Civil Procedure, testified that he had been engaged in the general practice of dentistry for eight months. His experience included the extraction of approximately one thousand teeth, none of which was an impacted lower second bicuspid. However, he had extracted 40 or 50 other impacted teeth.

The procedure followed in extracting Simone's tooth was related for the jury in considerable detail. After placing Simone in the dental chair, he said, he sterilized his instruments. He then gave Simone three injections of novocaine. After ascertaining, by probing, that there was complete anesthesia of the left side of the face, he incised the tissue over the impacted tooth. Employing another instrument, he pulled the tissue from the bone, and began cutting into the bone with a chisel and surgical hammer.

At this point in the operation, said Dr. Sabo, he cut a window in the bone and located the crown of the tooth. Using an elevator, he attempted to dislodge the tooth. Being unable to do so, he used a surgical hammer and chisel, and broke the tooth into small pieces which he removed. After removing all parts of the tooth, he placed five sutures and treated the gum with sulfa paste and iodaform gauze. He then smoothed over the area to prevent pain, took additional x-rays, and checked the patient for infection.

Upon cross-examination, Dr. Sabo admitted that, during a part of the operation, he held the chisel while his wife struck it with a surgical hammer. He specifically declared that only surgical hammers of different sizes were used in making the extraction. Mrs. Sabo was not a registered nurse, but had acted as his dental assistant for approximately seven months.

In regard to his conversations with Simone, Dr. Sabo admitted that he did not warn his patient of the danger of injury to the mandibular nerve, other than to tell him that it was a dangerous operation. But he told Simone he had consulted with Dr. Huenergardt, an oral surgeon, and said that this man might be called upon to perform the extraction. However, according to Dr. Sabo, "I made mention of the fact too, that it would be more expensive and, therefore, between us we decided that I would do it".

It appears that, in the removal of the tooth, the mandibular nerve was bruised or severed. As a result, at the time of the trial, Simone had a numbness of a portion of the lower lip and jaw which may be permanent.

Simone presented the testimony of an expert tending to prove that it is customary for a general practitioner to refer the extraction of impacted lower bicuspids to an exodontist or oral surgeon. Such a tooth, the testimony shows, is invariably in close proximity of a branch of the mandibular nerve, and the extraction constitutes "considerable danger to the mental nerve". The expert was asked whether it is customary practice for a general practitioner in dentistry in Los Angeles to inform a patient prior to the extraction of a tooth such as a lower left second impacted bicuspid, that there may be a serious injury to the mental nerve and the possibility of a resulting numbness of his lip. The doctor replied, "I think any dentist in Los Angeles who does such an operation would inform the patient of the likelihood of the complication because it is a great likelihood that it would occur".

An oral surgeon, testifying on behalf of Dr. Sabo, stated that it was customary and proper for general practitioners of dentistry in the locality, observing required standards of care, to extract impacted teeth. He explained that such practitioners are licensed to perform surgery in the area of the mouth. Upon cross-examination, he gave several reasons why a dentist may refer his patient to a specialist, but he specifically stated that it is not the customary practice for a general practitioner to refer a person with a completely impacted left lower second bicuspid to an exodontist for extraction. As he put it, "many men do their own extractions. As I stated before, it all depends on how the man feels about his ability".

Concerning the likelihood of injury in the removal of an impacted tooth, the expert told the jury that the danger of traumatization is present whether an exodontist or general practitioner performs the extraction. Traumatization of the mandibular nerve, he said, occurs in approximately 25 per cent of extractions such as that performed by Dr. Sabo. However, he did not know in what percentage of cases the nerve was severed. His opinion, based upon an examination of Simone, was that the nerve had been traumatized, but not severed.

Among other grounds presented in requiring a reversal of the judgment entered upon the verdict of the jury which heard this evidence, Dr. Sabo argues that the failure of a general practitioner to refer a patient to a specialist is not actionable in the absence of proof that, in the treatment of the patient, there was a failure to exercise the degree of skill and learning employed by specialists practicing in the same locality. He also takes the position that neither his failure to refer Simone to an exodontist, or the fact that he did not warn his patient of a possible injury to the mandibular nerve, supports the verdict and judgment because neither was the proximate cause of any injury.

The following instruction was given at the request of Simone: "When a general practitioner is confronted by a case that comes within the field of specialists practicing in the same locality, if the case presents an emergency when no practitioner more highly qualified than he for the service is available, or if he informs the patient of the need or advisibility of employing the services of a specialist and of his own lack of special ability for the case, and the patient insists on his personal services, and if he undertakes diagnosis and treatment of the case, the standard of ability required of him is that set by the learning and skill ordinarily possessed by general practitioners in the same locality and of good standing.

"In all other circumstances, if a general practitioner undertakes the treatment of such a case, and if at that time and in the same locality there are specialists of good standing practicing in, and limiting their practice to, the special field that embraces the case in question, it is the duty of that general practitioner to possess that degree of learning and skill ordinarily possessed by such specialists."

[1, 2] This instruction is subject to the same criticism as the one given in Sinz v. Owens, 33 Cal.2d 749, 205 P.2d 3, 8 A.L.R. 2d 757. Each of them failed to state that there is a duty to refer a patient to a specialist only if, under the same circumstances, a reasonably careful and skillful general practitioner would have done so. The general practitioner's duty must always be measured in relation to the facts in the particular case. In determining a course of action, he may and should consider such elements as the patient's mental and emotional condition, his known financial situation, and the many other variants which a physician meets in treating human ailments.

[3–5] However, assuming that, under the evidence, Dr. Sabo should have referred Simone to a dental surgeon, there is an entire failure of proof that in extracting the tooth he did not use the skill and care of such a specialist. The question as to whether there was proper care in the treatment of a particular case is one to be determined by the opinions of experts. The failure to use such care can be established only by their testimony. "Negligence on the part of a physician or surgeon will not be presumed; it must be affirmatively proved. On the contrary, in the absence of expert evidence, it will be presumed that a physician or surgeon exercised the ordinary care and skill required of him in treating his patient." Engelking v. Carlson, 13 Cal.2d 216, 220–221, 88 P.2d 695, 697.

In the record now before this court, no expert witness stated that anything done by Dr. Sabo constituted improper treatment. Neither is there any evidence to show that he did anything which a reasonably prudent and skillful oral surgeon would not have done. For all that appears,

Simone's tooth was extracted with the care and skill he would have received at the hands of a specialist.

This absence of evidence was recognized by the trial judge who instructed the jury as follows: "The technique and procedure in connection with the extraction or removal of a left lower impacted second bicuspid tooth is peculiarly within the knowledge of experts and the plaintiff has not offered any testimony that the technique and procedure employed by Dr. Sabo was not in accordance with the proper and required standards of reputable dentists, exodontist or oral surgeons practicing in this locality, therefore you may not consider that issue in your deliberations in this case."

The judgment is reversed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

There is ample evidence, under any one of several theories, to support the implied finding that negligence of the defendant proximately caused plaintiff's injuries and the judgment should be affirmed.

Plaintiff's testimony alone would support the verdict and judgment. He stated that, in extracting the impacted second bicuspid, defendant held a chisel and his wife hit it with a little silver hammer; "she just kept hitting it and every time she would hit it, why, it would jar my head." Defendant told his wife to hit harder and finally said, "Well, this is not doing any good * * * go get the hammer." Plaintiff further testified as follows: "Then she [defendant's wife] stood on this side and she started hitting me with this regular nail hammer, and when I saw that nail hammer I said, 'What is this?' * * * And then he [defendant] says, 'Hit it hard this time.' So then * * * she had both hands on it * * * so finally she hit it real hard and something cracked and he said, 'Now again,' and 'again' and each time I was just almost going way over. * * * Then all of a sudden she hit it real hard and the hammer flew off, I mean the head, and just grazed me * * * and when she hit me hard I passed out. I mean I fainted. And when I came to again there they were picking up the hammer and they were * * * putting the head back on there." Mrs. Sabo was not a registered nurse, although she had had some training in the use of X-rays and had assisted defendant in his office for about seven or eight months.

The majority hold that improper treatment was not shown, relying upon this proposition: "The question as to whether there was proper care in the treatment of a particular case is one to be determined by the opinions of experts. The failure to use such care can be established only by their testimony." But this rule is subject to the exception clearly set forth in Barham v. Widing, 210 Cal. 206, at page 214, 291 P. 173, at page 176, as follows: "It is * * * true that cases which depend upon knowledge of the scientific effect of medicine, or the result of surgery, must ordinarily be established by expert testimony of physicians and surgeons. [Citations.] *This rule, however, applies only to such facts as are peculiarly within the knowledge of such professional experts, and not to facts which may be ascertained by the ordinary use of the senses of a non-expert.*" (Italics added.) This exception has been similarly stated in many cases and is well established. Lawless v. Calaway, 24 Cal.2d 81, 86, 147 P.2d 604, 606 ("Where, however, negligence on the part of a doctor is demonstrated by facts which can be evaluated by resort to common knowledge expert testimony is not required since scientific enlightenment is not essential for the determination of an obvious fact."); Agnew v. City of Los Angeles, 82 Cal. App.2d 616, 619, 186 P.2d 450, 451 ("* * where the question of the propriety of the treatment is a matter of common knowledge of laymen, expert testimony is unnecessary in order to establish liability in a malpractice case."); Armstrong v. Wallace, 8 Cal.App.2d 429, 439, 47 P.2d 740; Walter v. England, 133 Cal.App. 676, 685, 24 P.2d 930; Nelson v. Parker, 104 Cal.

App. 770, 775–776, 286 P. 1078; see, Wires v. Litle, 27 Cal.App.2d 240, 243–244, 80 P.2d 1010, 82 P.2d 388; Swan, California Law of Malpractice, 33 Cal.L.Rev. 248, 272. The stated principle should be applied to this case. It certainly does not require expert testimony to establish that an ordinary nail hammer, wielded by an untrained person, is not a proper means of extracting a tooth, especially in view of the conceded fact that the particular extraction involved was a delicate and dangerous operation. If plaintiff's testimony were believed, the jury could reasonably conclude that defendant had not only failed to exercise the care and skill required of a specialist, but that he did not use the care and skill of a general practitioner of dentistry.

The majority opinion also states: "For all that appears, Simone's tooth was extracted with the care and skill he would have received at the hands of a specialist." Not only does plaintiff's testimony refute this statement, but there is expert evidence to the effect that the injury suffered by plaintiff would not have occurred in the course of proper treatment. The extraction took place in May, 1948. Plaintiff testified that his lip, chin and the side of his face were still numb at the time of the trial. Dr. Schoen, a dentist practicing in Los Angeles who was called as a witness by plaintiff, stated that a nerve "probably had been" severed where, after the extraction of an impacted bicuspid, a man's lip remained numb during the period in question. Dr. Felsen, an oral surgeon, testified for defendant. On direct examination, he gave this testimony: "From the X-ray that I see here *there wouldn't be any danger of severing the nerve* because the nerve is not involved in the impacted tooth, but the tip of the tooth is very close or resting upon the mandibular canal in which the mandibular nerve rests, and in executing the procedure to remove that tooth, the tooth might be tipped inadvertently in such a way as the end of the root might injure it, *but I doubt very much that it would sever the nerve in this particular case.*" The following testimony was given on cross-examination of this witness:

"Q. Therefore, isn't it true that there would be considerable danger of either severing the mandibular nerve or the mental nerve if the tooth were to be extracted? A. *Not this particular tooth, no.* * * *

"Q. In other words, would you say that there was no danger of severing a nerve in the vicinity of this particular tooth? A. I wouldn't say there was no danger of severing it, *but I can't see with the position of the end of the root in this particular X-ray how the nerve could be severed.* It could be traumatized, as I stated before, yes."

The plain import of Dr. Felsen's testimony is that, while the mandibular nerve might be unavoidably *injured* during the extraction of the particular tooth, a dentist using proper care and skill would not accidentally *sever* the nerve. It is settled that, to establish his case, the plaintiff in a malpractice action may rely upon expert evidence introduced by the defendant. Trindle v. Wheeler, 23 Cal.2d 330, 335, 143 P.2d 932; Blakeslee v. Tannlund, 25 Cal.App.2d 32, 36, 76 P.2d 216. Negligence is a reasonable inference to be drawn from the foregoing evidence, that is, that inference could be based upon the expert testimony tending to show that defendant severed the mandibular nerve in plaintiff's mouth in removing the bicuspid and that such an injury would not ordinarily arise in the absence of negligent treatment.

I cannot agree with the statement in the majority opinion that the instruction given here with respect to the duty of a general practitioner who undertakes the treatment of a case within the field of specialists is subject to the same criticism as the one given in Sinz v. Owens, 33 Cal.2d 749, 205 P.2d 3, 8, 8 A.L.R.2d 757. The instruction criticized in the Sinz case stated that if a physician or surgeon undertakes professional service "in a special branch of medical, surgical or other healing science, and if at that time and in the same locality there are members of his profession who specialize in, and limit their practice to, that particular branch of the healing profession, it is his duty to possess that degree of learning and skill ordinarily possessed by physicians and surgeons of good standing who engage in that special practice in the

same locality." Unlike that instruction, the one given in this case sufficiently sets forth the circumstances under which a general practitioner is not held to the standard of ability of a specialist and it is not substantially different in effect from the instruction suggested in Sinz v. Owens, supra, 33 Cal.2d at page 758, 205 P.2d 3. The instruction here told the jury that the standard of ability required of a general practitioner "is that set by the learning and skill ordinarily possessed by general practitioners in the same locality and of good standing" if there is an emergency or if he informs the patient of the necessity of a specialist's services and the patient insists on the services of the general practitioner. In my opinion, such an instruction sufficiently states the elements to be considered in determining the duty of the general practitioner. Certainly the financial ability of the patient to employ a specialist is not a matter for the dentist or physician to pass upon.

Moreover, it is apparent that the instruction was framed to cover the issues raised by the evidence, namely, whether it is the customary practice in Los Angeles for dentists to refer patients to specialists for extractions of impacted second bicuspids, and, if so, whether plaintiff was sufficiently advised of this fact and nevertheless insisted that defendant do the extraction.

Apart from the evidence tending to show negligent treatment of plaintiff, there is other evidence which would warrant a finding that defendant was negligent in undertaking the admittedly dangerous operation without sufficiently informing plaintiff of the hazards involved, thereby unreasonably exposing plaintiff to the risk of the very injury which occurred. Plaintiff's testimony was that Dr. Sabo told him that the operation was dangerous, but did not advise him that a nerve might be severed or that his mouth might be numb or paralyzed. Dr. Schoen testified as follows: "Q. Have you an opinion, Doctor, as to whether or not it is customary practice for a general practitioner in dentistry in Los Angeles to inform a patient prior to the extraction of a tooth such as that lower left second impacted bicuspid, that there might be a serious injury to the mental nerve and the possibility is that his lip may be left numb? A. I think any dentist in Los Angeles who would do such an operation would inform the patient of the likelihood of the complication because it is a great likelihood that it would occur." In answer to a similar question, Dr. Felsen stated: "Well, I think that the average dentist would advise the patient that there were certain elements of risk or danger to certain other structures in the removing of the impacted tooth. It probably would vary with different practitioners to what degree they would explain that to the patient." Dr. Felsen also testified that dentists "usually do advise" patients of the danger of traumatizing a nerve in extracting the tooth in question and stated that the nerve is injured in about 25 per cent of such extractions.

"[A]ctionable negligence in cases of this kind consists in his doing something which [the practitioner] should not have done, or in omitting to do something which he should have done * * *." Roberts v. Parker, 121 Cal.App. 264, 268, 8 P.2d 908, 909. Here, the jury was entitled to find that defendant, before making the extraction, failed to adequately inform plaintiff of the "great likelihood" of serious injury to the mandibular nerve, that such omission constituted a failure to exercise the care ordinarily practiced by dentists in the community, and that plaintiff would not have submitted to the operation if he had been properly warned. The situation is analogous to cases where the dentist or physician performed a dangerous operation or used a dangerous method of treatment without informing the patient that other, less hazardous, treatment was available. See, Vigneault v. Dr. Hewson Dental Co., 300 Mass. 223, 15 N.E.2d 185, 129 A.L.R. 95; Theodore v. Ellis, 141 La. 709, 75 So. 655.

For the foregoing reasons I would affirm the judgment.

37 Cal.2d 227

CITY & COUNTY OF SAN FRANCISCO v. SUPERIOR COURT IN AND FOR CITY & COUNTY OF SAN FRANCISCO et al.

S. F. 18264.

Supreme Court of California, in Bank.

May 15, 1951.

Rehearing Denied June 14, 1951.

Original mandamus proceedings by City and County of San Francisco, a municipal corporation, against Superior Court of the State of California, in and for the City and County of San Francisco, and the Honorable Preston Devine, Judge thereof, to compel the respondent court to order a physician to answer certain questions in a personal injury action brought against the City and County of San Francisco and another by an injured party. The Supreme Court, Traynor, J., held that as the physician had not at any time given the injured party advice or treatment as a patient or otherwise there was no physician-patient privilege but as physician made examination at request of the injured party's attorneys he was an intermediate agent for communication between injured party and attorneys and could therefore invoke attorney-client privilege.

Alternative writ of mandamus discharged, and petition for peremptory writ denied.

1. Witnesses ⇐209

Where physician had not examined injured party for purpose of giving him advice or treatment and had not at any time given him advice or treatment there was no physician-patient privilege. Code Civ. Proc. § 1881, subd. 4.

2. Witnesses ⇐209

The confidence that is protected by statute is only that given to a professional physician during a consultation with a view to curative treatment, for it is that relation only which law desires to facilitate. Code Civ.Proc. § 1881, subd. 4.

3. Witnesses ⇐219(5)

Even if physician-patient relationship existed between physician and injured party whom physician had examined, but not for purpose of giving him advice or treatment, privilege was waived by bringing of action for personal injuries. Code Civ.Proc. § 1881, subd. 4.

4. Witnesses ⇐208(1), 219(5)

Whole purpose of physician-patient privilege is to preclude humiliation of patient that might follow disclosure of his ailments and when patient himself discloses those ailments by bringing an action in which they are in issue, there is no longer any reason for privilege. Code Civ.Proc. § 1881, subd. 4.

5. Witnesses ⇐209

Statute providing that licensed physician or surgeon cannot, without consent of his patient, be examined in civil action as to any information acquired in attending patient, which was necessary to enable him to prescribe or act for patient, applies only when physician attends patient to treat, prescribe for, or act for him to prevent, palliate or cure an ailment, and if person examined is not a patient there is no physician-patient relationship and therefore no physician-patient privilege. Code Civ.Proc. § 1881, subd. 4.

6. Witnesses ⇐219(5)

Physician-patient relationship privilege given by statute is that of patient, not that of physician, and if patient does not claim privilege it is waived. Code Civ.Proc. § 1881, subd. 4.

7. Witnesses ⇐28(2)

A physician who has acquired knowledge of a patient or of specific facts in connection with patient may be called on to testify to those facts without any compensation other than ordinary witness receives for attendance on court. Code Civ.Proc. § 1881, subd. 4.

8. Witnesses ⇐198(1)

Attorney-client privilege to refuse, without consent of client, to be examined as to any communication made by client to him, is strictly construed, since it suppresses relevant facts that may be necessary for a just decision. Code Civ.Proc. § 1881, subd. 2.

9. Witnesses ⇐200, 205

Attorney-client privilege cannot be invoked unless client intended communication to be confidential, and only communications made to an attorney in course of

professional employment are privileged. Code Civ.Proc. § 1881, subd. 2.

10. Witnesses ⇐204(1)

Attorney-client privilege embraces not only oral or written statements but actions, signs, or other means of communicating information by a client to his attorney. Code Civ.Proc. § 1881, subd. 2.

11. Witnesses ⇐198(1)

Statute specifically extends client's privilege to preclude examination of attorney's secretary, stenographer, or clerk regarding information of communications between attorney and client acquired in such capacities, to rule out possibility of their coming within general rule that privilege does not preclude examination of third person who overhears or otherwise has knowledge of communication between client and his attorney. Code Civ.Proc. § 1881, subd. 2.

12. Witnesses ⇐206

A communication by client to attorney by any form of agency employed or set in motion by client is within statutory privilege, and that includes communications through an interpreter, through a messenger or any other agent of transmission, as well as communications originating with client's agents and made to attorney, and includes communications of attorney's agent to attorney because attorney's agent is also client's subagent and is acting as such for client. Code Civ.Proc. § 1881, subd. 2.

13. Witnesses ⇐198(1)

Fact that there is no physician-patient privilege does not preclude existence of attorney-client privilege. Code Civ.Proc. § 1881, subds. 2, 4.

14. Witnesses ⇐206

Where physician, as agent of attorneys, examined injured party for sole purpose of aiding injured party's attorneys in preparation of lawsuit and not for purposes of advising or treating client, information obtained by physician regarding client's condition and divulged to client's attorney was privileged. Code Civ.Proc. § 1881, subd. 2.

Dion R. Holm, City Atty., and George E. Baglin, Deputy City Atty., San Francisco, for petitioner.

Hoberg & Finger, John Finger, Peart, Baraty & Hassard, and George Smith, San Francisco, for respondents and real party in interest.

TRAYNOR, Justice.

James Hession brought an action for personal injuries against the City and County of San Francisco and the Western Pacific Railroad Company. He alleged that he suffered brain concussion, nerve root damage, and nervous shock. At the request of Hession's attorneys, Dr. Joseph Catton, a physician specializing in nervous and mental diseases, twice gave Hession a neurological and psychiatric examination. In his deposition Dr. Catton testified that there was no physician-patient relationship between him and Hession; that he did not advise or treat Hession; that the sole purpose of the examination was to aid Hession's attorneys in the preparation of a lawsuit for Hession; and that he was the agent of the attorneys. He refused to answer questions regarding Hession's condition on the grounds that the information sought was privileged under subdivision 2 and 4 of Section 1881 of the Code of Civil Procedure and that the questions called for "the use of faculties of a physician, neurologist, and psychiatrist and for an opinion based thereon, which opinion is a portion of my property which I do not wish to be deprived of without due compensation and arrangement having been made in relation thereto." Hession's counsel also claimed that the information was privileged.

Petitioner, the City and County of San Francisco, seeks a writ of mandamus to compel respondent court to order Dr. Catton to answer the questions.

The Physician-Patient Privilege

[1, 2] Dr. Catton testified that "there was no physician-patient relationship in the sense that I was examining him for the purpose of giving him advice or treatment, * * * nor did I at any time give him any such advice or treatment; so that

there wasn't that usual physician-patient relationship." He also filed an affidavit in which he averred that he "has not at any time prescribed for or treated the said James Hession as a patient or otherwise." Under such circumstances there is no physician-patient privilege under subdivision 4 of section 1881 of the Code of Civil Procedure.[1] That privilege cannot be invoked when no treatment is contemplated or given. "The confidence that is protected is only that which is given to a professional physician during a consultation with a view to curative treatment; for it is that relation only which the law desires to facilitate." 8 Wigmore, Evidence, 3d ed. 1940, § 2382, p. 817; In re Baird's Estate, 173 Cal. 617, 623–624, 160 P. 1078; In re Estate of Black, 132 Cal. 392, 393, 396, 64 P. 695; Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 166, 47 P. 1019; People v. Dutton, 62 Cal. App.2d 862, 863, 145 P.2d 676; Keller v. Gerber, 49 Cal.App. 515, 524, 193 P. 809; see 58 Am.Jur., Witnesses, § 415, p. 237; Bassil v. Ford Motor Co., 278 Mich. 173, 270 N.W. 258, 107 A.L.R. 1495.

[3] Even if there had been a physician-patient relationship, the privilege would be waived under section 1881(4) by Hession's bringing the action for personal injuries. Phillips v. Powell, 210 Cal. 39, 42, 290 P. 441; Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 360, 170 P.2d 465; see also Moreno v. New Guadalupe Mining Co., 35 Cal.App. 744, 754–755, 170 P. 1088.

Relying on Webb v. Francis J. Lewald Coal Co., 214 Cal. 182, 4 P.2d 532, 77 A.L.R. 675, respondent and Hession, the real party in interest, contend that since the privilege set forth in section 1881(4) is phrased in the language "prescribe *or act* for the patient" and the personal-injury-litigant exception is phrased in the language "prescribed for or treated said person" the exception to the privilege in the case of personal-injury litigants is not so broad as the privilege. (Italics added.) They conclude that the privilege exists here because Dr. Catton "acted" for Hession when he examined him and delivered to his counsel a written report of his findings, but that the exception cannot apply because Dr. Catton did not prescribe for or treat Hession. The Webb case clearly supports this conclusion, but a re-examination of that case compels the conclusion that this ground of the decision must be disapproved.

[4] The whole purpose of the privilege is to preclude the humiliation of the patient that might follow disclosure of his ailments. When the patient himself discloses those ailments by bringing an action in which they are in issue, there is no longer any reason for the privilege. The patient-litigant exception precludes one who has placed in issue his physical condition from invoking the privilege on the ground that disclosure of his condition would cause him humiliation. He cannot have his cake and eat it too.

[5] The view taken in the Webb case defeats the purpose of the statute by seizing upon the phrase "act for the patient" and giving it a meaning that cannot reasonably be attributed to the Legislature. The statute reads: "A licensed *physician or surgeon* can not, without the consent of his patient, be examined in a civil action, as to any information acquired in attending the patient, which was necessary to enable him to *prescribe or act* for the patient." (Italics added.) "Prescribe" is the correlative of "physician"; a physician prescribes for a patient. "Act" is the correlative of "surgeon"; a surgeon acts for a patient. A Missouri statute makes this clear by providing "* * * which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon". Mo.R.S.1949, §

1. "*Physician and patient.* A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient; * * * provided further, that where any person brings an action to recover damages for personal injuries, such action shall be deemed to constitute a consent by the person bringing such action that any physician who has prescribed for or treated said person and whose testimony is material in said action shall testify * * *."

491.060(5). The California statute embodies the same meaning by using the nouns physician or surgeon in the disjunctive and the verb applicable to each—prescribe or act—likewise in the disjunctive. Even if "act" were construed as relative to a physician as well as to a surgeon, the privilege could still not be extended to personal-injury litigants that the statute excepts. The statute refers to "information acquired in *attending* the patient". (Italics added) A physician attends a patient to treat, prescribe for, or act for him to prevent, palliate, or cure an ailment. If the person examined is not a patient there is no physician-patient relationship and therefore no physician-patient privilege.

[6] Even if there is a physician-patient relationship, it is settled that the privilege given by the statute is that of the patient, not that of the physician, and that if the patient does not claim the privilege, it is waived. Hirschberg v. Southern Pacific Co., 180 Cal. 774, 777, 183 P. 141; Lissak v. Crocker Estate Co., 119 Cal. 442, 445, 51 P. 688; Wheelock v. Godfrey, 100 Cal. 578, 587, 35 P. 317; San Francisco Credit Clearing House v. MacDonald, 18 Cal.App. 212, 219, 122 P. 964; see, 20 Calif.L.Rev. 302, 311; 8 Wigmore, supra, § 2386, p. 828. The view taken in the Webb case, however, would enable the physician to defeat the purpose of the statute by claiming the privilege even though the patient does not. The plaintiff in that case, the only one who could assert the privilege, did not do so; it was the physician who asserted it. "Respondent's counsel, however, remained silent and expressly stated to the court that they would take no part in this phase of the proceeding." Webb v. Francis J. Lewald Coal Co., supra, 214 Cal. at page 185, 4 P.2d at page 533.

The Contention That Dr. Catton Need Not Testify if He Is Not Paid More Than the Ordinary Witness Fee

[7] Doctor Catton asserted a privilege personal to himself, a privilege not to testify to knowledge and opinions that were the result of his special learning without payment of more that the ordinary witness fee. Petitioner asks him to testify, not by reason of his expertness in a special field, but because of his knowledge of specific facts as to Hession's condition, facts pertinent to an issue to be tried. He is like any other witness with knowledge of such facts; it is immaterial that he discovered them by reason of his special training. In testifying as a witness he would simply be imparting information relevant to the issue, as he would had he been a witness to the accident in which Hession was injured. "[A] physician who has acquired knowledge of a patient or of specific facts in connection with a patient may be called upon to testify to those facts without any compensation other than the ordinary witness receives for attendance upon court." McClenahan v. Keyes, 188 Cal. 574, 583, 206 P. 454, 458; see also, People v. Barnes, 111 Cal.App. 605, 610, 295 P. 1045; People v. Conte, 17 Cal.App. 771, 784, 122 P. 450, 457, Ex Parte Dement, 53 Ala. 389, 25 Am.Rep. 611; Dixon v. People, 168 Ill. 179, 48 N.E. 108, 39 L.R.A. 116; Summers v. State, 5 Tex.App. 365; Philler v. Waukesha County, 139 Wis. 211, 120 N.W. 829, 25 L.R.A.,N.S., 1040; 8 Wigmore, supra, § 2203, p. 134; 3 So.Cal.L.Rev. 448; 39 Yale L.J. 761; Pennsylvania Co. for Insurances v. City of Philadelphia, 262 Pa. 439, 105 A. 630, 2 A.L.R. 1576, 1577.

The Attorney-Client Privilege

[8, 9] Although Dr. Catton can invoke no privilege of his own and there was no physician-patient privilege in this case, we have concluded that Dr. Catton was an intermediate agent for communication between Hession and his attorneys and that Hession may therefore invoke the attorney-client privilege under section 1881, subdivision (2) of the Code of Civil Procedure. That subdivision reads: "An attorney, can not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity." See also, Bus. & Prof. Code, § 6068(e). This

privilege is strictly construed, since it suppresses relevant facts that may be necessary for a just decision. Satterlee v. Bliss, 36 Cal. 489, 508; Samish v. Superior Court, 28 Cal.App.2d 685, 695, 83 P.2d 305; see 27 Cal.Jur. 44, 51; 58 Am.Jur., Witnesses, § 464, p. 261. It cannot be invoked unless the client intended the communication to be confidential, McKnew v. Superior Court, 23 Cal.2d 58, 66, 142 P.2d 1; Mission Film Corp. v. Chadwick Pictures Corp., 207 Cal. 386, 390, 278 P. 855; Franzen v. Shenk, 192 Cal. 572, 584, 221 P. 932; Sharon v. Sharon, 79 Cal. 633, 675–678, 22 P. 26; Hager v. Shindler, 29 Cal. 47, 63–64; Ver Bryck v. Luby, 67 Cal.App.2d 842, 844, 155 P.2d 706; People v. Hall, 55 Cal.App.2d 343, 356–357, 130 P.2d 733; People v. White, 102 Cal.App. 647, 650, 283 P. 368, and only communications made to an attorney in the course of professional employment are privileged. McKnew v. Superior Court, supra, 23 Cal.2d 65–67, 142 P.2d 1; Franzen v. Shenk, supra, 192 Cal. 584, 221 P. 932; Sharon v. Sharon, supra, 79 Cal. 678, 22 P. 26; Mitchell v. Towne, 31 Cal.App.2d 259, 265, 87 P.2d 908; Ferguson v. Ash, 27 Cal. App. 375, 377–379, 150 P. 657.

The privilege is given on grounds of public policy in the belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence. Adequate legal representation in the ascertainment and enforcement of rights or the prosecution or defense of litigation compels a full disclosure of the facts by the client to his attorney. "Unless he makes known to the lawyer all the facts, the advice which follows will be useless, if not misleading; the lawsuit will be conducted along improper lines, the trial will be full of surprises, much useless litigation may result. Thirdly, unless the client knows that his lawyer cannot be compelled to reveal what is told him, the client will suppress what he thinks to be unfavorable facts." Morgan, Foreword, Am.Law.Inst. Code of Evidence, pp. 25–26. Given the privilege, a client may make such a disclosure without fear that his attorney may be forced to reveal the information confided to him. "[T]he absence of the privilege would convert the attorney habitually and inevitably into a mere informer for the benefit of the opponent." 8 Wigmore, supra, § 2380a, p. 813.

[10] The privilege embraces not only oral or written statements but actions, signs, or other means of communicating information by a client to his attorney. Ex parte McDonough, 170 Cal. 230, 234, 149 P. 566; L.R.A. 1916C, 593; see 58 Am.Jur., Witnesses, § 486, p. 272. "(A)lmost any act, done by the client in the sight of the attorney and during the consultation, may conceivably be done by the client as the subject of a communication, and the only question will be whether, in the circumstances of the case, it was intended to be done as such. The client, supposedly, may make a specimen of his handwriting for the attorney's information, or may exhibit an identifying scar, or may show a secret token. If any of these acts are done as part of a communication to the attorney, and if further the communication is intended to be confidential * * *, the privilege comes into play." 8 Wigmore, supra, § 2306, p. 590.

Petitioner contends that under the express terms of section 1881(2) it is only the attorney and the attorney's secretary, stenographer, or clerk who cannot be examined, and that since Dr. Catton was not engaged in any of these capacities he cannot withhold the information requested.

[11, 12] The statute specifically extends the client's privilege to preclude examination of the attorney's secretary, stenographer, or clerk regarding information of communications between attorney and client acquired in such capacities, to rule out the possibility of their coming within the general rule that the privilege does not preclude the examination of a third person who overhears or otherwise has knowledge of communications between a client and his attorney. Sharon v. Sharon, 79 Cal. 633, 677, 22 P. 2; Ver Bryck v. Luby, 67 Cal.App.2d 842, 844, 155 P.2d 706; Mitchell v. Towne, 31 Cal.App.2d 259, 265, 87 P.2d 908; Cohn v. Cohn, 130 Cal.App. 349, 355, 20 P.2d 61; Carleton v. Bonham, 60 Cal.App. 725, 726, 732–733, 214 P. 503; see, 8 Wigmore, supra, § 2311, p. 600, § 2326, p. 629; 27 Cal.Jur.

53; 11 Cal.Jur. Ten Year Supplement 685, note 3; 58 Am.Jur., Witnesses, § 492, p. 275, § 518, p. 291; 53 A.L.R. 369 et seq. It does not follow, however, that intermediate agents of communication between attorney and client fall within that general rule. Had Hession himself described his condition to his attorneys there could be no doubt that the communication would be privileged and that neither the attorney nor Hession could be compelled to reveal it, even though a client is not listed in section 1881(2) among those who cannot be examined. Verdelli v. Gray's Harbor, etc., Co., 115 Cal. 517, 47 P. 364, 778; Birmingham Railway & Electric Co. v. Wildman, 119 Ala. 547, 24 So. 548, 549–550; State v. White, 19 Kan. 445, 446–447; Hemenway v. Smith, 28 Vt. 701, 707; see, 8 Wigmore, supra, § 2324, p. 628. It is no less the client's communication to the attorney when it is given by the client to an agent for transmission to the attorney, and it is immaterial whether the agent is the agent of the attorney, the client, or both. "(T)he client's freedom of communication requires a liberty of employing other means than his own personal action. The privilege of confidence would be a vain one unless its exercise could be thus delegated. A communication, then, by *any form of agency* employed or set in motion by the client is within the privilege.

"This of course includes communications through an *interpreter,* and also communications *through a messenger* or any other *agent of transmission,* as well as communications *originating with the client's agent* and made to the attorney. It follows, too, that the communications of the *attorney's agent* to the attorney are within the privilege, because the attorney's agent is also the client's sub-agent and is acting as such for the client." 8 Wigmore, supra, § 2317, pp. 616–617; New York Casualty Co. v. Superior Court, 30 Cal.App.2d 130, 132–133, 85 P.2d 965; Lewis v. United Air Lines Transport Corp., D.C., 32 F.Supp. 21, 22; Schmitt v. Emery, 211 Minn. 547, 2 N.W.2d 413, 416, 139 A.L.R. 1242; In re Heile, 65 Ohio App. 45, 29 N.E.2d 175, 176–177; see, 58 Am.Jur., Witnesses, § 472, pp. 264–265, §§ 497–498, pp. 279–280, § 502, pp. 281–282; 70 C.J., Witnesses, § 537, p. 401; cases collected in 139 A.L.R. 1256–1260; 53 A.L.R. 369, 373. Thus, when communication by a client to his attorney regarding his physical or mental condition requires the assistance of a physician to interpret the client's condition to the attorney, the client may submit to an examination by the physician without fear that the latter will be compelled to reveal the information disclosed. Webb v. Francis J. Lewald Coal Co., 214 Cal. 182, 186–187, 4 P.2d 532, 77 A.L.R. 675; see 5 So.Cal.L.Rev. 446. In Arnold v. City of Maryville, 110 Mo.App. 254, 85 S.W. 107, 108, and McMillen v. Industrial Comm. of Ohio, Ohio App., 37 N.E.2d 632, on which petitioner relies, it was held, as we hold in the present case, that there was no physician-patient privilege. In neither case, however, was the attorney-client privilege invoked or considered.

[13, 14] It is contended that the purpose of the patient-litigant exception in subdivision 4 of section 1881 would be defeated if the attorney-client privilege in subdivision 2 can be invoked to prevent a physician from devulging the results of his examination of a person for the purpose of aiding his attorneys in the preparation of an action for personal injuries. The two subdivisions relate to two separate and distinct privileges. Since there was no physician-patient relationship, there was no physician-patient privilege to waive; the whole of subdivision 4 including the exception was therefore inapplicable. It does not follow that if there is no physician-patient privilege there can be no attorney-client privilege. The patient-litigant exception applies only to the physician-patient privilege in subdivision 4 and there is no corresponding client-litigant exception in subdivision 2. Had Dr. Catton treated Hession before being asked to serve as an intermediate agent between Hession and his attorneys, the patient-litigant exception would apply and Dr. Catton would then have been like any other witness with knowledge of facts pertinent to an issue to be tried. The exception could not be defeated by asking the physician to reveal his knowledge of the facts to the attorneys, for a litigant cannot silence a witness by having him reveal his knowledge to the litigant's attor-

ney. See, Hickman v. Taylor, 329 U.S. 495, 506–509, 67 S.Ct. 385, 91 L.Ed. 451; 8 Wigmore, supra, §§ 2317–2318, pp. 615–618; 58 Am.Jur., Witnesses, § 498, pp. 279–280. Similarly, if Dr. Catton should now treat Hession, any information acquired in the course of that treatment would not be privileged, although the results of his previous examinations and his reports to Hession's attorneys would be.

The alternative writ of mandamus is discharged, and the petition for the peremptory writ is denied.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.

37 Cal.2d 215

BRYANT, Director of Employment et al. v. INDUSTRIAL ACC. COMMISSION.

Sac. 6175.

Supreme Court of California, in Bank.

May 15, 1951.

James G. Bryant, Director of Employment, and the Department of Employment, brought writ of review against the Industrial Accident Commission of the State of California, to review an award of respondent Commission and obtain annulment of that portion of the award which denied petitioners' claim of a lien against the award. The Supreme Court, Schauer, J., held that the Industrial Accident Commission had no authority, in purported exercise of discretion, to deny a lien against the award for permanent disability benefits paid to the injured workman.

Award annulled and cause remanded.

Carter, J., dissented.

Prior opinion, see 224 P.2d 444.

1. Workmen's compensation ⇐1004

The Director of Employment and Department of Employment were entitled as matter of law to lien on compensation award, including award for permanent disability, for unemployment compensation disability benefits paid to injured workman, and Industrial Accident Commission's partial denial of such lien in attempted exercise of discretion was improper. Labor Code, §§ 4653, 4654, 4661, 4903(a–g); Gen. Laws, Act 8780d, §§ 150 et seq., 207.

2. Master and servant ⇐78.3(3)
Workmen's compensation ⇐1004

The 1947 amendment adding, to provisions as to lien against compensation award, provision as to unemployment compensation disability benefits paid did not change right of applicant to receive unemployment disability benefits, but merely provided means for recovery of such benefits upon determination that applicant was entitled to workmen's compensation. Labor Code, § 4903(f).

3. Administrative law and procedure ⇐305
Workmen's compensation ⇐1090

The Legislature, not the Industrial Accident Commission, sets the limits within which the Commission can adopt and carry out policy.

4. Master and servant ⇐78.3(3)

The 1945, 1947 and 1949 amendments of workmen's compensation statute were not intended to affect construction of Unemployment Insurance Act. Gen.Laws, Act 8780d, § 1 et seq.; Labor Code, § 4661.

Fred N. Howser and Edmund G. Brown, Attys. Gen., Chas. W. Johnson, Irving H. Perluss, William L. Shaw and Vincent P. Lafferty, Deputy Attys. Gen., for petitioners.

Sidney L. Weinstock, San Francisco, as amicus curiæ on behalf of petitioners.

Edmund J. Thomas, Jr., T. Groezinger and Robert Ball, all of San Francisco, for respondent.

Charles P. Scully, San Francisco, as amicus curiæ on behalf of respondent.

SCHAUER, Justice.

Petitioners, the Director of Employment and the Department of Employment, seek review of an award of respondent Industrial Accident Commission, and annulment of the portion of the award which denies petitioners' claim of a lien against certain workmen's compensation awarded to Her-

bert R. Wade. On June 22, 1948, Wade sustained an injury arising out of and in the course of his employment. He instituted proceedings before the Industrial Accident Commission to recover workmen's compensation. During the pendency of such proceedings, over a period of four months from June through October, 1949, the Department of Employment paid the applicant Wade, as unemployment compensation disability benefits,[1] the sum of $460.72. In the proceedings before the Industrial Accident Commission, the Department of Employment claimed a lien in this amount against any workmen's compensation which might be awarded Wade.[2] The Industrial Accident Commission determined that Wade was entitled to workmen's compensation for temporary total disability from June 30, 1948, to July 26, 1949, and for permanent partial disability from August 3, 1949, until expiration of 175 weeks. It allowed a lien for the amount of unemployment disability benefits paid during the period when, according to its order, applicant was entitled to workmen's compensation for temporary disability and disallowed the lien for the benefits paid during the period when, according to its determination, applicant was entitled to workmen's compensation for permanent disability.

[1] Petitioners contend that as a matter of law they are entitled to a lien against workmen's compensation for the entire amount paid as unemployment disability benefits, regardless of whether the workmen's compensation was awarded for temporary disability or for permanent disability. The Industrial Accident Commission contends that in every case it has discretion as to whether it will allow a lien against workmen's compensation; that where the claimed lien is for unemployment disability benefits it would be an abuse of discretion to deny the lien for benefits paid during a period of temporary disability, but that the commission "is fully justified" in denying a lien for benefits paid during a period of permanent disability. Amicus curiæ State Federation of Labor contends that as a matter of law an unemployed, disabled applicant is entitled to both unemployment disability benefits and workmen's permanent disability compensation. Resolution of the various contentions depends upon interpretation of the Labor Code and the Unemployment Insurance Act (3 Deering's Gen.Laws, Act 8780d). Consideration of the pertinent statutory provisions leads to the conclusion that the petitioners as a matter of law are entitled to the lien claimed in its entirety and that the respondent commission exceeded its authority in denying the lien in part.

Prior to the adoption of the unemployment compensation disability insurance program, the Senate Interim Committee on Unemployment Insurance reported that "In California where a worker is unemployed because of injury arising within the scope of his employment, some protection is offered by the Workmen's Compensation Act. If an individual is unemployed because of lack of work, benefits are provided under the Unemployment Insurance Act. However, for the worker who is unemployed because of an injury not within the reach of the Workmen's Compensation Act no protection whatsoever is granted. Your committee feels it is an anomalous situation and a serious gap in providing economic security for the large working population of the state." (Senate Journal, May 7, 1945, p. 85.) The committee recommended adoption of an insurance program "to pay benefits to individuals who are unemployed because of illness or injury *for which no compensation is otherwise made*" (id., p. 126; italics petitioners') and further recommended "That no disability benefits be paid

1. The Unemployment Insurance Act (3 Deering's Gen. Laws, Act 8780d, § 152, par. (b)) defines "unemployment compensation disability benefits" as "money payments * * * to an eligible unemployed individual with respect to his wage losses due to unemployment as a result of illness or other disability resulting in such individual being unavailable or unable to work due to such illness or disability."

2. The Labor Code (§ 4903, par. (f), quoted infra), provides for such a lien.

to an individual receiving unemployment insurance benefits or workmen's compensation" (id., p. 89).

The next session of the Legislature adopted article 10 of the Unemployment Insurance Act (3 Deering's Gen.Laws, Act 8780d; Stats. 1st Ex.Sess.1946, ch. 81, § 1). Article 10 provides for unemployment disability benefits. Section 207 thereof provided, "An individual shall be ineligible for unemployment compensation disability benefits with respect to any week which the commission [the Unemployment Stabilization Commission] finds that he has received or is entitled to receive * * * benefits under a workmen's compensation law * * *" Under this language an unemployed disabled applicant might have been found ineligible for unemployment disability benefits if he received, for example, medical treatment, or a very small workmen's compensation payment for a slight previous disability unrelated to the disability which caused his unemployment. Therefore, in 1947 the Legislature amended section 207.

Paragraph (b) of section 207, as amended in 1947, now provides, "An individual shall not be eligible for unemployment compensation disability benefits for any week of unemployment due primarily to a disability, for which week the commission [the Unemployment Stabilization Commission] finds that with respect to such disability he has received, or is entitled to receive, in the form of cash payments, benefits under a workmen's compensation law, * * * provided, however, that if such benefits are less than the weekly amount he would have otherwise received as disability benefits under Article 10 of this act, he shall be entitled to receive for such week, if otherwise eligible, disability benefits, reduced by the amount of such cash payments." Section 207 clearly shows that the Legislature did not intend to permit recovery of both unemployment disability benefits and workmen's compensation for the same period of unemployment. At the same session during which it enacted the last-quoted version of section 207, the Legislature added paragraph (f) to section 4903 of the Labor Code. That section had provided that "The commission [the Industrial Accident Commission] may determine, and allow as a lien against any amount to be paid as compensation:" (a) Reasonable fee for legal services in connection with the claim for compensation. (b) Reasonable expenses for medical treatment of the industrial injury. (c) Reasonable value of living expenses subsequent to the injury. (d) Reasonable burial expenses of deceased employe. (e) Reasonable living expenses of deserted wife or minor children. Paragraph (f), added in 1947, reads, "The amount of unemployment compensation disability benefits which have been paid under or pursuant to the Unemployment Insurance Act in those cases where, pending a determination under Division 4 of this code, there was uncertainty whether such benefits were payable under that act or payable hereunder." Paragraph (g), added in 1949, reads, "The amount of unemployment compensation benefits paid erroneously to the injured employee for a period for which he was unable to work and for which he received temporary total disability payments under this division."

[2] It does not appear that the Legislature, by adding paragraph (f) to section 4903 of the Labor Code in 1947, changed the right of an applicant to receive unemployment disability benefits; it merely provided a means for the Unemployment Stabilization Commission to recover such benefits when it was finally determined by the Industrial Accident Commission that the applicant was entitled to workmen's compensation. The reason for providing such means is obvious. An applicant is not entitled to unemployment disability benefits for a period of unemployment which, according to the findings of the Unemployment Stabilization Commission, was due to a disability for which he was entitled to workmen's compensation. But if the question whether the applicant is entitled to workmen's compensation is contested, the Unemployment Stabilization Commission cannot make a final determination of the question; such determination must be made by the Industrial Accident Commission. Pending such final determination the Department of Employment might, as it did

here, pay the applicant unemployment disability benefits. This is precisely the situation described in paragraph (f) of section 4903 "where, pending a determination under Division 4 of this code, there was uncertainty whether such benefits were payable under that act [the Unemployment Insurance Act] or payable hereunder."

It is the commission's [3] position that, because section 4903 provides that it "may" allow a lien and because " 'may' is permissive" (Lab.Code, § 15), it "may" in its discretion refuse to allow liens under section 4903. The following cases suggest that the commission's "discretion" as to liens under paragraphs (a) through (e) of section 4903, though wide, does not include "discretion" to disallow completely a lien where it is established that the lien claimant did furnish services or living expenses of value: Independence Indem. Co. v. Ind. Acc. Comm. (1935), 2 Cal.2d 397, 404, 407, 41 P.2d 320; Pacific Employers Ins. Co. v. Ind. Acc. Comm. (1938), 10 Cal.2d 567, 578, 75 P.2d 1058; Schilling v. Ind. Acc. Comm. (1920), 47 Cal.App. 190, 192, 190 P. 373; Safway Steel Scaffold Co. v. Ind. Acc. Comm. (1942), 55 Cal.App.2d 388, 389, 130 P.2d 484; Bentley v. Ind. Acc. Comm. (1946), 75 Cal.App.2d 547, 549, 171 P.2d 532. The commission relies on Di Pasqua v. Ind. Acc. Comm. (1949), 14 Cal.Comp.Cases 251, 252, in support of its contention that section 4903 gives it "discretion" to disallow a proved lien. In that case there were proper grounds for disallowing the lien, and any implication that the commission had "discretion" to deny a proved lien was not necessary to its decision. A good example of the sort of discretion which the commission has under section 4903 is Flagler v. Kelly (1941), 6 Cal.Comp.Cases 307. There the unpaid balance of compensation was insufficient to pay the claimed liens for rent and attorney's fee. The commission divided the amount available pro rata between the two lien claimants on the theory that this was the most equitable way to obtain the desired result, that is, not to discourage landlords from furnishing quarters to injured employes and not to discourage attorneys from representing them.

[3] The commission urges that it soundly exercised its discretion when it awarded a lien only for unemployment disability benefits paid during the period while the applicant was entitled to workmen's compensation for temporary disability and not for benefits paid during the time he had a permanent disability rating. It argues as follows: Permanent disability compensation is intended to provide the employe with sustenance while he rehabilitates himself and adjusts to his new earning capacity (1 Campbell, Workmen's Compensation, p. 728); it is payable for "prospective loss of future earnings" (Dept. of Motor Vehicles v. Ind. Acc. Com. (1939), 14 Cal.2d 189, 192, 93 P.2d 131). Temporary disability compensation, since it is measured by a fraction of wages (Lab.Code, §§ 4653, 4654) is intended to partially compensate for loss of wages. Unemployment disability benefits too are intended "to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury" (3 Deering's Gen.Laws, Act 8780d, § 150). Therefore, it is proper that the workman should not receive both temporary disability compensation and unemployment disability benefits at the same time, since both are intended to compensate for the same loss; it is equally proper that the workman should receive unemployment disability benefits (just as he might receive wages) during the time he is receiving permanent disability compensation and adjusting himself to his new, disabled status. The commission asserts, further, that paragraph (b) of section 207 of the Unemployment Insurance Act (quoted supra, 231 P.2d 34 does not preclude simultaneous payment of permanent disability compensation and unemployment disability benefits, because the permanent disability compensation is not payable "for any week of unemployment due primarily to a disability"; rather, it is payable because of the employe's changed, permanently disabled condition. This tortuous construction

3. The word "commission" as used in this discussion, unless otherwise indicated, refers to the Industrial Accident Commission.

reaches a result which, as we have already indicated, appears to us to be contrary to the legislative intent. Such result, to be sure, agrees with Industrial Accident Commission policy which has a reasonable theoretical basis. But it is the Legislature, not the commission, which sets the limits within which the commission can adopt and carry out policy.

[4] The commission urges that the Legislature by recent amendments of section 4661 of the Labor Code further recognized that permanent disability compensation is to compensate for loss of ability to compete in the labor market in the future, and should not be diminished because the employe is receiving wages or unemployment compensation benefits on account of loss of wages. Prior to 1945 section 4661 provided, "Where an injury causes both temporary and permanent disability, the injured employee is not entitled to both a temporary and permanent disability payment, but only to the greater of the two." By a series of amendments (Stats.1945, p. 2506; Stats. 1947, p. 2572; Stats.1949, p. 346) the Legislature liberalized section 4661, and it now provides that "the injured employee is entitled to compensation for any permanent disability sustained by him in addition to any payment received by such injured employee for temporary disability." There is nothing in the history or context of section 4661 of the Labor Code which indicates that it was intended to have any effect on the construction of the Unemployment Insurance Act.

The State Federation of Labor urges that the Unemployment Insurance Act and the Labor Code require as a matter of law that the applicant who is unemployed because of an industrial injury shall receive unemployment disability benefits during the period of permanent disability rating for the purpose of workmen's compensation. The Federation agrees with the Industrial Accident Commission's distinction between the nature of temporary disability compensation (for loss of wages) and permanent disability compensation (for prospective loss of future earning power). It construes paragraph (f) of section 4903 of the Labor Code to mean, as indicated by the bracketed insertions, that the Industrial Accident Commission may allow as a lien "The amount of unemployment compensation disability benefits [that is, payments to compensate for wage loss] which have been paid under * * * the Unemployment Insurance Act in those cases where, pending a determination under Division 4 of this code, there was uncertainty whether *such* benefits [i. e., payments to compensate for wage loss, which include temporary but not permanent disability compensation] were payable under that act or payable hereunder." (Italics added by Federation.) According to the Federation, permanent disability compensation is not "such" a benefit as to which there could be "uncertainty" because it is not a payment to compensate for wage loss and, therefore, paragraph (f) permits a lien against temporary compensation only.

This statutory construction is even more tortuous than that in which the commission indulges, and would lead to the remarkable conclusion that the phrase "any amount to be paid as compensation," which has been in the first clause of section 4903 since the adoption of the Labor Code and which has meant just what it says as to paragraphs (a) through (e), acquired a new meaning in 1947 as to paragraph (f) alone. If the Legislature had intended that the lien provided for in paragraph (f) should be against temporary disability compensation only it could have said so; that it knew how to write an amendment with such an effect is demonstrable, for in 1949 it adopted paragraph (g) (quoted supra, 231 P.2d 34) which expressly so provides as to unemployment compensation benefits.

For the reasons above stated, the award is annulled and the cause is remanded to the Industrial Accident Commission for further proceedings in accord with this opinion.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I dissent. This case presents the question of whether, under the applicable statutes, an employee unable to work because of an

injury received in the course of his employment may receive unemployment disability payments under the Unemployment Insurance Act while he is receiving *permanent* disability payments for the injury under the workmen's compensation laws. It is conceded that the statutes do not permit such payments when the workman's compensation is for *temporary* disability as distinguished from *permanent* disability.

Under the law as stated and the background of the statutes here involved, the question must receive an affirmative answer if such statutes are given a reasonable and liberal construction as required by section 3202 of the Labor Code. The law was firmly established before the adoption of the unemployment disability provisions of the Unemployment Insurance Act that there was a clear distinction between temporary and permanent disability payments under workmen's compensation laws. That is clearly evinced by the following provisions of the Labor Code: "If the injury causes *temporary* total disability, the disability payment is sixty-five per cent of the average *weekly earnings* during the period of such disability, consideration being given to the ability of the injured employee to compete in an open labor market." (Labor Code, § 4653. Italics added.) "If the injury causes *temporary* partial disability, the disability payment is sixty-five per cent of the *weekly* loss in *wages* during the period of such disability." (Labor Code, § 4654. Italics added.) On the other hand, compensation for *permanent* disability is computed in some cases for life (Labor Code, § 4658) and takes into consideration "the nature of the physical injury or disfigurement, the *occupation* of the injured employee, and *his age* at the time of such injury, consideration being given to the *diminished ability* of such injured employee, to compete in an open labor market." (Labor Code, § 4660. Italics added.) That is to say, temporary disability payments are for *wages* actually lost while permanent disability is for impairment of *earning capacity*. The matter was clearly analyzed by this court in Department of Motor Vehicles v. Industrial Accident Commission, 14 Cal.2d 189, 191, 93 P.2d 131, 132: "The rule is well recognized that, generally, an employee is entitled to an award for *permanent* disability *without regard to the receipt of wages* after the injury. That the inability to return to reemployment is not a test for an allowance of permanent disability is determined by the Labor Code itself. Section 4660 thereof provides that, in determining the percentage of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his age at the time of such injury. * * *

"In Postal Tel. [Cable] Co. v. Industrial Acc. Comm., 213 Cal. 544, 3 P.2d 6, the rule is announced that wages earned by and paid to an injured employee subsequent to an award of compensation for a *permanent* disability could not be credited against such award, holding, in accordance with the rule followed in several industrial states, that the disability referred to in the statute was *not such disability as impaired present earning power only,* but embraced any loss of physical functions which detracted from the former efficiency in the ordinary pursuits of life. It is the prospective loss of future earning power under the existing handicap of physical impairment that is to be considered; and ability to do the exact work formerly done by the employee is not the sole measure of disability." (Italics added.) It is clear therefore that temporary disability payments under workmen's compensation laws are a substitute for wages lost by the employee while disabled. Hence if the payments for disability allowed under the Unemployment Insurance Act are also for such *wages* lost, then payments thereunder are deductible from such temporary disability compensation payments *only* and not from permanent disability compensation payments. That is, the unemployment disability provisions relate to and are compatible with only the temporary disability features of workmen's compensation. That it deals only with wages, rather than earning capacity is clear. "An individual shall be deemed disabled in *any week* in which, because of his physical or mental condition, he is unable to perform his regular or customary work". (Unemployment

Insurance Act, Stats.1935, p. 1226, as amended, § 201. Italics added.) The amount of benefits is computed on the basis of the wages payable (id. §§ 53, 54, 203), and, as noted in the majority opinion, the reference is to the *"weeks"* the employee receives benefits under the Workmen's Compensation Act, all pointing to the conclusion that wages, not earning capacity, is the basis for computing unemployment disability benefits.

That permanent disability payments should not be deducted from unemployment disability payments, or vice versa, is patently sensible. The former are for the loss for life of the capacity to earn a living. They are not apportioned according to certain periods of time, that is, one installment does not represent the payment for the loss of earning capacity for the installment period. The latter, however, are directly apportioned to *each week* and on the basis of the wages that would have been paid for that week had the employee not been disabled. There is, therefore, insufficient similarity between the two to justify balancing one against the other.

The only answer made by the majority opinion to the foregoing construction of the statute is that it is "tortuous." On the contrary it is wholly reasonable and compelled by the requirement that workmen's compensation laws be liberally construed to preserve their benefits to their beneficiaries. (Labor Code, § 3202.)

Furthermore, my construction of the act is necessitated by the theory of workmen's compensation that industry shall bear the burden of industrial injuries. (27 Cal.Jur. 256.) Under the Unemployment Insurance Act (§ 44) the employee contributes to the fund from which the benefits are payable. To that extent, he, not industry, is bearing the cost of an industrial injury.

Finally, there is an additional factor that makes the foregoing interpretation of the statutes mandatory, if anything is to be salvaged from the legislative declaration that an employee is entitled to *both temporary and permanent disability*. *Prior* to its amendment in 1945, section 4661 of the Labor Code provided: "Where an injury causes both temporary and permanent disability, the injured employee is *not entitled to both a temporary and permanent disability payment,* but only to the greater of the two." (Italics added.) In that year it was amended to allow a recovery of both permanent and temporary disability compensation in part by adding the following sentence: "except that where the temporary disability payment exceeds 25 per cent of the permanent disability payment the injured employee shall be paid 75 per cent of such permanent disability payment in addition to the temporary disability payment." (Stats. 1945, Ch. 1335.) In 1947 the partial recovery was increased as follows: "Where an injury causes both temporary and permanent disability, the injured employee is entitled to compensation for any permanent disability sustained by him in addition to any payment received by such injured employee for temporary disability; provided, however, that where the permanent disability rating is 70% or greater, it shall be conclusively presumed that temporary disability did not exceed 104 weeks." (Stats. 1947, Ch. 1132.) Finally in 1949, the Legislature went the whole way and allowed *both* temporary and permanent disability compensation to be paid. It stated: "Where an injury causes both temporary and permanent disability, the injured employee is entitled to compensation for any permanent disability sustained by him *in addition to any payment received by such injured employee for temporary disability.*" (Stats.1949, Ch. 107. Italics added.) Here is a clear mandate of the Legislature that the permanent disability compensation *shall not* be diminished by any payment of temporary disability compensation. That is to say, the "loss of wages"—temporary disability compensation—shall not reduce the "loss of earning capacity"—permanent disability compensation. But under the strained construction of the statutes given in the majority opinion that mandate is completely ignored. It says that the unemployment disability payment, which is for the loss of wages only, the same as temporary disability compensation, *must* be deducted from the permanent disability compensation allowed for loss of earning capacity. That puts the employee back where he was prior to 1945 with the

temporary deducted from the permanent disability compensation allowed him. The unemployment disability benefit may be deducted from the temporary disability compensation, but the deduction must stop there, for if it extends to the permanent disability compensation, nothing was achieved by the 1945, 1947 and 1949 amendments to section 4661 of the Labor Code. The various statutes must be read together to reach the legislative intent. I cannot assume, as does the majority, that the Legislature intended to give with one hand and take away with the other.

The Industrial Accident Commission construed the statutes here involved in accord with the views herein expressed, and the majority concede that the policy of the Commission in so construing the statutes has a *"reasonable theoretical basis."* What is meant by the latter phrase is not clear in view of the reasoning and conclusion reached in the majority opinion. If it is meant that the interpretation placed upon the statutes by the Commission is reasonable, then it should be adopted by this court. That such construction is reasonable and not "tortuous" is obvious from the foregoing discussion.

For the foregoing reasons I would affirm the award.

37 Cal.2d 174

SCHUMM by WHYNER v. BERG et al.

L. A. 21830.

Supreme Court of California, in Bank.

May 11, 1951.

Johan Richard Wallace Schumm, an infant, by Kay Whyner, his guardian ad litem, brought an action against Phil Berg and Noah Beery, Jr., as executors of the estate of Wallace Beery, deceased, for breach of an oral contract allegedly made between decedent and the plaintiff's mother whereunder decedent was to procure paid up insurance policies to provide plaintiff with a specified weekly income until plaintiff reached the age of 21 years, and to provide plaintiff with a specified sum when plaintiff reached his majority. The Superior Court, Los Angeles County, William B. McKesson, J., rendered a judgment of dismissal after defendants' demurrer was sustained without leave to amend, and plaintiff appealed. The Supreme Court, Carter, J., held that the alleged promise of decedent was supported by consideration.

Reversed.

Schauer, J., dissented.

Prior opinion 224 P.2d 56.

1. Bastards ⇐17

Alleged contract by which mother agreed to forbear from instituting filiation proceedings during her pregnancy in consideration for alleged father's alleged promise to make financial provisions for child after birth of child was not child's contract made by mother as his agent, and as such void because minor cannot give delegation of power, but was contract between alleged father and mother for benefit of child as third party beneficiary. Civ.Code §§ 33, 196a; Probate Code, § 1431.

2. Pleading ⇐205(1)

Where complaint is sustainable on any theory, it is not vulnerable to general demurrer.

3. Bastards ⇐17

Alleged agreement by which mother was to forbear from instituting filiation proceedings during her pregnancy in consideration for alleged father's alleged promise to make financial provision for child after birth of child was not waiver of any of child's rights before its birth, and agreement was not invalid as constituting compromise of minor's claim without approval by court. Probate Code, § 1431.

4. Bastards ⇐17

Mother's alleged agreement to forbear from instituting filiation proceedings during her pregnancy was valid consideration for alleged father's alleged promise to make financial provision for child after birth of child, since there was detriment to mother to extent that she would have been relieved of her obligation to support child by action such as she agreed to forego. Civ.Code § 196a.

5. Bastards ⇐33

Mother could after conception and before birth of child, have sued putative father of child to enforce putative father's obligation to support child. Civ.Code § 196a.

6. Bastards ⇐17

Promise of mother of illegitimate child to give child same Christian name as that of alleged father of child was valid consideration for alleged father's alleged promise to make financial provision for child after birth of child.

7. Contracts ⇐53

Validity of consideration does not depend on its value, and law will not enter into inquiry as to adequacy of consideration.

8. Bastards ⇐17

Alleged agreement by mother to forbear from instituting filiation proceedings during her pregnancy in consideration for alleged father's alleged promise to make financial provision for child after birth of child was not unenforcible as having been obtained by threats of injury to alleged father's character, notwithstanding fact that alleged father was movie star, since sufferance of him by unfavorable publicity would only have been incident of suit which mother agreed to forego. Civ.Code, § 196a.

9. Bastards ⇐17

Alleged agreement by which mother was to forbear from instituting filiation proceedings during her pregnancy in consideration for alleged father's alleged promise to make financial provision for child after birth of child was not a contract that would fall within rule that where contract is unconscionable and shocking adequacy of consideration is important. Civ.Code, § 196a.

10. Frauds, statute of ⇐5

Alleged oral agreement by which mother was to forbear from instituting filiation proceedings during her pregnancy in consideration for alleged father's alleged promise to make financial provisions for child after birth of child was not unenforcible as oral agreement made upon consideration of marriage, notwithstanding alleged recital in contract to effect that mother and third party were about to be married and that mother and alleged father wished to impose upon third party no responsibility for child's support. Civ.Code, §§ 196a, 1624, subd. 3, Code Civ.Proc., § 1973, subd. 3.

11. Frauds, statute of ⇐33(1)

Whenever promise to answer antecedent obligation of another is made upon fresh consideration beneficial to promisor, no matter from what source it may move, promise is original one and valid though oral. Code Civ.Proc. § 1973, subds. 2, 3; Civ.Code, § 2794(4).

12. Frauds, statute of ⇐33(3)

Oral agreement by mother to forbear from instituting filiation proceedings during her pregnancy in consideration for alleged father's alleged promise to make financial provisions for child after birth of child was not unenforcible as an oral promise to answer for the debt, default, or miscarriage of another, notwithstanding alleged recital therein that mother was about to marry third party and that neither mother nor alleged father wished to impose upon such third party any responsibility for child's support. Civ.Code § 1624, subd. 2, Code Civ.Proc. § 1973, subd. 2.

13. Frauds, statute of ⇐44(1), 75

Alleged oral agreement by which mother was to forbear from instituting filiation proceedings during her pregnancy in consideration for alleged father's alleged promise to procure paid up insurance policies to provide for expected child was not unenforcible as an oral contract which by its terms was not to be performed during lifetime of promisor or as a promise by alleged father to devise property. Civ.Code, § 1624, subd. 6; Code Civ.Proc. § 1973, subd. 6.

14. Frauds, statute of ⇐84

Alleged oral agreement by which mother was to forbear from instituting filiation proceedings during her pregnancy in consideration for alleged father's alleged promise to purchase and deliver on child's birth two paid policies of insurance of value in excess of $500 was not unenforcible as a

contract for the sale of personal property having a value in excess of $500. Civ.Code §§ 1624a, 1724; Code Civ.Proc. § 1973a.

15. Election of remedies ⇐1

An "election of remedies" is the choosing between two or more different and coexisting modes of procedure and relief allowed by law on same state of facts.

See publication Words and Phrases, for other judicial constructions and definitions of "Election of Remedies".

16. Election of remedies ⇐3(3)

By bringing filiation proceedings against his putative father, child did not abandon his right to bring separate action as third party beneficiary under alleged contract between his mother and his alleged father under which alleged father had allegedly agreed to make financial provision for child, where such contract expressly provided that it was not an abrogation of child's rights under filiation statute. Civ. Code, § 196a.

17. Judgment ⇐585(3)

Final judgment holding that child's filiation proceeding against his putative father abated on death of putative father would not be res judicata as to suit by child, as third party beneficiary, to recover from executors of his putative father for breach of oral contract allegedly made between decedent and plaintiff's mother whereunder alleged father allegedly promised to make financial provisions for child. Civ.Code § 196a.

Maurice Rose, Los Angeles, for appellant.

Loeb & Loeb, Gang, Kopp & Tyre, Keating Coffey, Robert E. Kopp and Milton A. Rudin, all of Los Angeles, for respondents.

CARTER, Justice.

Plaintiff appeals from a judgment of dismissal entered after defendants' demurrer was sustained without leave to amend in an action against a father's estate on a contract for the support and education of an illegitimate child.

Plaintiff, Johan Richard Wallace Schumm, is a minor born on February 7, 1948; he prosecutes the action by his guardian ad litem, Kay Whyner. Defendants are the executors of the estate of Wallace Beery, deceased. According to the complaint, the following facts appear: Plaintiff is the son of Beery and Gloria Schumm, neither of whom was married. He was conceived as the result of an act of sexual intercourse between Beery and Gloria on May 18, 1947. In August, 1947, Gloria's request of Beery that he marry her to legitimatize the expected child being refused, she demanded that he acknowledge his paternity of the expected child or she would institute proceedings to have him declared the father and for support of the child. Beery believed, and it was a likely result, that such a suit would be damaging to his social and professional standing as a prominent motion picture star. Under these circumstances, in August, 1947, while Gloria was pregnant with the child (and acting as the agent of the child—see discussion later herein), and for his express benefit, entered into an oral agreement with Beery as follows:

"Whereas, said Gloria Schumm conceived a child by said Wallace Beery as the result of an act of sexual intercourse between them in the County of Los Angeles, State of California, on or about May 18, 1947, and is now pregnant with said child; and

"Whereas, said Wallace Beery is a man of great wealth with very substantial income and well able to make adequate provision for the support and education of said expected child, suitable to Wallace Beery's circumstances, station in life and standard of living; and

"Whereas, said Gloria Schumm is penurious, without property or income and penniless and is unable to make any provision for the support or education of said expected child; and

"Whereas, Gloria Schumm is about to marry one, Hans Schumm; and

"Whereas, neither of the parties hereto wish to impose upon said Hans Schumm any responsibility for the maintenance and support of the said child of said Wallace Beery; and

"Whereas, said Wallace Beery deems it to be to his best interests, social and financial, that no suit be instituted against him in any Court for a public adjudication that he is the father of said expected child and for that reason desires to avoid such paternity suit and the unfavorable publicity such suit might entail.

"Now, Therefore, in consideration of the mutual covenants hereof, said Wallace Beery and Gloria Schumm agree as follows:

"(a) The said Gloria Schumm during the remainder of the period of her said pregnancy until the birth of said child shall institute no action or proceeding in any Court to establish judicially the fact that said Wallace Beery is or will be the father of said child.

"(b) Upon the marriage of said Gloria Schumm and Hans Schumm, said expected child if born alive shall be surnamed 'Schumm' and its name if a male shall include said Beery's Christian name 'Wallace,' or if a female, shall include said Beery's nickname 'Wally.'

"(c) Wallace Beery, if said child be born alive, recognizes and acknowledges the claim of Gloria Schumm in behalf of said expected child that he is morally and legally responsible for the support and education of said child in a manner suitable to said Wallace Beery's circumstances, station in life and standard of living from the date of the birth of said child until said child shall become 21 years of age, or until the death of said child, whichever shall occur sooner, and the said Wallace Beery recognizes the claim of Gloria Schumm in behalf of said expected child that he is morally responsible to afford said child a fair start in its adult life, and that considering the wealth and earning capacity of Wallace Beery the sum of $25,000 would be reasonable for such purpose and should be supplied by Wallace Beery to said child for such start.

"(d) Promptly upon the birth of said child, if born alive, said Wallace Berry shall purchase and acquire and deliver to and for said child two fully paid-up policies of a Life Insurance Company, to-wit: (1) one fully paid-up policy to be applied on account of the support and education of said child, whereby the Life Insurance Company shall have agreed to pay to said child beginning as of the date of his birth until he shall have reached the age of 21 years, or until his death, whichever occurs sooner, the sum of $100 per week; (2) a second fully paid-up policy on the Twenty Year Endowment plan, to afford said child a fair start in its adult life, whereby the Life Insurance Company on said child's twenty-first birthday, if he be then living, shall have agreed to pay to said child the sum of $25,000; the said child to have no interest in the life insurance features, if any, of said policies, which shall be exclusively matters of Wallace Beery's own concern; provided however, that said Wallace Beery in lieu of said first mentioned policy to be applied on account of support and education may promptly on the birth of said child designate a Bank in the City of Los Angeles, State of California as Trustee, and forthwith deposit with such Trustee interest or dividend bearing securities sufficient in amount to yield over and above the Trustee's charges and costs, a minimum net income of $100 per week, with provision in the Trust Agreement that the Trustee, beginning from the date of the birth of said child until the said child reaches the age of 21 years, or until said child's death, whichever occurs sooner, shall pay to said child the sum of $100 per week.

"(e) Said child shall be maintained, supported and educated as befitting a child of a prominent public man of wealth. Recognizing that the child's receipts under one of said policies of $100 per week will be wholly inadequate to accomplish the desired result, even without taking into account illness of the child from time to time during its minority, possible accidents, educational and other extraordinary unforeseen expenses, it is stipulated that nothing hereinbefore stated shall be deemed to be an intention on the part of any of the parties hereto to modify, decrease or compromise the legal and moral obligations of Wallace Beery to his said child to provide it during its minority with the necessary

funds for its maintenance, support and education according to the station in life and standard of living of Wallace Beery."

Pursuant thereto Gloria married Hans Schumm on August 21, 1947, and on the birth of plaintiff, gave him the name above mentioned including "Wallace" and the surname "Schumm"; no proceeding was instituted until after the birth. Beery refused to comply with any of the provisions of the contract, except he paid nine weekly installments of $25, beginning July 6, 1948. Damages of $104,135 are claimed. Beery died and a claim against his estate was rejected. Another phase of the controversy has been decided on appeal. Schumm v. Beery, 100 Cal.App.2d 407, 224 P.2d 54.

[1] In support of the order sustaining the demurrer defendants assert that it is alleged in the complaint that Gloria "acting as agent of said expected child [plaintiff] expressly for his benefit" entered into the contract, that is, the contract was plaintiff's contract made by Gloria as his agent; that, therefore, it is void because "a minor cannot give a delegation of power". (Civ.Code, § 33) Plaintiff asserts, however, that the contract was not between him and Beery but between Gloria and Beery for the benefit of plaintiff as a third party beneficiary. (There is no dispute that recovery may be had on such a contract, if valid.) The matter turns, therefore, on whether the complaint shows such a contract. It does allege that the contract was made by Gloria "acting as agent" for the expected child. That allegation was stricken, but the complaint goes on to state that she entered into the contract "expressly for his benefit." It is said in the contract that *Gloria* and Beery "agree" to the then following terms. *She* agrees not to institute a paternity suit during pregnancy, hardly something the child could agree that she would not do. The whole tenor of the contract points to it being between Gloria and Beery for plaintiff's and Gloria's benefit. There are no obligations assumed by plaintiff in the contract. Moreover, it might be mentioned that under some authorities the *theory* of liability under a contract in favor of a third party beneficiary, that the contracting party-promisee was the agent for the beneficiary, is purely a fiction. Corbin on Contracts, § 794. The allegations indicating agency may well refer to a fictional agency. The creditor's claim that was filed against Beery's estate states that Gloria and Beery entered into the contract.

Defendants assert that under § 196a of the Civil Code, a mother of an illegitimate child has no action against the father for its support, but only an action in a representative capacity on behalf of the child, and that in agreeing not to institute a suit, plaintiff's right was bargained away, and therefore, plaintiff must be the contracting party, and Gloria acted solely in a representative capacity. There may be some logic in the argument, but it may also be said that she is not promising away plaintiff's right, as possibly she could not do; she is agreeing that *she* will not take steps to enforce it, and that only before the birth of the child.

[2] Defendants point to allegations that before the contract, Gloria told Beery she was going to institute suit in behalf of plaintiff. We see little significance in that. It does not necessarily show that therefore she contracted as plaintiff's agent. Reference is also made to an allegation that plaintiff and Gloria performed all the terms of the contract to be by them performed. But it is also alleged that Gloria alone did that. At most it is a stating of different theories. If a complaint is sustainable on any theory it is not vulnerable to a general demurrer. Lord v. Garland, 27 Cal.2d 840, 168 P.2d 5.

[3] Defendants contend that the contract constituted a compromise of a minor's claim which has not been approved by the court pursuant to § 1431 of the Probate Code and is therefore invalid. This is predicated on the assertion that the consideration for Beery's promises was a promise that no action would be brought for the child's support which is a compromise of the plaintiff's right to support. The contract does not purport to be a compromise of plaintiff's right to support. It will be remembered that the last sentence in the contract states that plaintiff's right

to support is not abrogated or compromised by the contract. It is true that that clause was added to the contract by the amended complaint, but that does not require that it be ignored as it is not contrary to the original complaint. It is merely an additional term added to a contract alleged in the original complaint. Therefore, it is not within the alleged rule urged by plaintiff that facts once alleged cannot be withdrawn for consideration by filing an amended complaint. As we have seen before, Gloria agreed only not to institute proceedings before the birth of plaintiff. After the birth she was free to commence proceedings. That was not a waiver of any of *plaintiff's rights* before birth. It was only that *she* would not prosecute them.

Defendants contend that for various reasons there was no consideration for the contract. It is asserted that inasmuch as plaintiff was not bound by the contract because it was not approved under § 1431 of the Probate Code, Beery was not bound because there was no mutuality of obligation. That argument is predicated upon the assumption that the contract was between plaintiff and Beery, which, as pointed out, is not the case. Plaintiff is the third party beneficiary of the contract and there is no performance required of him.

Defendants assert that Gloria's promise not to institute suit and to name plaintiff after Berry is not consideration. We cannot agree with either assertion.

[4, 5] On the first proposition, the argument runs to the effect that it is the illegitimate *child's* right under § 196a of the Civil Code to enforce the obligation of the father to support it; that the mother has no right except to bring the action in a representative capacity on the child's behalf; that, therefore, in agreeing not to sue she has suffered no detriment, for having no right, she gave up nothing; that a forbearance to sue on a void claim is not good consideration. Before dealing with that contention we note defendants' claim that there was no promise not to institute proceedings, for the promise does not say no action of any kind will be instituted by a guardian or otherwise. The promise (quoted supra) is plain enough. It clearly contemplates that Gloria will not directly or indirectly cause litigation to be instituted involving the question of Beery being the father of the child before the child is born.

The mother does have a definite interest in maintaining the action, for under § 196a the obligation to support is imposed upon both the mother and father. If the mother does not bring an action against the father and he refuses to give support, she will have to bear it. To the extent that she obtains relief against the father in such an action she is relieved of that burden. In agreeing to refrain from suing she is thereby suffering a detriment. It is not a case, therefore, where a person has no right of action and thus could not be benefited by a forbearance to prosecute an action. Gloria had the legal right to bring an action after conception and before birth. Davis v. Stroud, 52 Cal.App.2d 308, 126 P.2d 409; Kyne v. Kyne, 38 Cal.App.2d 122, 100 P.2d 806.

[6, 7] Gloria's promise to name plaintiff after Beery (given name Wallace) was adequate consideration to support the contract. It was a detriment to Gloria and a benefit to Beery. The privilege of naming a child is valid consideration for a promise. Eaton v. Libbey, 165 Mass. 218, 42 N. E. 1127; Daily v. Minnick, 117 Iowa 563, 91 N.W. 913, 60 L.R.A. 840; Gardner v. Denison, 217 Mass. 492, 105 N.E. 359, 51 L.R.A.,N.S., 1108; Wolford v. Powers, 85 Ind. 294; see Green v. Green, 298 Mass. 19, 9 N.E.2d 413; New Jersey Orthopaedic Hosp. & Dispensary v. Wright, 95 N.J.L. 462, 113 A. 144; Freeman v. Morris, 131 Wis. 216, 109 N.W. 983; Babcock v. Chase, 92 Hun 264, 36 N.Y.S. 879; Corbin on Contracts, § 127; Williston on Contracts (Rev.Ed.), § 115. This is in accord with the principle that the law will not enter into an inquiry as to the adequacy of the consideration. 6 Cal.Jur. 189; Williston on Contracts (Rev.Ed.), § 115; Rest., Contracts, § 81. Defendants' attack the foregoing authorities by asserting that they are dictum or based upon an authority not in point or did not give serious consideration to the question of the sufficiency of the "right to name" as consideration. They

have cited no authority to the contrary, however, and two eminent authorities on contracts, Corbin and Williston, supra, have cited them for that proposition. Reason supports the rule, for having a child bear its father's name is commonly considered a privilege and honor, and Beery assumed it was, for he obtained such a promise running to him. Merely because in the cited cases the promise was to use the putative father's surname does not make them distinguishable. That is merely a matter of degree, and as seen, the validity of consideration does not depend on its value. Defendants refer to recitations in the contract that Berry was prominent and did not want the possible adverse publicity resulting from the instigation of a paternity suit. But that was only for the period prior to birth, and as seen, the promise to name the child after him was in his favor and presumably he considered it valuable.

[8] The contract is not enforceable, say defendants, because the consent of Beery to it was obtained by threats of injury to his character. However, the complaint does not allege that Gloria would injure his character if he did not enter into the contract. It is alleged that prior to the date of the contract "upon the decedent's [Beery] refusal of a request * * * Gloria * * * had made that the decedent by marrying her legitimatize said expected child, said Gloria Schumm demanded that the decedent, in writing or by deed and act, clearly acknowledge that he is the father of said expected child, and said Gloria * * * then intended and there declared to the decedent her purpose and intention, upon the failure of the decedent to effect such paternal acknowledgment, promptly to institute in behalf of said expected child a suit in this [Superior] Court for a decree adjudging the decedent to be the father of said expected child and requiring decedent to make adequate and proper provision for the maintenance, support and education of said expected child before and after its birth and during its minority." She merely said she would commence a suit, a right she clearly had as hereinbefore seen. A sufferance by him of unfavorable publicity would only be an incident of the suit.

[9] Mixed with this contention is the claim that while adequacy of consideration is not important ordinarily, it is, where the contract is unconscionable and shocking. See Herbert v. Lankershim, 9 Cal.2d 409, 71 P.2d 220. We cannot say, however, that the contract falls within such a rule, at least on the present state of the record. It must be assumed (from the allegations of the complaint) that plaintiff is the illegitimate son of Beery; that he left an estate of over $2,000,000; that Gloria is in "penurious circumstances"; the use of his name and forbearance to bring an action may have great intrinsic value. The obligation assumed by him is one imposed by law. Civ.Code, § 196a.

[10] Defendants assert that the contract being oral is unenforceable because of various provisions of the statute of frauds. First, is the provision requiring "An agreement made upon consideration of marriage" to be in writing. Civ.Code, § 1624(3); Code Civ.Proc., § 1973(3). This is predicated on the clause recited in the contract that "Whereas, Gloria is about to marry" Schumm and neither Gloria nor Beery wish to impose upon him any responsibility for plaintiff's support; that upon such marriage plaintiff's name shall be "Schumm"; that Gloria and Schumm were married and the child so named. The amended complaint does not necessarily establish that a marriage between Gloria and Schumm was consideration for the contract. The reference in the contract was merely a recital that they were about to marry and that no liability was to be imposed upon Schumm. Plaintiff was to bear Schumm's name but that includes no promise to marry. It is not alleged, as asserted by defendants, that in performance of the contract Gloria and Schumm were married. Rather it is alleged that Gloria "having married Schumm," on plaintiff's birth, he was named Schumm. It then goes on to say what was done in performance of the contract.

[11, 12] Second, the contract is within the provision requiring a writing for "A

special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in section 2794 of the Civil Code" Code Civ.Proc., § 1973(2); Civ.Code, § 1624(2). It is asserted that Beery promised to answer for the obligation of Schumm to support plaintiff. It is reasoned that as Gloria and Schumm were married when plaintiff was born, he was presumed legitimate and Schumm was liable for his support. Assuming the validity of that argument, it is predicated on the assumption that the promise was to plaintiff. The promise was to Gloria and obviously from the terms of the contract it was not to answer for any default of Schumm's, but was an original promise to Gloria. Among other reasons why the statute does not apply is the rule that a promise to answer for the debt of another is deemed an original obligation and not within the statute "Where the promise is upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person". Civ.Code, § 2794(4). The rule is stated: "Whenever a promise to answer an antecedent obligation of another is made upon a fresh consideration beneficial to the promisor, no matter from what source it may move, the promise is an original one and valid though oral; or, as was said in an early case, whenever the leading and main object of the promisor is not to become surety or guarantor of another, but to subserve some purpose or interest of his own, his promise is not within the statute, although the effect of the promise may be to pay the debt or discharge the obligation of another." 12 Cal.Jur., 869. See Greenfield v. Sudden Lumber Co., 18 Cal.App.2d 709, 64 P.2d 1007. As we have seen, Gloria's promise to name the child after Beery and to refrain from instituting an action was beneficial to Beery. This is in line with the basic principle that: "The important question, running through all cases dealing with the code subdivision just quoted, is whether the promises made are in fact assumptions of another's liability, or the primary obligation of the promisor himself. In the former case, the promise is within the statute and must be in writing, but in the latter case the promise is valid, though verbal. The precise language used in making the promise is important, as a slight change in phraseology may have the effect of changing a promise, intended to be conditional and collateral, into an independent and original undertaking." 12 Cal.Jur., 864.

[13] Third, the contract must be in writing, state defendants, for it is "by its terms is not to be performed during the lifetime of the promisor," Code Civ.Proc., § 1973(6); Civ.Code, § 1624(6) and it is a promise by Beery to devise property. Code Civ.Proc., § 1973(6); Civ.Code, § 1624(6). The only argument advanced to support this argument is that the agreement as a whole shows it was a contract to devise property—the life insurance policies. Obviously, it is not such a contract.

[14] Fourth, it is claimed that the contract is one for the sale of personal property (a chose in action) having a value in excess of $500; thus within the provision that: "A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged, or his agent in that behalf.

"The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply." Code Civ.Proc., § 1973a; Civ. Code, §§ 1624a, 1724. The reference is to the provision in the contract, supra, in con-

nection with Beery's promise to support, that he will purchase and deliver on the child's birth two paid up policies of insurance, one in which the insurer would pay $100 per week to the child during minority and the other under which the child is to receive $25,000 on reaching majority.

It should be quite clear that this was not intended as a sale. Beery was not an insurance company and could not "sell" insurance. He merely agreed to furnish the money necessary to obtain such policies. It is true he promises to deliver them but the main purpose was that he furnish the necessary funds in order that the protection afforded by a reputable insurer be secured. In lieu of the first policy a trust with a bank as trustee may be established. Certainly, if Beery promised to deposit the funds for support in a bank to Gloria's or the child's credit, it would not be considered a sale of a chose in action against the bank. The situation here is not substantially different. (Even if it be assumed that a sale of the insurance policies was intended, it may be that the statute has been satisfied in that "part payment" takes the case out of the statute. Here all of the performance by Gloria has been performed. She has refrained from instituting the action and named plaintiff after Berry.)

[15–17] Finally, it is asserted that plaintiff is barred from enforcing the contract because he also instituted an action for support under § 196a of the Civil Code. That action was commenced before Beery's death which occurred before it was tried. The action was dismissed on the ground that the action did not survive Beery's death. That judgment of dismissal was affirmed. Schumm v. Beery, supra, 100 Cal. App.2d 407, 224 P.2d 54. Defendants' argument is two-fold: that by commencing that action plaintiff had made an election of remedies, that is, to enforce his right under § 196a and thus abandoning the contract, and that the demurrer was sustainable on the ground that another action was pending.

As to election of remedies, plaintiff asserts that it cannot be raised by demurrer, Code Civ.Proc., § 430. But, assuming it may, the doctrine is not applicable here. The general rule is stated: "'An election of remedies is defined as the choosing between two or more different and coexisting modes of procedure and relief allowed by law on the same state of facts.' 9 R.C.L., p. 956. 'Election of remedies has been defined to be the right to choose or the act of choosing between different actions or remedies where plaintiff has suffered one species of wrong from the act complained of. Broadly speaking, an election of remedies is the choice by a plaintiff to an action of one of two or more coexisting remedial rights, where several such rights arise out of the same facts, but the term has been generally limited to a choice by a party between inconsistent remedial rights, the assertion of one being necessarily repugnant to or a repudiation of the other.' (20 C.J., p. 2)" Mansfield v. Pickwick Stages, 191 Cal. 129, 130, 215 P. 389. The facts are not the same nor are the remedies inconsistent. The instant action is on the contract, which makes precise provision for what shall be paid for the support. The other action was under the statute, Civ.Code, § 196a, which is the general obligation to support. By bringing the action under the statute, plaintiff did not abandon any right under the contract and the contract expressly provides that it is not an abrogation of the right under the statute. On the claim of another action pending, that action has gone to final judgment—affirmed on appeal. It would not be res judicata, Cf., Stevens v. Kelley, 57 Cal.App.2d 318, 134 P.2d 56, for all it determined was that an action under § 196a does not survive the death of the father.

Judgment reversed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, and SPENCE, JJ., concur.

SCHAUER, Justice (dissenting).

In my view the opinion prepared for the District Court of Appeal by Mr. Presiding Justice Moore (reported at 224 P.2d 56) correctly disposes of the questions presented. For the reasons therein stated I would affirm the judgment of the trial court.

STEWART et al. v. McCOLLISTER.

L. A. 21682.

Supreme Court of California, In Bank.

May 15, 1951.

Rehearing Denied June 14, 1951.

Cecile C. Stewart, and another, brought action against W. O. McCollister for damages for personal injuries allegedly caused by defendant's negligent operation of his automobile. The Superior Court, Los Angeles County, Robert H. Scott, J., entered judgment for defendant and plaintiffs appealed. The Supreme Court, Spence, J., held that where plaintiffs did not claim, in pleadings or otherwise, that defendant's negligence occurred in course of any public employment, they were not required to file verified claim with city or defendant within 90 days after accident.

Judgment reversed with directions.

Schauer and Edmonds, JJ., dissented.

Prior opinion 220 P.2d 618.

1. Counties ⇐213
Municipal corporations ⇐741(1)

Provisions of law, whether found in statutes or in charter provisions of cities or counties, requiring filing of verified claims for damages against certain public agencies, adopted in connection with abolishment of rule of immunity of public agencies from tort liability, created new statutory rights of action against such public agencies. Government Code, § 1981.

2. Municipal corporations ⇐1021

Primary purpose of provisions of law requiring filing of verified claims for damages against certain public agencies is to put agency on notice and to give it an early opportunity to investigate merits of the claim before chance for effective investigation is lost. Government Code, § 1981.

3. Municipal corporations ⇐741(1)

Under statute providing that, whenever it is claimed that injury resulted from negligence of public employee occurring during course of his employment, verified claim for damages shall be presented and filed with employee and municipality within 90 days after accident occurred, injured person's common-law right of action against employee would be qualified by requirement of filing of claim only in event that injured person claims that he was injured as result of negligence of public employee occurring during course of his public employment. Government Code, § 1981.

4. Automobiles ⇐230

Where plaintiffs, suing for damages allegedly caused by motorist's negligent operation of his automobile, did not claim, in pleadings or otherwise, that motorist's negligence occurred in course of any public employment, plaintiffs were not required to file verified claim under statute requiring filing of verified claims within 90 days after accident whenever it is claimed that injury resulted from negligence of public employee occurring during course of his employment, notwithstanding that motorist claimed and proved that accident occurred while he was in the course of his employmen for city. Government Code, § 1981.

William N. Parker, Pasadena, for appellants.

Early, Maslach, Foran & Tyler, Robert E. Early and John B. Connolly, Los Angeles, for respondent.

SPENCE, Justice.

Plaintiffs appeal from a judgment entered in favor of defendant McCollister in an action brought to recover damages for personal injuries allegedly caused by defendant's negligent operation of his automobile.

The cause was not tried upon all issues but the judgment was entered after a trial by the court of a single issue raised by way of special defense in defendant McCollister's amended answer. Said defendant alleged therein that at the time of the accident, he was employed by the city of Los Angeles; that he was acting within the course of his employment with said city; and that plaintiff had not presented or filed any verified claim within 90 days after the accident occurred. Said defense was based upon the provisions of section 1981 of the Government Code.[1] The trial court

1. Section 1981: "Whenever it is claimed that any person has been injured or any property damaged as a result of the negligence or carelessness of any public

found in accordance with the facts alleged in said special defense and concluded that plaintiffs were therefore not entitled to a trial on the merits. Judgment in favor of defendant was entered accordingly.

In ruling upon said special defense, the trial judge indicated that he felt bound by the decision in Huffaker v. Decker, 77 Cal. App.2d 383, 175 P.2d 254. As will hereinafter appear, we are of the view that the Huffaker case is not controlling, and that both the wording of the statute and its historical background clearly indicate that the trial court erred in entering judgment in favor of defendant McCollister under the circumstances presented by the record. A brief statement of the pertinent facts will suffice to show that the construction of said section 1981 for which defendant contends, and which was adopted by the trial court, is untenable in theory and unjust in its operation.

The accident occurred in the city of Los Angeles on December 27, 1946. At that time defendant was driving his own 1936 Ford Sedan, which bore a Nevada license number, and concerning which automobile defendant later testified "there was some mixup in the motor number but I was legally the owner." Plaintiffs filed their complaint on March 5, 1947. It was the ordinary type of action against the individual defendant McCollister seeking to recover damages based upon the latter's common law liability for negligence. The city of Los Angeles was not made a party to the action and plaintiffs made no claim in their complaint, or otherwise, that defendant McCollister was in the employ of any other person or entity. On March 29, 1947, defendant McCollister filed an answer in the ordinary form, which answer contained no hint of any alleged public employment of defendant or of any alleged defense relating to the failure to file a verified claim. On April 5, 1948, being more than a year after the filing of the complaint and more than 15 months after the happening of the accident, defendant filed an amended answer, which first disclosed his alleged special defense as above set forth. If plaintiffs were given any intimation prior to the filing of the amended answer, on April 5, 1948, that anyone claimed that defendant McCollister's 1936 Ford automobile, which was registered under a Nevada license number, was being used on the official business of the city of Los Angeles when the accident occurred on December 27, 1946, the record fails to disclose that fact. Nevertheless, said defendant seeks a construction of said section 1981 which would completely absolve him from his common law liability for negligence merely because defendant finally claimed and proved, by way of special defense, that at the time of the accident he was in the course of his employment with the city of Los Angeles in "the heating and refrigeration division" of "the Building and Safety Department," using his own car, for which he was "allotted seven cents a mile."

[1, 2] Turning to the legislative history of said section 1981, it appears that its forerunner was an act passed in 1931. Stats.1931, p. 2476, as amended; Deering's General Laws, Act 5150. The 1931 act was passed as a companion measure to an act relating to the liability in damages of certain public agencies and requiring the filing of verified claims relating to such liability. Stats.1931, p. 2475, as amended; Deering's General Laws, Act 5149. Both acts were similarly phrased commencing with the words "Whenever it is claimed that any person has been injured * * *." Similar introductory words are found in the present section 1981. It seems clear that these and other provisions of the law specifically requiring the filing of verified claims for dam-

officer or employee occurring during the course of his service or employment or as a result of the dangerous or defective condition of any public property, alleged to be due to the negligence or carelessness of any officer or employee, within 90 days after the accident has occurred, a verified claim for damages shall be presented in writing and filed with the officer or employee and the clerk or secretary of the legislative body of the school district, county, or municipality, as the case may be. In the case of a State Officer the claim shall be filed with the officer and the Governor."

ages, whether such provisions are found in our statutes or in charter provisions of cities or counties, were adopted in connection with various amendments which largely abolished the rule of immunity of public agencies from tort liability and created new statutory rights of action against such public agencies. It further seems clear that the primary purpose of the various provisions requiring the prompt filing of a verified claim was to put the public agency on notice, and to give it an early opportunity to investigate the merits of the claim, of which it otherwise might have no knowledge until after the chance for effective investigation had been lost by the lapse of time. It may be conceded that the legislature, either intentionally or by oversight, failed to include a provision in our general statutes requiring the filing of a verified claim as a prerequisite to the bringing of an action for damages against every public agency under all circumstances, Ansell v. City of San Diego, 35 Cal.2d 76, 216 P.2d 455 and it may be further conceded that the provisions of section 1981 of the Government Code, and its forerunner, had the effect of qualifying the common law right of action for negligence against a public employee under certain circumstances. Veriddo v. Renaud, 35 Cal.2d 263, 217 P.2d 647. But the question remains as to the extent to which such common law right of action was thereby qualified.

[3] Both the legislative history and the plain wording of said section 1981 make it manifest that it was the intention of the legislature to qualify the common law right of action against the negligent person by requiring the filing of a verified claim only in the event that the *injured person* claims that he has been injured as the result of the negligence of a public employee occurring during the course of his public employment. The pertinent wording of the section is "Whenever it is claimed that any person has been injured or any property damaged as a result of the negligence or carelessness of any public officer or employee occurring during the course of his service or employment * * *." Both the condition expressed in this introductory clause and the conditional requirement expressed in the main clause for the filing of a verified claim clearly relate solely to the claims of the injured person. Who, perchance, other than the injured person, ordinarily makes a claim of negligence against another, with or without a further claim relating to the course of employment? Certainly it is not the alleged negligent person himself. Yet defendant argues for a strained construction of the section and asks this court to declare that the section was intended to cover the situation where the public employee himself claims that his alleged negligence occurred in the course of his public employment without any such claim having been made by the injured person. In other words, defendant contends that it was intended by said section to place in the hands of the negligent employee the power to conceal the fact of his employment for the short period allowed for the filing of a verified claim, and then to render himself immune from his common law liability by alleging and proving that his alleged negligence occurred in the course of his public employment, and that no verified claim had been filed. We cannot ascribe to the legislature any such intention. If that construction should be held proper, then said section 1981 would provide a nefarious device in the hands of the defendant.

The several claims statutes and charter provisions prescribing varying requirements concerning the length of time for the filing of verified claims, the contents thereof, and the manner of filing or presentation may well be said to have become traps for the unwary. No additional traps should be added by an unwarranted construction of said section 1981. Perhaps the unfortunate person who lies in an unconscious state as a result of his injuries or who is under other disability for a long period of time, must be held to be deprived of his statutory cause of action against certain public agencies if his verified claim is not filed within the time prescribed. See Artukovich v. Astendorf, 21 Cal.2d 329, 131 P.2d 831, and cases cited. But it does not follow that the courts should torture the language of said section 1981 so as to deprive the injured person of his common law right of action against the negligent person when no claim is made

by the injured person at any time that the alleged negligence occurred in the course of public employment.

[4] It has been suggested that when the public employee alone is sued, the section would be meaningless if it is confined to the situation where plaintiff alleges the public employment in his complaint, as such allegation would be surplusage in such action. It will be noted that this is not the construction which we have placed upon the section. The fact which bears repetition is that plaintiffs here have never claimed, in their pleadings or otherwise, that defendant's negligence occurred in the course of any public employment. We hold that under these circumstances the provisions of the section do not come into play, and that they cannot be relied upon by a defendant by the mere claim on his part that his alleged negligence occurred in the course of his public employment in the absence of any such claim having been made on the part of the injured person.

It should be further noted that if defendant's construction were adopted, then it would necessarily follow that the mere assertion of the claim by any negligent person in any action that his negligent conduct occurred in the course of public employment would defeat the action of the injured person, regardless of the truth or falsity of such claim. The wording of the section clearly makes it operative upon the interposition of the claim without regard to proof thereof; and this fact alone compels the conclusion that it was intended to cover only the situation where such claim is made by the injured person.

In the prior cases in which said section 1981 has been successfully invoked, it was the injured person, and not the public employee, who pleaded that the injuries had been incurred as a result of the negligence of the public employees while acting in the course of his public employment. Veriddo v. Renaud, supra, 35 Cal.2d 263, 217 P.2d 647; Huffaker v. Decker, supra, 77 Cal. App.2d 383, 175 P.2d 254. The situation in each of said cases is therefore clearly distinguishable, as the injured person who made such allegations had failed to allege and prove compliance with the requirements of said section concerning the prior filing of a verified claim. The case before us is therefore one of first impression and is not controlled by the cited authorities.

The judgment in favor of defendant McCollister is reversed, with directions to the trial court to try the cause upon the merits.

GIBSON, C. J., and SHENK, CARTER and TRAYNOR, JJ., concur.

SCHAUER, Justice.

I dissent. It is my view that the trial court correctly ruled that by reason of plaintiffs' noncompliance with the claims statute involved (Gov.Code, § 1981), judgment should be rendered for defendant.

That the majority opinion for all practical purposes repeals section 1981 can scarcely be disputed. The majority state as a reason for this holding, inter alia, that "the construction of said section * * * which was adopted by the trial court, is * * * unjust in its operation." That is an argument in which I might join if it were addressed to the Legislature but in giving effect to it here I think that the court invades the legislative field. The majority also assert that the trial court's construction is "untenable in theory"; but this assertion has no better support than the previously quoted charge of unjustness in operation.

The majority hold that the operation of section 1981 is dependent not at all on the *fact* of public employment and a negligent act in the course thereof, but solely on the pleading (or possibly some other specific assertion) of a *claim* to that effect by an injured person. This holding leaves to the *injured person* in every case the power to control whether section 1981 shall be operative or wholly non-operative. And the *fact* as to whether the offending public employe was in truth in the employ of the public and was acting in the course of his duty is wholly immaterial. It makes no difference whether the claim is true or false, say the majority; the controlling fact is the specific pleading (or possibly some other formal and specific assertion) of the claim. If the claim is specifically asserted, true or false, the statute applies; if the *claim* is not specifically asserted by the injured per-

son the *fact* of public employment is immaterial. Thus, say the majority, "The wording of the section clearly makes it operative without regard to proof thereof; and this fact alone compels the conclusion that it was intended to cover only the situation where such claim is made by the injured person."

Quite recently this court upheld section 1981 against the contention that it was unconstitutional as class legislation. We said (in Veriddo v. Renaud (1950), 35 Cal.2d 263, 265, 217 P.2d 647), "As already pointed out, section 1981 falls within a chapter of the Government Code dealing with the liability of officers and employes, and if compliance with its provisions is not a prerequisite to suit against such persons on account of the claims specified in that section, then the section appears to be wholly meaningless, since it is not applicable to claims against a public agency. Such a viewpoint does not overlook the common law liability of an employe as an individual for his own negligence (see Mock v. City of Santa Rosa (1899), 126 Cal. 330, 344, 58 P. 826; Payne v. Baehr (1908), 153 Cal. 441, 444, 95 P. 895; Moore v. Burton (1925), 75 Cal.App. 395, 401, 242 P. 902), but simply recognizes that the Legislature has extended to public officers and employes, who incur liability in the performance of government service, the protection of a claims statute and the privilege of having defended at public expense those damage suits which are enumerated in chapter 6. The Huffaker case treats of this point and also disposes of plaintiffs' argument based on section 21 of article I and subsection 32 of section 25 of article IV of the California Constitution that the claims statute constitutes an unconstitutional classification (see pages 387–389 of 77 Cal.App.2d, pages 256–257 of 175 P.2d). As stated at page 389 of 77 Cal.App. 2d at page 257 of 175 P.2d, 'It should be noted that the statute does not deprive the injured person of his cause of action against the employee. That remains as it was before the statute was enacted. He is not denied due process. (Young v. County of Ventura, 39 Cal.App.2d 732, 104 P.2d 102.) The statute merely places upon him a reasonable procedural requirement to the maintenance of his action * * * [P]laintiff claimed that section 1981 is unconstitutional as special legislation insofar as it requires the filing of such claims for damages as a prerequisite to suit against an officer or employee * * * The principles under which the state may provide procedure applicable alone to public employees and officers for the collection of judgments against them are equally applicable here. (Ruperich v. Baehr, 142 Cal. 190, 75 P. 782; Lawson v. Lawson, 158 Cal. 446, 111 P. 354.)'"

The majority holding, departing from the principles above enumerated, is reached by construing the section as if it read, "Whenever it is claimed that any person has been injured or any property damaged as a result of the negligence or carelessness of any [one who is also specifically pleaded or claimed by the injured person to be a] public officer or employee occurring [and which is further specifically pleaded or claimed by such injured person to have occurred] during the course of his service or employment," then, and then only, but regardless of the truth or falsity of the claim, is presentation and filing of the claim within 90 days required.

The majority opinion further asserts that "The several claims statutes and charter provisions prescribing varying requirements covering the length of time for the filing of verified claims, the contents thereof, and the manner of filing or presentation may well be said to have become traps for the unwary." Again, it is obvious that however much this argument may appeal either to the emotions or to logic it is one which should be addressed to the Legislature, not advanced by this court as a reason for striking down what the Legislature has enacted, unless the majority intend to give full effect to the proposition and overrule the many cases which have heretofore upheld such statutes against that very contention. Certainly I agree that "No additional trap should be added by an unwarranted construction of said section 1981" but the very use of that argument suggests the corollary that the plain import and the sole object of the language which the Legislature has used should not be avoided by "an unwarranted construction." The declaration of

the majority that "it does not follow that the court should torture the language of said section 1981 so as to deprive the injured person of his common law right of action against the negligent person" could more soundly be paraphrased to read that "it does not follow that the courts should torture the language of said section 1981 so as to [relieve] the injured person of his [statutory duty] of serving and filing his claim within the time fixed or so as to deprive the public employe of the safeguard thrown around him as a public servant."

The majority opinion also asserts that "It should be further noted that if defendant's construction were adopted, then it would necessarily follow that the mere assertion of the claim by any negligent person in any action that his negligent conduct occurred in the course of public employment would defeat the action of the injured person, regardless of the truth or falsity of such claim. The wording of the section clearly makes it operative upon the interposition of the claim without regard to proof thereof; and this fact alone compels the conclusion that it was intended to cover only the situation where such claim is made by the injured person." Except that such assertion is signed by a majority of this court I would scarcely think that it could be seriously advanced. It seems to me that only on proof of the fact, not on naked assertion of the claim, would the defense be operative. And the truth is that here the fact was proven and is not even disputed.

As previously indicated, this court has only recently considered and reaffirmed the view that the claim provisions of section 1981 do not apply to claims against the public agency (Ansell v. City of San Diego (1950), 35 Cal.2d 76, 216 P. 455; see also Holm v. City of San Diego (1950), 35 Cal. 2d 399, 217 P.2d 972), but are designed exclusively to afford a measure of procedural protection to public employes and officers who incur liability in the performance of government service (Veriddo v. Renaud (1950), supra, 35 Cal.2d 263, 265, 217 P.2d 647; see also Porter v. Bakersfield & Kern Elec. Ry. Co. (1950), 36 Cal.2d 582, 225 P. 2d 223. Inasmuch as the statute in question is clearly and solely intended to give that protection, then to permit plaintiffs to avoid the statute and strip the public employe of such protection by the simple device of merely withholding from their pleadings any allegation of the pertinent fact—a fact which would be mere surplusage in pleading the cause of action—would seem to produce a result incongruous with the legislative intent. There is nothing in the language of the statute to suggest that its applicability is to be limited to cases in which the plaintiff, obviously as surplusage, specifically alleges the employment of the tort-feasor by the governmental unit.

It is the fact of public employment, with its relatively low compensation, and the interest of the public therein, which has led the Legislature to extend the safeguards (or what have heretofore been the safeguards) of section 1981 to persons so employed. It is a sheer denial of realism, and a defeat of the legislative object, to hold that the safeguards are operative only when the plaintiff in a damage action chooses to make them so by pleading evidentiary details of proof which are surplusage in his complaint. It is equally a denial of realism to suggest that any personal injury action against a person based on negligence of that person committed by him while he was in public employment and while he was acting in the scope of that employment does not necessarily involve precisely the type of "claim," and the only type of claim, which section 1981 is designed to cover; the very filing of the action constitutes an assertion of the claim.

Detailed study—even word by word analysis—of the statute in question will further show the untenability of the majority holding. Such study makes it clear that the word "claimed" as used at the outset of section 1981 in the phrase "Whenever it is *claimed* that any person has been injured or any property damaged as a result of the negligence or carelessness of any public officer or employee occurring * * *" is not used in the same sense as the word "alleged" in the later phrase "or as a result of the dangerous or defective condition of any public property, *alleged* to be due to the negligence or carelessness" of a public offi-

cer or employe. As pointed out in the Veriddo case, holding the claims statute to be applicable to public employes does not overlook the common law liability of an employe as an individual for his own negligence. Of course a cause of action based upon such liability can be stated in a complaint, as was done by plaintiffs here, without mention of the public employment; but it was the design of the Legislature, and the only rational sense of the statute, that the *fact* of the public employment and failure to comply with the claims statute could be set up as defensive matter in defendant's answer, as was done here. On the other hand, before one may be held to liability for the dangerous or defective condition of public property, which plainly is not his own to control in the absence of his public employment, it must be made to "appear" (i. e., "alleged") among other things (see Gov.Code, § 1953, subd. (a); Shannon v. Fleishhacker (1931), 116 Cal.App. 258, 261–262, 2 P.2d 835; Barsoom v. City of Reedley (1940), 38 Cal.App.2d 413, 420, 101 P. 2d 743) that such dangerous or defective condition was due to his negligence or carelessness or that he had notice of such condition. It is thus apparent that the use of the word "alleged" in section 1981 simply recognizes the necessity of pleading both the public employment and the dangerous or defective condition of public property, whereas the use of the word "claimed" recognizes that a cause of action may be stated for negligence without including an allegation of public employment or any elaboration on the details of the cause of action beyond those common to causes against other defendants.

It should be noted, further, because of implications to the contrary in the majority opinion, that the record in this case contains no suggestion that defendant "concealed" his public employment from plaintiff until the statutory time allowed for filing of a claim had elapsed. Certainly defendant should not be required to advise plaintiff, prior to the expiration of the limitation period, as to the proper and timely steps to take in preparing and prosecuting his lawsuit.

The view suggested by plaintiffs and in reality adopted by the majority opinion—that the statute shall apply only when the *plaintiff* specifically pleads the facts of public employment, and denying to a *defendant* the right to plead the same facts defensively—renders the statute substantially meaningless and, if the court follows this rule in subsequent cases, will entirely defeat it whenever astute counsel so elects. Separate actions can be filed against the employer and the employe. In the action against the employe no allegation or elaborated claim of the fact of public employment will be necessary (it would be mere surplusage) and the defendant cannot plead or prove the fact of public employment and failure to comply with section 1981 as a defense; and when such facts do appear on the trial they will constitute no defense to the employe because the plaintiff has not pleaded such details of the "claim." And in the action against the employer the fact of having made, or the failure to have asserted, served or pleaded, any claim on the employe will be immaterial. (Ansell v. City of San Diego (1950), supra, 35 Cal.2d 76, 77, 79, 216 P.2d 455.) The two actions can be tried separately (or consolidated for trial) and the plaintiff can recover from both defendants without any suggestion of compliance with section 1981. A very cautious plaintiff might try his action against the employe and recover judgment therein before he even files the second action against the public agency employer; since, at least in the absence of special charter provisions, the one year statute of limitations alone is applicable, this procedure would seem to be practicable. The plaintiff by the simple device of refraining from pleading surplusage, refraining from serving and filing a claim other than his complaint, and, possibly, by delaying filing his action until the ninety-day period has expired,[1] completely avoids operation of section 1981. Such a

1. He possibly should delay commencing his action until the ninety-day period has expired because, the majority reasoning suggests, the defendant might be permitted to urge non-compliance with the statute as a defense if he pleads it within the ninety-day period.

result in my view does violence to all pertinent rules of statutory interpretation.

For the reasons stated the judgment should be affirmed.

EDMONDS, Justice (dissenting).

I agree with Justice SCHAUER'S analysis of the statute and his conclusion that the judgment should be affirmed. Moreover, as I pointed out in Porter v. Bakersfield & Kern Elec. Ry. Co., 36 Cal.2d 582, 225 P.2d 223, to limit the operation of section 1981 deprives a public employee of the full protection of the statute to which this court has held him to be entitled. In the Porter case, the code section was construed to allow a claim to be filed after the commencement of the suit against the employee. It has now been construed so that no claim need be filed at any time if the plaintiff chooses not to plead all of the facts and all of the rights accorded a public employee by the Legislature are taken from him.

Rehearing denied; EDMONDS and SCHAUER, JJ., dissenting.

37 Cal.2d 263

RAINS v. CONTRA COSTA COUNTY et al.

S. F. 18068.

Supreme Court of California, in Bank.

May 18, 1951.

Floyd A. Rains brought action against the County of Contra Costa, a political subdivision, and others, to enjoin certification of appointment of one defendant as medical director of the county hospital, and to have amendatory ordinance removing medical director and others from civil service declared invalid. The Superior Court, Contra Costa County, Benjamin C. Jones, J., entered judgment for defendants and plaintiff appealed. The Supreme Court, Gibson, C. J., held that amendatory ordinance adopted by county supervisors removing county physicians and surgeons and medical director of county hospital from civil service was not a repeal within ordinance placing county employees under civil service and providing that ordinance could not be repealed unless submitted to electors and approved by majority vote, but was a valid amendment.

Judgment affirmed.

Carter, J., dissented.

Prior opinion, 220 P.2d 816.

1. Counties ⇐55

Purpose of ordinance placing county employees under civil service and providing that ordinance could be amended by county supervisors without approval by people, but that no amendment repealing ordinance would be effective unless submitted to electors and approved by majority vote, would be to deprive supervisors of power to destroy or substantially impair civil service system without approval by voters, but at same time to permit supervisors to amend ordinance and make such changes and modifications as would not constitute a substantial impairment of the system. Government Code, §§ 31100–31113.

2. Counties ⇐55

Where county supervisors adopted amendatory ordinance removing county physicians and surgeons and medical director of county hospital from civil service, and it was not shown that amendatory ordinance was part of an attempt to destroy civil service system by piecemeal amendment, civil service system was not substantially impaired, and therefore, amendatory ordinance was not a "repeal" within ordinance placing county employees under civil service and providing that county supervisors could amend ordinance without approval by people but that no amendment repealing ordinance would be effective unless submitted to electors. Government Code, §§ 31100–31113.

See publication Words and Phrases, for other judicial constructions and definitions of "Repeal".

Todd & Todd and Henry C. Todd, all of San Francisco, for appellant.

Francis W. Collins, Dist. Atty. and Charles Hemmings, Deputy Dist. Atty., Martinez, for respondents.

GIBSON, Chief Justice.

Plaintiff, suing as a taxpayer, seeks to enjoin certain officials of Contra Costa County from paying compensation to, or certifying the appointment of, defendant Degnan as medical director of the county hospital, and to have an ordinance, which removed the medical director and others from civil service, declared invalid. Judgment was entered for defendants, and plaintiff has appealed.

In May, 1944, the board of supervisors adopted ordinance 325 establishing a merit system for county employees pursuant to the County Civil Service Enabling Act, now sections 31100–31113 of the Government Code. All employees were thereby placed under civil service except elected officials, casual employees of county institutions, members of commissions, persons serving without compensation, and certain investigators and others employed by the sheriff and district attorney. Thereafter, as required by the enabling act, ordinance 325 was submitted to and ratified by the electors of the county. The ordinance provided that it could be amended by a four-fifths vote of the supervisors without approval by the people, but that "no amendment repealing this Ordinance shall be effective unless the proposition of its repeal shall first have been submitted" to the electors and approved by a majority vote.

In 1948, by four-fifths vote, the supervisors adopted ordinance 471 which amended ordinance 325 by including in the exempt categories the medical director of the county hospital and all physicians and surgeons serving the county. Defendant Degnan, a doctor of medicine, was thereafter appointed medical director without being required to take a civil service examination, and plaintiff seeks to prevent payment of his salary, claiming that ordinance 471 is invalid and ineffective.

[1] The principal question is whether ordinance 471 amounts to a repeal within the meaning of the provision of ordinance 325 that no repeal shall be effective until approved by the voters. This provision refers to both amendment and repeal, and it appears that the clear intent of the ordinance is to deprive the supervisors of the power to destroy or substantially impair the civil service system without approval by the voters, but at the same time to permit the supervisors to amend the ordinance and make such changes and modifications as would not constitute a substantial impairment of the system. This is in accord with the general definitions of the terms, since repeal ordinarily means revocation, rescission, abrogation or destruction, whereas amendment involves an alteration or change, as by addition, taking away or modification. Webster's New Internat. Dict.; 3 Words and Phrases, pp. 319–321; 37 Words and Phrases, pp. 5–6.

[2] In this case ordinance 471 removed from civil service a very limited class of employees consisting of the medical doctors serving the county. The type of work done by medical men, the times and hours when such work must be done, possible difficulties in obtaining medical men in that county for civil service positions, the general scarcity of doctors, and many other factors may have influenced the supervisors to conclude that the system as a whole would work more efficiently, and that the county would derive greater benefits, if this limited professional group were excluded. While opinions differ as to the advisability of bringing or retaining certain kinds of employees under civil service, experience may demonstrate the wisdom of adding certain classes or eliminating others, and here both the language and the general purpose of ordinance 325 are consistent with permitting some degree of elasticity. The record does not indicate that ordinance 471 was part of an attempt to destroy the civil service system by piecemeal amendment, and we cannot say that there was any substantial impairment. Accordingly, it must be held that the supervisors had power to adopt ordinance 471 and that it was not a repeal within the meaning of ordinance 325.

Other contentions made by plaintiff are without substantial merit and need not be discussed. Likewise, in view of our determination that ordinance 471 was a valid amendment of ordinance 325, we need not pass on the further question whether the

supervisors could limit their power to take future legislative action by specifying in ordinance 325 the manner in which it might be modified or repealed.

The judgment is affirmed.

SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I dissent. Pursuant to statute (Govt. Code, § 31100 et seq.) the board of supervisors of Contra Costa County passed an ordinance outlining a complete and detailed plan of civil service for county employees. It was submitted to and approved by the voters of the county as required by the statute (Govt. Code, § 31105). It contains a provision that it may be amended (1) by a 4/5 vote of the supervisors without submitting the same to a vote of the people, (2) "but no *amendment* repealing" it shall be effective unless approved by the people. Nevertheless the supervisors amended the ordinance by removing a group of county employees from civil service who were within its provisions and placing them in an exempt category without submitting the amendment to the voters. The question is, therefore, whether it was intended that the civil service system could be substantially impaired without the approval of the people.

The provision expressly dealing with this subject is clear enough. It says, as above seen, that (1) the ordinance may be amended by the board, (2) but no *amendment* repealing it is valid unless approved by the people. It is not reasonable to say that the second part—repeal by amendment—refers only to a repeal of the ordinance in its entirety by one measure as distinguished from a repeal of part of it, for the first part—the authority of the supervisors to amend—also mentions an amendment of the ordinance rather than a repeal of it *or a part thereof*. It is not to be supposed that the supervisors could not amend the ordinance unless it was amended in toto. Therefore the ordinance should read: (1) The board may amend it or any part thereof (2) but no amendment repealing it or a part thereof is valid unless approved by the people. Under that interpretation, and the *literal* reading of the ordinance, the board alone could adopt *no amendment which had the effect of repealing a part* of the ordinance by omission of material or by additions which would impliedly repeal other parts. If the provision involved is read literally it means that no amendment could be made except by the voters except one which in no way altered any part of the ordinance. That follows from the wording of the second part of the provision that no *amendment* repealing the ordinance may be passed by the board. That recognizes that an "amendment" of a statute may, in effect, *repeal* a portion of it although it does not purport to do so, for if the amendment *omits* part of the content of the portion amended, such part is repealed. *Thus no amendment which has the effect of repealing any part of the ordinance may be passed by the board.* The board could only add to the ordinance in such fashion that the effect would be not to change any of the then existing contents of the ordinance. It is not necessary to go that far however. It may be said that the two parts appear to be inconsistent on their face but must be harmonized in order to give effect to each as far as possible. This suggests that the two parts should be construed to mean that under the first part, the board alone may amend the ordinance or any part thereof so long as the amendment does not impair the civil service system—the heart of the ordinance. It may alter procedural matters and other details of which there are many; it may make changes which further the main purpose of the ordinance. Under the second part, only the voters may make changes which impair or tend to destroy the main thesis—a civil service system for county employees.

There are many factors which are compellingly persuasive for the foregoing construction. First, the ordinance recites that it is adopted "in order to establish an equitable and uniform procedure for dealing with personnel matters through a Civil Service Commission, and to place County employment on a merit basis for the purpose of obtaining the highest efficiency and

assuring that the best qualified persons available shall be brought into the service of the County, * * *." It sets up a detailed scheme for the system. *"All regular county employees* shall be included in the merit system hereby adopted * * *." (Italics added.) The only exceptions are elected officials, commission members and special employees. Thus the vital principle is that all county employees with very limited exceptions are protected by civil service tenure.

Second, civil service laws should be liberally construed to the end that the system shall be preserved and a return to the spoils system avoided. Steen v. Board of Civil Service Commissioners, 26 Cal.2d 716, 160 P.2d 816; Allen v. McKinley, 18 Cal.2d 697, 117 P.2d 342; Almassy v. Los Angeles County Civil Service Commission, 34 Cal.2d 387, 210 P.2d 503. Thus even though the interpretation of the majority may be plausible, the one set forth above should be followed because otherwise the whole system is put in jeopardy.

Third, if the board may exempt one group of employees from the system, it has it within its power to destroy it completely. It may whittle away at the system by the exemption process, group by group, ordinance by ordinance, though adopted on the same day. Thereby it may accomplish indirectly what it cannot do directly—destroy the system in one fell stroke. Certainly the right of the people to pass upon the issue is not to be so lightly brushed aside. The majority opinion holds, by implication at least, that this could not be done; that this court would strike down such an action. It does not say upon what legal basis it could arrive at such a conclusion. The question is one of *power.* If the board has the *power* to amend the ordinance by exempting *one* group of employees from civil service then there is no rule of law limiting it to that group. It may proceed to exempt all employees in one ordinance or reach that result piecemeal, group by group, ordinance by ordinance.

The majority holds that the board could not substantially impair the civil service system. That position is wholly inconsistent with the major premise of the majority opinion that the board has power to repeal a part of the ordinance by amendment. Under the majority view there is nothing in the ordinance which places any such limitation on the board. It is said in one breath that the board has power to repeal the ordinance by amendment and in the next that such cannot be done if too much is repealed. But the majority does not say how much is too much. This is left for future conjecture and speculation.

Fourth, viewing the requirement of a vote of the people—the second part—either as an initiative or referendum provision, the rule must be applied that such provisions are to be liberally construed to preserve the right to the people to vote on such measures. Perry v. Jordan, 34 Cal.2d 87, 91, 207 P.2d 47; Gage v. Jordan, 23 Cal.2d 794, 147 P.2d 387; Warner v. Kenny, 27 Cal. 2d 627, 165 P.2d 889; Hunt v. Mayor and Council of Riverside, 31 Cal.2d 619, 191 P.2d 426; McFadden v. Jordan, 32 Cal.2d 330, 196 P.2d 787. Thus we should not take a narrow view of the right of the people to pass upon any proposed inroads on the civil service system adopted by them.

Fifth, it has been held that "amendment" —the first part—may mean something which betters rather than impairs the act amended. In McFadden v. Jordan, supra, 32 Cal.2d 330, 333, 196 P.2d 787, 789, quoting from Livermore v. Waite, 102 Cal. 113, 36 P. 424, 25 L.R.A. 312, in speaking of amending or revising the Constitution this court said: "The very term 'constitution' implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature. On the other hand, the significance of the term 'amendment' implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed." Paraphrasing, the very establishment of a comprehensive civil

service system by the people implies a permanent and abiding structure and indicates the will of the people that the "underlying principles upon which it rests" shall continue to exist until changed by them. An amendment by the board without their consent implies such an addition or change within the lines of the original act as will effect an improvement or better carry out the basic purpose. The amendment here adopted is just to the contrary.

I would therefore reverse the judgment.

CROSS v. TUSTIN et al.
Civ. 14801.

District Court of Appeal, First District, Division 2, California.
May 9, 1951.*

Nancy Cross sought writ of mandamus against John Tustin, Personnel Director, and others, which was denied by Superior Court, Santa Clara County. The Superior Court, Santa Clara County, Byrl R. Salsman, J., denied plaintiff's motion to impeach and vacate settled statement on appeal and oral motion to amend. Plaintiff moved for new trial on each motion. Motions for new trials were dismissed by Superior Court, Santa Clara County, Byrl R. Salsman, J., and plaintiff appealed. District Court of Appeal dismissed the appeal without opinion. Plaintiff petitioned for rehearing of order dismissing appeal. District Court of Appeal held that order settling statement was nonappealable.

Petition for rehearing denied.

1. Appeal and error ⇐117

Order settling statement on appeal is not appealable.

2. Appeal and error ⇐82(1)

Order after final judgment which is appealable is only one which affects the final judgment in some manner or bears some relation to it either by way of enforcing it or staying its execution. Code Civ.Proc., § 963.

3. Appeal and error ⇐113(2)

Where original order is nonappealable, order refusing to vacate or amend it is also nonappealable.

4. Appeal and error ⇐113(2)

In certain cases, appeal will lie from denial of motion to vacate previous judgments or orders when those judgments or orders were themselves appealable.

5. Appeal and error ⇐113(2)

Appeal does not lie from order denying motion to vacate judgment or order, where motion calls upon court only to repeat or overrule former holding on same facts, but appeal does lie when appeal from first order would be vain for lack of record showing rights of aggrieved party.

6. Appeal and error ⇐113(2)

Where order settling statement was nonappealable, order denying motions to vacate and to amend order settling statement was nonappealable and appeal did lie from orders denying new trials on such motions.

Nancy Cross, Stanford, in pro per.

Howard W. Campen, County Counsel, Harry C. Nail, Jr. Asst. County Counsel, Santa Clara County, San Jose, for respondents.

PER CURIAM.

Appellant has petitioned this court for a rehearing of our order dismissing her appeal. The original order was made from the bench without opinion. Further consideration has only served to satisfy us that our order of dismissal was correct and we take this opportunity to state the reasons for our action.

Appellant sought a writ of mandamus in the Superior Court of Santa Clara County, which was denied. There was no reporter present at the proceedings. Since appellant desired to appeal the judgment, it became necessary to prepare a narrative statement of the proceedings. The parties were in

* Subsequent opinion 236 P.2d 142.

sharp disagreement as to what had occurred at the hearing, and hence what should be included in the narrative statement upon which the appeal would be based. Judge Del Mutolo of the above court then certified a Settled Statement on Appeal.

Appellant subsequently appeared before this court, petitioning for Settlement of Narrative Statement. This petition was denied, rehearing denied, and petition for hearing denied. Cross v. Tustin, 96 Cal. App.2d 207, 214 P.2d 565.

Appellant then moved the Superior Court of Santa Clara County to impeach and vacate the certified settled statement. She alleged deceit and fraud on the part of respondents' counsel, passion and prejudice of Judge Del Mutolo, and collusion between the judge and counsel for respondents. Judge Salsman heard this motion and the subsequent proceedings. After a hearing, appellant's motion to impeach and vacate was denied. An oral motion to amend the settled statement was also denied. Appellant then moved for a new trial on each of the above two motions. These motions for new trials were dismissed. An appeal was taken from all four of the orders mentioned in this paragraph. It is this appeal which respondents now move to dismiss.

Respondents contend: (1) An order settling a statement is not an appealable order; (2) An order denying a motion to vacate or amend an order settling statement is not appealable; and (3) An appeal does not lie from orders denying new trials on non-appealable orders.

[1] The primary fact is that an order settling a statement on appeal is not an appealable order.

"When appellant cannot or does not want to avail himself of this method (bringing up of reporter's transcript) of preparing the record on appeal, either because a reporter was not present at the proceedings or for other reasons, and when he fails to convince the trial judge that his statement accurately reflects the proceedings in question, the action of the trial judge, who heard and tried the case, must be regarded as final." Burns v. Brown, 27 Cal.2d 631, 636, 166 P.2d 1, 4.

[2] "An appeal may be taken from any special order made after final judgment Code of Civil Procedure, section 963. But the orders after judgment which are appealable under this section are only those which affect the final judgment in some manner or bear some relation to it either by way of enforcing it or staying its execution. Lake v. Harris, 198 Cal. 85, 89, 243 P. 417; Imperial Beverage Co. v. Superior Court, 24 Cal.2d 627, 150 P.2d 881. The test is the same with relation to orders made in the preparation of records on appeal. An order terminating proceedings for the preparation of a record has the same effect as an affirmance of the judgment or dismissal of the appeal, and is appealable (Wood v. Peterson Farms Co., 214 Cal. 94, 3 P.2d 922; W. J. Somers Co. v. Smith, 45 Cal.App. 703, 188 P. 311), but an order denying a motion to terminate such proceedings is not appealable (Hohnemann v. Pacific Gas & Electric Co., 29 Cal.App.2d 551, 85 P.2d 151; Landreth v. Ducommun, 9 Cal.App.2d 135, 48 P.2d 984); nor is an order relieving a party from default in the preparation of a record on appeal. McWilliams v. Hudson, 98 Cal.App. 185, 276 P. 598, 277 P. 529; Buis v. Lindauer Corp., 116 Cal.App. 558, 3 P.2d 18.

* * *

"There is nothing in the Rules on Appeal which places any new limitation upon the discretionary powers of the trial judge in the settlement of records on appeal and nothing which would bring the order here under consideration into the class of orders after judgment from which appeals may be taken.

"The order settling the statement does not in any manner affect the judgment or its enforcement; it is not appealable and the appeal from the order is dismissed." Lande v. Southern California Freight Lines, 78 Cal.App.2d 417, 419–421, 177 P.2d 936, 937.

As pointed out in the opinion from which the last quotation is taken an order terminating proceedings for the preparation of a record has been held appealable because it "has the same effect as an affirmance of the judgment", but any order which results in the settlement of a record is not appealable because it does not affect the judgment

"either by way of enforcing it or staying its execution."

[3] This brings us to respondents' second point, i. e., if the original order is non-appealable, an order refusing to vacate it is also non-appealable. That this is a well-settled rule in California is incontrovertible. Litvinuk v. Litvinuk, 27 Cal.2d 38, 43, 162 P.2d 8; 2 Cal.Jur. 164, secs. 30 and 31, et seq., and cases cited therein; 1 Cal.Jur. 10 yr. supp. 294, 1 Cal.Jur.Supp. (1942 pocket part) 103, 1 Cal.Jur.Supp. (1950 pocket part) 136, and cases cited therein.

To escape the scope of the rule that an order settling a statement is non-appealable, and a non-appealable order cannot be appealed indirectly by the device of appealing from the denial of a motion to impeach and vacate, or amend such order, appellant argues as follows: That these appeals are from denials of motions brought under C.C. P. 1916 and 473, and that the rule is "* * that whenever secs. 1916 or 473 of the Code of Civil Procedure—or the ground of fraud or mistake even without specific reference to statute—have been properly invoked on motion to vacate and set aside or amend a record or order * * * the grounds of which motion were not reviewable on appeal from the judgment or other order, and where an order in any action to which C.C. P. 963(2) applies denying the motion to vacate a record was entered after trial of the motion on its merits in the trial court, appeal has been uniformly accepted in California."

[4] In all the cases appellant cites for this proposition the orders appealed from were denials of motions to vacate or amend orders *which were themselves appealable.* Stein v. Simpson, 96 Cal.App.2d 642, 644, 216 P.2d 117, appeal from the denial of a motion to amend a special order after judgment, itself appealable; Friedrich v. Roland, 95 Cal.App.2d 543, 551–552, 213 P.2d 423, denial of motion to be relieved from default judgment; Winslow v. Harold G. Ferguson Corp., 25 Cal.2d 274, 283, 153 P.2d 714, appeal from denial of motion to vacate an appealable order—which had been appealed, but the appeal abandoned; Grief v. Dullea, 66 Cal.App.2d 986, 992–993, 153 P.2d 581, denial of motion to set aside judgment by one not a party of record but injuriously affected by the judgment which denial may be appealed by such party; Stewart v. Stewart, 32 Cal.App.2d 148, 89 P.2d 404, dealing with the effect of a foreign divorce decree, not pertinent; Ratliff v. Ratliff, 100 Cal. App. 556, 557, 280 P. 554, appeal from denial of a motion to vacate a judgment; Sharp v. Eagle Lake Lumber Co., 60 Cal.App. 386, 391–392, 212 P. 933, appeal from denial of of motion to vacate judgment; W. J. Somers Co. v. Smith, 45 Cal.App. 703, 705–706, 188 P. 311, appeal from denial of motion to set aside an order refusing to certify a record on appeal, which order could have been reviewed on appeal or mandamus, depending on the state of the record. All that those cases illustrate is that in certain cases an appeal will lie from the denial of a motion to vacate previous judgments or orders when those judgments or orders were themselves appealable.

The same distinction is true of the cases cited by appellant in support of the proposition that: "Appeal will lie where the circumstances are such that appeal with the record available on appeal from the judgment would be vain for the lack of a record showing the rights of the aggrieved party." Again, the distinguishing feature of all of the cases cited by appellant for this proposition is that the orders appealed from were denials of motions to vacate orders which were themselves appealable, as follows: Valentin v. Valentin, 93 Cal.App.2d 588, 592, 209 P.2d 654, appeal from order denying motion to set aside an order for appraisement of property; Johnson v. Sun Realty Co., 138 Cal.App. 296, 298–299, 32 P.2d 393, appeal from order refusing to vacate a judgment; Ratliff v. Ratliff, 100 Cal. App. 556, 557, 280 P. 554, appeal from order denying motion to set aside default judgment; Hilliker v. Board of Trustees, 91 Cal.App. 521, 526, 267 P. 367, appeal from order denying motion to set aside and amend judgment which was also appealed from; In re Yoder, 199 Cal. 699, 702–703, 251 P. 205, appeal from order denying mo-

tion under C.C.P. 473 to set aside an order of adoption on the ground of fraud.

In this connection appellant also cites: Airline Transport Carriers, Inc., v. Batchelor, 102 Cal.App.2d 241, 227 P.2d 480. This was a case where a "clerk's default" was entered, and a default judgment subsequently filed. Defendant moved to set aside the default judgment, which motion was granted. Subsequently the court ordered defendant to show cause why judgment should not be entered against him as the "clerk's default" had not been set aside. Defendant's motion to correct the minute order was denied and judgment entered against him. This court held the action of the trial court to be error, the circumstances appearing to be such that all parties knew that defendant was seeking complete relief from default in the motion to set aside the default judgment which the trial court had granted. We cannot see the relevancy of this case to the instant motion to dismiss, or to the proposition advanced by appellant.

[5] In all of the above cases the general rule is clearly set out that an appeal does not lie from an order denying a motion to vacate a judgment or order, where the motion calls upon the court only to repeat or overrule the former ru'ing on the same facts. Such an appeal would only duplicate the review which could be had on appeal from the original order. The above cases, however, are all illustrative of one well-defined exception that an appeal will lie when "an appeal from the first order would be vain for lack of a record showing the rights of the aggrieved party." See 2 Cal. Jur. 164, sec. 30, et seq., and cases cited therein.

Appellant's remaining contention that the orders appealed from are appealable is simply that an appeal will lie when the order appealed from is on a motion under Code Civ.Proc. secs. 473 or 1916 to correct or impeach a judicial record, if the motion has been brought on grounds or tried with evidence not available in the record on appeal from the judgment or order. For this proposition she cites W. J. Somers Co. v. Smith, 45 Cal.App. 703, 705, 188 P. 311. In that case, as previously pointed out, an appeal was taken from the denial of a motion to set aside a previous order which itself could have been reviewed on appeal or by mandamus. No other authority is cited for this proposition advanced by appellant.

[6] It appears clear that if the original order is non-appealable, an order denying a motion to vacate or amend the order or an order denying a motion for new trial is also non-appealable, and that this rule governs the instant motion.

The petition for rehearing is accordingly denied.

104 Cal.App.2d 181

LOWENTHAL v. KUNZ et al.

Civ. 17856.

District Court of Appeal, Second District, Division 1, California.

May 15, 1951.

Rehearing Denied June 11, 1951.

Hearing Denied July 12, 1951.

Proceeding by Henry Lowenthal, administrator of the estate of Pauline Lowenthal, also known as Pauline M. Lowenthal, deceased, against Adele Kunz, and others, wherein plaintiff contended that he was vested with an undivided one-half interest in certain property because joint tenancy deed, executed by named defendant to herself and intestate, after intestate had conveyed, without consideration, one-half interest in the land to named defendant upon oral agreement to hold it in trust, was invalid. The Superior Court of Los Angeles County, Wilbur C. Curtis, J., entered judgment adverse to plaintiff and he appealed. The District Court of Appeal, Hanson, J., pro tem, held that named defendant was sole owner within statute providing that sole owner can create joint tenancy by a transfer to himself and others, and joint tenancy deed was valid.

Judgment affirmed.

1. Joint tenancy ⇐1

Under statute providing that a joint interest is one owned in equal shares, by

title created by single transfer from sole owner to himself and others, when expressly declared in transfer to be joint tenancy, the "joint interest" may be of a legal estate, an equitable estate, or any other type of estate recognized by law. Civ.Code, § 683.

See publication Words and Phrases, for other judicial constructions and definitions of "Joint Interest".

2. Joint tenancy ⇦1

Under statute providing that a joint interest is one owned in equal shares, by title created by single transfer from sole owner to himself and others, when expressly declared in transfer to be joint tenancy, owner of naked legal title or estate would be "sole owner", though beneficial owner's title would not be affected, since joint interest may be of a naked legal estate. Civ.Code, § 683.

See publication Words and Phrases, for other judicial constructions and definitions of "Sole Owner".

3. Joint tenancy ⇦1
Trusts ⇦61(3)

Where tenant in common conveyed her undivided one-half interest to her co-tenant, without consideration, but upon oral agreement of grantee to hold grantor's interest in trust, grantee was "sole owner" of legal title, and therefore, joint tenancy deed naming both parties as grantees with right of survivorship, executed and recorded at grantor's oral request, was valid, and terminated grantor's equitable right in the property. Civ.Code, § 683.

4. Frauds, statute of ⇦63(1)

A right of property which arises by an oral agreement may be released by an oral agreement, or its equivalent, as by an oral request to convey or release.

Paul J. Otto, Irvin C. Evans, Los Angeles, for appellant.

Harry S. Apter, Los Angeles, for respondents.

HANSON, Justice pro tem.

The question here presented is whether a joint tenancy deed executed by the record title holder to herself and another, as grantees, is invalid and ineffective merely because the title holder had originally acquired an undivided one-half interest in the property from her co-grantee, without consideration, upon an oral agreement to hold said interest for her in trust. The answer to the question depends upon the interpretation to be given to Civil Code, sec. 683. As a prelude to its consideration we state the facts.

The defendant Adele Kunz and plaintiff's intestate Pauline Lowenthal, while business partners, acquired in 1924, as tenants in common, the real property here involved by a grant deed which conveyed an undivided half interest therein to each. Until the death of Pauline the two continued to reside in the property. Meanwhile in 1932 Pauline by a grant deed conveyed her interest to Adele, without consideration, but upon the oral agreement of Adele to hold such interest in trust for Pauline. In 1943 Adele upon the request of Pauline executed a joint tenancy deed to the property in which she and Pauline were named as grantees. This deed was recorded in 1945. In 1948 Pauline died.

Plaintiff, as administrator of the estate of Pauline contended in the court below, and contends here as well, that the joint tenancy deed was invalid by virtue of the provisions of Civil Code, sec. 683, and accordingly that he is vested with an equitable undivided one-half interest in the property by virtue of the oral agreement made by Adele in 1932.

The language of Civil Code, sec. 683, so far as it is here material and applicable (with the language within the brackets supplied by us) reads as follows: "A joint interest is one owned by two or more persons in equal shares, by a title [legal, equitable or otherwise] created by a single * * * transfer, * * * from a *sole owner* to himself and others, * * * when expressly declared in the transfer to be a joint tenancy, * * *." (Italics supplied.)

The statute expressly provides that a joint tenancy interest to be owned by two or more persons in equal shares may be

created by a "transfer from a sole owner to himself and others". Was Adele Kunz, the grantor in the joint tenancy deed to herself and Pauline, a "sole owner" within the meaning of that phrase in the statute? Appellant contends she was not because at the time she executed the deed she held an undivided one-half interest in the property in trust for Pauline. Hence the argument runs she could not be the sole owner.

[1, 2] In interpreting the language "Sole owner" as found in the statute we need to keep in mind that a "joint interest" (i. e., a joint tenancy) may be of a legal estate, an equitable estate, or any other type of estate recognized by the law. 48 C.J.S., Joint Tenancy, § 3b, pp. 914–915; 33 C.J. 907; Edmonds v. Commissioner of Internal Revenue, 9 Cir., 90 F.2d 14 at page 16. Hence, it is clear that if there is only one owner of record of a legal estate or title, he is the sole owner thereof even if the ownership is only of the naked legal estate or title. For instance, in the ordinary conveyance of a fee to A, in trust for X, it is well established that A is the sole owner of the legal estate and that X is the sole owner of the beneficial or equitable estate. Under such circumstances, unless the deed under which A claims provides otherwise, it is plain that under the statute A may convey the legal title to himself and another as he is the sole owner of what he conveys, i. e., the legal title. Such a conveyance, however, would not affect X's beneficial or equitable estate or title and he could enforce his rights thereunder as against the grantees of A. By the same token X could transfer his beneficial or equitable estate under the statute to himself and another as he is the sole owner thereof. Nowhere in the statute do we find language restricting the words "sole owner" to "sole owner of the land" or "sole owner of the estate or title." Accordingly, "sole owner" as used in the statute refers to anything as to which there may be sole ownership. With this interpretation of the language of the statute we turn to apply it to the facts of the case.

[3, 4] Respondent Adele concedes that immediately before she executed the joint tenancy deed she held the legal title, subject to an oral trust in favor of Pauline of an undivided one-half interest in the property. The evidence discloses, and the trial court found, that Pauline requested her to execute and place of record a joint tenancy deed in which the two should be named as grantees with a right of survivorship. This oral request by Pauline when acted upon by Adele terminated the equitable right which Pauline had in the property as it was not created by a writing nor was it of record. This rule appears not only to be correct in principle but it accords with the great weight of authority which we think should be followed. See 3 Scott on Trusts, sec. 460, p. 2306; Rest., Trusts, secs. 441, comment b, and 460; cf. Carter v. Hopkins, 79 Cal. 82, 21 P. 549; Johnson v. Altman, 96 Cal.App.2d 467, 215 P.2d 768; Nicolds v. Storch, 67 Cal.App.2d 8, 153 P. 2d 561; Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 122 N.E. 378; Deadman v. Yantis, 230 Ill. 243, 82 N.E. 592. A right in property which arises by an oral agreement may be released by an oral agreement, or its equivalent, as by an oral request to convey or release. (Cases and texts, supra.) If Adele had executed and recorded the joint tenancy deed without the request or knowledge of Pauline we would be presented with a situation which is not here for decision. Upon the facts of the case it seems plain that the decision below was in all respects correct.

Judgment affirmed.

DORAN, Acting P. J., and DRAPEAU, J., concur.

104 Cal.App.2d 100

RICE v. BROWN et al.

Civ. 17848.

District Court of Appeal, Second District, Division 3, California.

May 9, 1951.

Clyde G. Rice brought action against Jack A. Brown and William A. Brown for an accounting and for dissolution of an alleged partnership. The Superior Court of Los Angeles County, Carl A. Stutsman, J., rendered a judgment for the plaintiff, and defendants appealed. The District Court of Appeal, Bartlett, J., Pro Tem., held that since referee made findings not based on evidence regularly admitted at hearing, and since conduct of referee deprived defendants of their day in court, judgment based on report was required to be reversed.

Judgment reversed.

1. Reference ⇐61

A referee can not make decisions based on information or matters which would be inadmissible before court. Code Civ.Proc. § 2103.

2. Reference ⇐61, 63

Order of reference which empowered referee to examine parties as well as any other witnesses and reserve to court power to make other and further orders with respect to reference and to direct issue of subpoenas and subpoenas duces tecum to be used in furtherance of duties to be performed by referee, contemplated quasi judicial proceedings, that referee would hold hearings, that any testimony given before referee would be under oath, and that any document received in evidence would be identified on oath of witnesses. Code Civ.Proc. §§ 639, 2103.

3. Appeal and error ⇐1044

Where referee made findings not based on evidence regularly admitted at hearing, and conduct of referee deprived defendants of their day in court on a most important phase of the trial, judgment entered against defendants entirely on basis of referee's report would be reversed. Code Civ.Proc. §§ 639, 2103.

4. Account stated ⇐19(3)

In action for accounting, evidence sustained finding of trial court that there was no account stated between the parties.

5. Appeal and error ⇐843(2)

Where both plaintiff and defendants were in accord that neither a partnership nor a joint venture was shown by the evidence, and determination, if any, of trial court that joint venture existed was error, contention on appeal that finding of trial court that there was a joint enterprise required as a matter of law an additional finding that plaintiff was a duly licensed contractor, was moot.

Harry William Elliott, Los Angeles, Rodd Kelsey, Beverly Hills, for appellants.

Elmer I. Moody, Arthur L. Ball and Chester C. Kempley, all of Los Angeles, for respondent.

BARTLETT, Justice pro tem.

This is an appeal from a judgment rendered in favor of plaintiff and respondent for $12,000 in an action for an accounting and for a dissolution of an alleged partnership.

Respondent's first and second causes of action allege the existence of a partnership between respondent and appellants. His third cause of action alleged that appellants and respondent entered into a joint venture. The fourth cause of action in the complaint alleged facts which would indicate that the relationship between the parties was that of employer and employee. In their answer the appellants denied that any partnership existed, denied that there was any joint venture and alleged affirmatively that the relationship between appellants and respondent was solely that of employer and employee.

It developed that the original arrangement entered into on March 16, 1944, between respondent and appellant Jack A. Brown was between appellant and Jack A. Brown but that later, on January 26, 1946, the defendant William A. Brown came into the enterprise. The whole arrangement

between these parties came to end on August 1, 1946.

During the course of the trial the court decided that an order of reference should be made and that the referee should find sums which would represent one-half of the profits of the original enterprise received subsequent to January 1, 1946, on plastering contracts entered into prior to August 1, 1946, and in which respondent William A. Brown did not participate; also one-third of the profits received subsequent to January 1, 1946, on plastering contracts entered into prior to August 1, 1946, and in which appellant William A. Brown was entitled to participate. The order of reference read in part as follows: "That Ralph E. Sperry, a public accountant in the County of Los Angeles be, and he is hereby, appointed referee to take and state an account to enable this court to enter final judgment in the correct amounts and the parties to this action are hereby required to produce before said referee all books, papers and writings in their possession and control relating to their joint venture and transactions between themselves and said referee is hereby empowered to examine any parties to this action as well as other witnesses and to employ other accountants and bookkeepers to further and facilitate said accounting and that he report the result of said accounting to this court.

"That the Court reserves the right and jurisdiction to make such other and further orders with respect to said accounting and a judgment based thereon and to direct the issuance of subpoenas and subpoenas *duces tecum* to be used in furtherance of the duties to be performed by the referee and to approve or modify the report of said referee and to enter final judgment accordingly upon motion of either party."

Thereafter the referee filed a document consisting of 45 pages termed "Referee's Report on Accounting." Appellants objected to the report on the same ground raised here and moved to strike it. The objections were overruled and the motion denied and, entirely on the basis of this report, the court found appellants were indebted to respondent in the sum of $12,000 and entered judgment for that amount.

Appellants contend that this judgment should be reversed for the reason that by the conduct of the referee and the nature of the report rendered by him, there was no legal evidence before the court to support the amount of the judgment; that the report itself was illegal and void and that the respondent is being deprived of his property without due process of law.

[1] This was a compulsory reference by the court on its own motion under the provisions of section 639 of the Code of Civil Procedure. It is to be observed at the outset that no trial or hearing of any kind was had before the referee. No witnesses were sworn, no documents were identified upon the oath of any witness nor was any opportunity given to examine any witness or to introduce evidence before the referee. The referee in this case was appointed by the court for the decision of particular matters inconvenient to be heard by the judge and such a reference is a quasi judicial proceeding. (22 Cal.Jur. 685.) It would seem axiomatic that a referee can not make decisions based upon information or matters which would be inadmissible before court. An examination of this report of the referee is of interest. The beginning of the report reads: "Pursuant to Interlocutory Judgment and Order of Reference signed June 7, 1949, by Carl A. Stutsman, Judge, the books and records of Jack A. Brown et al. have been carefully examined, taking into consideration the system of internal control and the accounting procedures of the business. The accounting records and other supporting evidence were examined by methods and to the extent deemed appropriate but the examination did not constitute a detailed audit of all transactions." What books and what records of Jack A. Brown, et al., were examined are not identified and there is no way of telling what the referee means as to the other supporting evidence which he examined. It is stated, after setting forth certain jobs referred to in Schedules A, B, C, D and E attached to the report, that: "In addition to the above jobs, it was determined from a study of Account 194 entitled 'Profit on Completed Jobs,' which was maintained until November 30, 1946 and

which is analyzed as *Schedule F*, that Clyde G. Rice was entitled to share in the gross profit from other jobs not specifically analyzed to the extent of $24,583.66 (See Schedule I)." The report further states: "It is not clear as to whether it was agreed that William A. Brown have a one third interest in business arising after the date of the agreement *or* that William A. Brown have a one third interest in business completed and gross profit or loss ascertained after the date of the agreement. Attorneys for the plaintiff state that there was very little testimony on this exact point. The defendants particularly urged that William A. Brown terminated his salary basis of employment as at January 31, 1946." Instead of taking any evidence upon this subject it is evident that the referee merely contented himself with ex parte conversations with counsel and after that made this statement: "After consideration, it is determined that the plaintiff shall share in profits determined and realized on and after February 1, 1946 only to the extent of 33⅓ per cent." The report further states: "A number of the jobs examined involved *change orders* and/or *extras* which were performed after July 31, 1946. It was found in certain contracts that provision was made in the original contracts as to the basis of payment to the contractor in the case of *extra* work. After due consideration, it is the view of the Referee that it is normal and consistent with prevalent practice to assume that there will be changes or extras on many jobs for which contracts are entered into and that such changes or extras constitute a reasonable expectancy and are inherently a part of the original contract." This is, of course, quite important for the reason that it is evident that other contracts for extras were entered into after July 31, 1946. The evidence concerning these other contracts is nowhere to be found and, in our opinion, it would require evidence for a court to determine whether or not the prevalent practice is as set forth in the referee's report. Surely it cannot be determined by the opinion of the referee and it would depend in great part on the nature of the extras as to whether or not they would be inherently a part of the original contract. That this matter is important is shown by the reference to collections made as late as July 16th and 18th of 1947 based on a cost plus arrangement. In that connection the referee sets forth a letter dated October 18, 1946, which stated in part as follows: "We have been authorized by the Architects on the C. E. Toberman Building to proceed with considerable additional work on the interior of this building. Your sub-contract on this job has been materially affected by this change and you are requested to contact our Supt., Mr. E. Hauser, or this office direct regarding the work involved that will be extra to your present contract." This letter was addressed to Jack A. Brown by R. J. Daum Construction Company and in the absence of any explanatory testimony would appear to refer to new work authorized after the accounting date. As to this the referee says: "Since the Original contract was signed on or about January 15, 1946 it would have been very impractical for this extra work to have been performed by any other contractor and it is therefore ruled that the 'cost plus' extra portion of the job is an inherent portion of the original job." In the absence of any testimony on the subject it would be doubtful if the court itself would have any right to make such a ruling. The same situation existed in regard to another job on the Wilshire Medical Building. As the gross profit on this job including extras was $17,139.98, it was a material matter, especially as the referee states: "It is ruled that the plaintiff is entitled to share in the entire profit from this job." From Schedule A attached to the report it will be noted that a portion of the report was taken from figures from an accounting by one Lowrie and one Bontems which will be referred to later. Document I attached to the report of the referee has attached to it this statement by the referee: "It appears that this statement was prepared by Mrs. H. Gilchrist." Under the heading of "Referee's Comments" we find the following in regard to Document III: "This document consists of a Balance Sheet as at July 31, 1946, a Profit and Loss Statement for seven months ending July 31, 1946 and a Schedule of

Jobs in Progress as at July 31, 1946 and was prepared by James W. Bontems and Co., Certified Public Accountants, as a basis for determining the final accounting with Clyde G. Rice. It is to be noted that the last two pages of the document appear as Defendant's Exhibit H and again as Defendant's Exhibit I." Document IV discloses the following under "Referee's Comments": "Presented herewith is a copy of two pages of work papers which, it is understood, were prepared by Irene Lowrie who was a witness in the case and was formerly employed by the Jack A. Brown organization. These two pages show how the sum of $11,380.89 was determined as being due to Clyde G. Rice." In response to the complaint of the appellants that "The referee further, as evidence by the last mentioned footnotes, imported opinion evidence contained in the accounts prepared by Lowry and Bontems, who were never called as witnesses and whose statements of account were not prepared under the supervision of the referee or by methods and procedures known to the referee," the respondent replies that these very documents were introduced at the trial of the case as appellants' "Exhibits H and I." This is only partially correct as an examination of these exhibits discloses and, furthermore, it does not answer the gist of appellants' argument.

[2, 3] It is stated that the court's order appointing the referee was ambiguous and uncertain. However, the order of reference which empowered the referee to examine the parties as well as any other witnesses and reserve to the court the power to make other and further orders with respect to the reference and to direct the issue of subpoenas and subpoenas *duces tecum* to be used in furtherance of the duties to be performed by the referee certainly contemplated quasi judicial proceedings, that the referee would hold hearings, that any testimony given before him would be under oath and that any document received in evidence would be identified upon the oath of witnesses. Section 2103 of the Code of Civil Procedure provides that the law respecting the evidence on a trial before a jury is equally applicable on a trial before a referee. The conduct of the referee in this proceeding deprived the appellants of their day in court on a most important phase of the trial, the amount for which judgment was returned against him. The rule is set forth in In re McNamee, 131 Cal.App. 30 at page 31, 20 P.2d 722, at page 722: "Respondent virtually concedes this but contends that 'the matter was referred to the Referee to investigate all the facts and to report, as provided under section 18 of the Land Registration Act; and it has been held by this court that such proceeding is proper even under sections 638 and 639 of the Code of Civil Procedure.' In re Application of Reed, 204 Cal. 119, 266 P. 948. We find nothing in this act, or section of the Code of Civil Procedure referred to, vesting a referee with power to make findings not based on evidence regularly admitted at the hearing. It certainly cannot be maintained that a referee can be clothed with power not possessed by the court appointing him. 'We have repeatedly held, that a trial before a referee should be conducted in the same manner as though it was had before a court.' Goodrich & Myers v. Mayor and Common Council of Marysville, 5 Cal. 430, 431."

[4] Appellants contend that the court erred in finding against their contention that an account was stated between the parties. Suffice it to say that there was sufficient evidence in the record to sustain the finding of the court.

[5] Appellant also contends that "The finding of the court that there was a joint enterprise between plaintiff and defendants required as a matter of law an additional finding that plaintiff was a duly licensed contractor." An examination of the findings of fact and conclusions of law disclosed no direct finding of either a partnership or a joint venture. The only allusion to a joint venture is found by way of recital in the conclusions of law: "That the contract of joint adventure entered into on the 16th day of March, 1944 as found in paragraph I of the Findings of Fact and as amended as found in paragraph III of the Findings of Fact was a valid subsisting contract until terminated by defendant Jack

A. Brown." The findings referred to in this quoted paragraph would raise an inference that a partnership existed but not a joint venture. However, both parties seemed to be in accord that there was neither a partnership nor a joint venture shown by the evidence but a contract of employment as alleged in respondent's fourth cause of action and in the defendants' answer. The respondent correctly states: "Certainly the evidence does not disclose respondent had to perform or performed any duties of any kind in connection with the actual plastering work. Certainly the evidence shows that he did not make any bids and did not agree to undertake or offer to undertake, or even purport to have the capacity to undertake or to submit bids on any plastering contracts. According to the testimony of appellant Jack Brown, which has been previously alluded to with references, respondent did not submit any bids. The only thing respondent did in connection with bids, according to such testimony, was to convey to the general contractor the cost of plastering on the job as fixed by the appellant Jack Brown. In so doing the respondent was simply acting as a means of communication. To summarize the respondent's position: He agreed to act as salesman and an estimator of the quantity of plastering of the different characters called for by plans and specifications. Furthermore, according to the testimony, that is all that he ever did do." Appellants state: "Respondent did not at any time claim any vested right or interest in either specific property or what might be termed a partnership interest. From this it is clear that the essential characteristics of a partnership or joint venture were not present. * * * There can be no question from the evidence but that Respondent neither had nor claimed to have or be entitled to these or any one of these interests of a partner, either during the relationship or upon or after its termination. It may be concluded from the foregoing and from the evidence that Respondent's right to participate in profits arose from the fact that a percentage of such net profits was the *measure* of his salary or wage and not an interest arising from any relationship or partnership or coadventurer." An examination of the transcript discloses that both appellants and respondent are correct in their statement as to the testimony before the court and such being the record if the recital in the conclusions of law as to a joint venture can be construed to be a holding that a joint venture existed, then the court was in error in such a determination. If, on a retrial of this action, the evidence developed shows that either a partnership or a joint venture did as a matter of fact exist, the question appellants raise would be of importance, but in the present state of the record, for the reasons referred to, the question is moot.

The judgment is reversed.

SHINN, P. J., and VALLÉE, J., concur.

104 Cal.App.2d 111

HAMILTON v. HAMILTON.

Civ. 14634.

District Court of Appeal, First District, Division 2, California.

May 10, 1951.

Action by Geraldine A. Hamilton against John H. Hamilton for divorce. Plaintiff was awarded interlocutory decree of divorce and was given legal and physical custody of minor daughter. Thereafter, on defendant's affidavit, the Superior Court in and for the City and County of San Francisco, Harry J. Neubarth, J., entered order modifying the divorce decree by awarding custody of daughter to defendant, and plaintiff appealed. The District Court of Appeal, Schottky, J., pro tem., held that awarding custody of daughter to defendant was not an abuse of discretion.

Order affirmed.

1. Appeal and error ⇐931(5)

An appellate tribunal must ordinarily accept all evidence favorable to respondent as true, and all conflicts must be resolved in favor of respondent.

2. Divorce ⇐296

Trial court in divorce action has very broad discretion in determining custody and control of minor children, and clear abuse of discretion must appear before appellate court can interfere with determination of trial court. Civ.Code, § 138.

3. Divorce ⇐298(4)

Question in divorce action as to whether a parent is fit or proper person to have custody of minor child refers to parent's fitness at time of hearing. Civ.Code, § 138.

4. Divorce ⇐298(4)

In determining fitness of a parent to have custody of child, in divorce action, trial court should consider question of fitness as it relates to welfare of child. Civ. Code, § 138.

5. Divorce ⇐303(1)

Custody of child of fit and proper parent may not be awarded to stranger, nor may fit parent be given bare legal control without actual physical custody, but where husband announced intention to permit minor child to remain for present in doctor's care where wife had herself placed child, changing custody of child, both legal and physical, from wife to husband was not an award of physical custody to a stranger. Civ.Code, § 138.

6. Divorce ⇐298(6)

Under statute providing that in divorce action, other things being equal, child of tender years should be given to mother, mother had no absolute right to custody of child of tender years. Civ.Code, § 138 (2).

7. Divorce ⇐298(6)

Question of whether custody of a child of tender years should be given to mother, under statute providing that in divorce actions, if other things are equal, custody of child should be given to mother, is to be determined solely from standpoint of child, and feelings and desires of contesting parties are not to be considered except in so far as they affect the best interests of the child. Civ.Code, § 138(2).

8. Divorce ⇐296, 312.6(6)

An application for modification of an award of custody of minor child in divorce action is addressed to sound legal discretion of trial court, and its discretion will not be disturbed unless record presents clear case of abuse of discretion. Civ. Code, § 138.

9. Divorce ⇐303(3)

In divorce action, findings that husband was fit and proper person to have custody of minor child, that wife was neither fit nor proper person at that time to have custody, and that best interest and well-being of child would be served by award to husband, and order changing custody of child from wife to husband, were supported by evidence. Civ.Code, § 138.

10. Divorce ⇐303(3)

In divorce action, order changing custody of minor child from wife to husband was not an abuse of discretion. Civ.Code, § 138.

Vincent W. Hallinan, San Francisco, Richard M. Siegel, San Francisco, of counsel, for appellant.

Young, Rabinowitz & Chouteau, San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

This is an appeal from an order modifying an interlocutory decree of divorce by changing the custody of a minor daughter, Michelle, 9 years old, from the mother to the father.

Appellant mother was awarded an interlocutory from respondent father in 1943, which decree approved and made a part of the decree the property settlement previously reached between the parties. The court made no finding as to the fitness of either parent to have the custody of the child, then 2½ years old, and did not, in the decree proper, make an award of the custody of the child. The property settlement agreement, however, gave appellant mother legal and physical custody of the child and required respondent father to pay $75 for the support of the child and also required him to pay $200 per month to appellant for 48 months or until her remarriage. In 1946 on motion of appellant

the amount to be paid by respondent for the support of the child was raised to $100 per month.

In September 1949 respondent father filed an affidavit alleging that in December 1948 appellant mother had delivered said minor child to Dr. Margaret Chung, that appellant was not a fit and proper person to have custody of said child, that she threatened to take said child out of the State of California and praying that the custody of the child be awarded to him. An order to show cause was issued and pending the hearing thereof appellant was restrained from taking the child outside of the State of California and both parties were restrained from taking the child from the physical possession of Dr. Chung. Following a hearing which occupied a portion of October 26th, October 27th and November 28th, the court on January 7, 1950, made the order appealed from, awarding the custody of said minor child to respondent, in which order the court found "that defendant (respondent) is a fit and proper person to have the custody of said child, Michelle Hamilton, and that plaintiff (appellant) is neither a fit or proper person at the present time to have the custody of said child and further that the said plaintiff is unable to make any adequate provision therefor; that it is to the best interest and well-being of said child that custody of said child be awarded to the defendant."

Appellant bases her appeal upon two contentions: 1. The finding of fact that she is an unfit mother is unsupported by the evidence. 2. The order depriving her of custody of her minor child is an abuse of discretion on the part of the trial court.

[1] Before discussing these contentions of appellant we shall summarize briefly the evidence as disclosed by the record, bearing in mind the familiar rule governing appellate tribunals that all of the evidence favorable to the respondent must ordinarily be accepted as true, and that all conflicts must be resolved in favor of the respondent. As hereinbefore stated the minor child was in the custody of appellant after the entry of the interlocutory decree in 1943. During most of the time the child was boarded out. In the early part of 1948 the child was brought to San Francisco to live with appellant in a small apartment on Post Street. In December 1948, appellant told Dr. Margaret Chung, a well-known American born physician and surgeon, that an investigator for the juvenile authorities had told her that she would either have to find a home for the child or the child would become a ward of the Juvenile Court. Dr. Chung, who was the godmother of Michelle, and was the surgeon who had delivered her at birth, and who had seen her frequently from the time of her birth, told appellant she would be happy to take care of the child without any cost to appellant and for appellant to let the child come and stay with her. Appellant agreed to this and on December 25, 1948, Dr. Chung went to appellant's apartment and got Michelle. The evidence showed that Michelle had had a pancreatic deficiency from birth which required constant medical care, medication and a special diet. When Dr. Chung received the child from appellant in December 1948, Michelle, then about 8 years old, weighed 32 pounds and was in the first grade. She was pallid, nervous and irritable. While living with Dr. Chung, Michelle was given a special diet and tutored in her school work so that at the time of the hearing, some 10 months after coming to live with the Doctor, she weighed 50 pounds and was in the fourth grade. In September 1949, appellant planned to remove the child from California and take her to Florida and so informed Michelle and immediately the child began to lose weight and cry frequently.

Appellant testified that she was living in one room in a rooming house and eating her meals outside; that she was not employed at the time that she testified (November 28th) but that she had worked a week or a week and a half as a cigar and cigarette clerk some six weeks previously. She testified to no other employment. She stated that she planned to take Michelle to Florida and to live with her father there; that her father was a widower who was an officer in the Miami Police Department; that he lived alone in a two room apart-

ment but would get a bigger place as soon as she and Michelle arrived there; that she expected to obtain employment when she got to Miami. Respondent testified that appellant's father was an elderly man, in poor health and had a heart condition.

Respondent is an airplane pilot who is in California about one-half of the time. He is a bachelor earning about $1000 per month and testified that if he were awarded the custody of Michelle he intended to have her continue to live with Dr. Chung. Additional facts will be hereinafter set forth.

Notwithstanding the earnest and able argument of counsel for appellant we are convinced that the findings of the court find ample support in the record and that the court did not abuse its discretion in making its order changing the custody of the child from the mother to the father.

The authority of the court to change or modify its decree in divorce cases, so far as the custody and maintenance of the minor children are concerned, is found in section 138 of the Civil Code, wherein it is provided: "In actions for divorce the court may, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody, care, education, maintenance and support of such minor children as may seem necessary or proper, and may at any time modify or vacate the same."

[2] Appellant concedes, as indeed she must, that the trial court has a very broad discretion in determining the custody and control of minor children in a divorce action, and to modify such order upon a proper showing, and that a clear abuse of discretion must appear before this court can interfere with the determination of the trial court.

[3] As was said in Prouty v. Prouty, 16 Cal.2d 190, at page 194, 105 P.2d 295, at page 297: "The question as to whether a parent is a fit or proper person to have the custody of a minor child refers, however, to his or her fitness at the time of the hearing".

[4] In determining the fitness of a parent to have the custody of a child a court should consider the question of fitness as it relates to the welfare of the child. The court in the instant case found that respondent father was a fit and proper person to have the custody of the child, and that appellant mother was neither a fit or proper person *at the present time* (italics ours) to have the custody of said child, and the court found further that appellant was unable to make any adequate provision therefor and that it is to the best interest and well-being of said child that her custody be awarded to respondent.

It is clear from the record that there was a change in the circumstances of appellant, respondent and the child since the entry of the interlocutory decree in 1943. Appellant had found it necessary to board the child during most of the time, and after she brought the child to San Francisco early in 1948 to live with her in her apartment on Post Street, it is fairly inferable from the record that she was not able to care for the child properly for the record shows that she called Dr. Chung and told Dr. Chung that the juvenile authorities had informed her she would have to find a home for the child. She was quite willing to give the child over to Dr. Chung's care in December, 1948, and the record shows that in the 10 months between the time appellant turned the child over to Dr. Chung's care and the time of the hearing, the child gained 12 pounds in weight and advanced from the 1st grade in school to the 4th. After appellant in September 1948 decided that she wanted to take the child from Dr. Chung's care and take her to Florida the matter was brought before the court upon the application of respondent for a change of custody. It is apparent from the record that the court felt that appellant was not in a condition or a position to properly care for a child in Michelle's physical condition, for when appellant was on the stand the court said: "I can take a look at this young lady and from my observation right now tell she is not in any physical condition to take care of this baby." The court was fully

justified in concluding that the child needed the type of care that she was receiving from Dr. Chung and that if the custody of the child were awarded to respondent she would continue to receive that care and treatment, whereas if appellant continued to have custody of the child she would carry out her announced intention to take the child to Florida to live with appellant and her father, a widower, with the probable result that the health and welfare of the child would suffer detriment.

Appellant relies strongly upon the case of Roche v. Roche, 25 Cal.2d 141, 152 P.2d 999, 1000, in which divorced parents were given joint "legal" custody of their child, physical custody of whom was given to the child's grandparents by the trial court. There was a finding that the mother was a fit and proper person to have custody of the child but no finding as to the fitness of the father. The order was reversed on appeal and the trial court directed to make a finding as to the father's fitness, and to make an appropriate order in the light of the circumstances disclosed, the Supreme Court following the rule laid down in Stever v. Stever, 6 Cal.2d 166, 56 P.2d 1229, that if either parent is a fit and proper person to have the custody of a child, such custody may not be awarded to a stranger. The court went on to state that this "policy * * * may not be thwarted by the artifice of giving a fit parent bare legal control while denying actual physical care and custody."

[5] As we view the matter the order in the instant case is easily distinguishable from the order in Roche v. Roche. Here the custody of the child, both legal and physical was awarded to respondent, her father. The mere fact that it was respondent's announced intention to permit the child to remain for the present in Dr. Chung's care, where appellant herself placed her in December 1948, and where her condition showed such great improvement, does make the instant case one in which physical custody is awarded to a stranger.

[6] Nor do we agree with appellant that the order violates the policy of the law in favor of maternal custody for a minor female child of tender years. Appellant cites subd. (2) of section 138 which provides that "other things being equal", if a child is of tender years, it should be given to the mother. The following language from Phillips v. Phillips, 48 Cal.App.2d 404, at page 407, 119 P.2d 736, at page 738, is applicable here: "This section does not give the mother the *absolute right* to the custody of a child of tender years. The qualifying clause, 'but other things being equal', still leaves a large measure of discretion with the trial court. If the court finds that other things are *not* equal, as it evidently did here, and there is any substantial evidence to support such a finding, our inquiry is at an end."

[7,8] And as stated in Munson v. Munson, 27 Cal.2d 659, at page 666, 166 P.2d 268, at page 272: "Plaintiff relies on the proposition that, as between parents adversely claiming custody, 'other things being equal, if the child is of tender years it should be given to the mother.' (Civ. Code, sec. 138, which refers to actions for divorce; the proposition is equally applicable here.) The evidence above recited is clearly sufficient to support the determination of the trial court that 'other things' are not equal in this case. 'In determining whether other things are equal within the meaning of the above Code section, the trial court is necessarily allowed a wide latitude in the exercise of its discretion. In the first instance it is for the trial court to determine, after considering all the evidence, how the best interests of the child will be preserved. The question is to be determined solely from the standpoint of the child, and the feelings and desires of the contesting parties are not to be considered, except in so far as they affect the best interests of the child.' (Taber v. Taber (1930), 209 Cal. 755, 756, 290 P. 36, 37.) It is settled that 'An application for a modification of an award of custody is addressed to the sound legal discretion of the trial court, and its discretion will not be disturbed on appeal unless the record presents a clear case of an abuse of that discre-

tion. (Citations.)' (Foster v. Foster (1937), 8 Cal.2d 719, 730, 68 P.2d 719, 724.)"

[9, 10] No other points raised require discussion. We are convinced that the order appealed from awarding the custody of the minor child, Michelle, to respondent is fully supported by the evidence and the law, and that for an appellate court to hold in this case that the trial court abused its discretion would be an unwarranted usurpation of the function of the trial court.

The order is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

104 Cal.App.2d 109

EVARTS et al. v. JONES.

Civ. 17909.

District Court of Appeal, Second District, Division 3, California.

May 9, 1951.

Eugene F. Evarts and others sued C. J. Jones for specific performance of a deposit receipt agreement providing for execution of a contract for sale and purchase of real estate. From a judgment of the Superior Court of Los Angeles County, Percy Hight, Judge assigned, dismissing the action for plaintiff's failure to amend their amended complaint after the court sustained a demurrer thereto with leave to amend, plaintiffs appealed. The District Court of Appeal, Bartlett, J., pro tem, held that the amended complaint was demurrable for misjoinder of causes of action, uncertainty, ambiguity, and unintelligibility.

Judgment affirmed.

1. Appeal and error ⇐854(3)

Where plaintiffs declined to amend their amended complaint after sustaining of demurrer thereto with leave to amend, judgment dismissing action must be affirmed if any grounds of demurrer were good.

2. Pleading ⇐192(2), 193(6)

An amended complaint, praying specific performance of memorandum deposit receipt agreement providing for execution of contract for sale and purchase of realty, was demurrable for misjoinder of causes of action, uncertainty, ambiguity and unintelligibility, where memorandum agreement was superseded by execution of sale contract and not alleged to be based on adequate consideration or to be fair and reasonable, and complaint was uncertain as to acts by which defendants were alleged to have attempted to prevent performance of agreement by plaintiffs and whether both plaintiffs and defendant signed escrow instructions set up as exhibit.

R. C. W. Friday, Los Angeles, for appellants.

John G. Clock, Long Beach, for respondent.

BARTLETT, Justice pro tem.

This is an appeal from a judgment of dismissal after the sustaining of a demurrer to an amended complaint with leave to amend, but no amendment filed.

The amended complaint was filed by appellants on September 27, 1948. The demurrer of respondent was filed on October 28, 1948, but was not heard until June 27, 1949, at which time the demurrer was sustained and appellants were granted ten days within which to amend their complaint. Appellants not having filed any amendment to their pleading, on February 27, 1950, a hearing, at which both appellants and respondent were represented, was had on a motion of respondent for a dismissal of the action. This motion was granted.

[1] Respondent demurred generally and upon the ground that the amended complaint was ambiguous, unintelligible and uncertain and also that there was a misjoinder of causes of action. Appellants having been given leave to amend and having declined to avail themselves of the

opportunity, if any of the grounds of the demurrer were good, the judgment of dismissal must be affirmed. Metzenbaum v. Metzenbaum, 86 Cal.App.2d 750, 195 P.2d 492; Hendricks v. Osman, 72 Cal.App.2d 465, 164 P.2d 545.

[2] The amended complaint purports to be one for specific performance. It is long, it states what was told to plaintiffs not only by defendant but by a third person, it attaches as exhibits letters from a bank, it contains much lengthy argument, it sets forth quotations from text books, code sections and court decisions, but it does not state a cause of action. The pleading sets forth a deposit receipt agreement dated February 17, 1944, which by its terms provides that an agreement for sale and purchase of real estate should thereafter be executed and if not so executed that the $50 paid should be held by the seller as liquidated damages. This memorandum agreement of February 17, 1944, was superseded on August 1, 1944, by the execution of the agreement for purchase and sale of real estate referred to in the agreement of February 17th. However, the agreement that appellants ask be specifically enforced is not this latter one, but the one of February 17, 1944. There is no allegation in the amended complaint that this agreement of February 17, 1944, the one which they seek specifically to enforce, was based upon an adequate consideration or that as to the defendant it was fair and reasonable. Appellants allege: "That, the Plaintiffs have done and have offered to do all necessary acts required of them by said agreements," but in later allegations negative this by showing instances in which they did not perform. If in this record they are attempting to allege prevention of performance by acts of the respondent, the complaint is most uncertain as to what these acts were. Escrow instructions are set up as an exhibit. Apparently one appellant signed these instructions but not the other. It is uncertain in this respect and it is impossible to determine from the complaint whether the respondent ever signed these instructions at all. The uncertainties in the amended complaint are too numerous to enumerate here. The entire document is thoroughly unintelligible. In fact it is that type of pleading which the court so aptly described in Craig v. City of Los Angeles, 44 Cal.App.2d 71, at page 73, 111 P.2d 977, at page 978: "The complaint is framed in such a disjointed and incoherent manner that the only course open to respondents was that of interposing a demurrer raising the questions of misjoinder of causes of action, uncertainty, ambiguity and unintelligibility."

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

104 Cal.App.2d 126

BUTLER et al. v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 14550.

District Court of Appeal, First District, Division 1, California.

May 14, 1951.

Rehearing Denied June 13, 1951.

Hearing Denied July 12, 1951.

Action by James Butler and others against the City and County of San Francisco, a municipal corporation, and others to secure a peremptory writ of mandate requiring defendants to determine and forthwith pay plaintiffs the differential between the amounts allegedly due to plaintiffs and the amounts paid them during the fiscal year 1948–1949. The Superior Court in and for the City and County of San Francisco, Herbert C. Kaufman, J., entered a judgment for plaintiffs and defendants appealed. The District Court of Appeal, Fred B. Wood, J., held that under the charter provisions of the City of San Francisco, the board of supervisors when amending its annual appropriation ordinance and annual salary ordinance on or before July 25, in a year, was not required to fix the compensation of the members of certain craft groups at rate established by such group by collective bargaining agreement executed after the first of July in that year.

Judgment reversed.

1. Appeal and error ⇐123

A minute order of the trial court which showed upon its face that it was a mere preliminary entry authorizing a subsequent judgment was not appealable. Rules on Appeal, rule 2(b) (2).

2. Mandamus ⇐187(2)

A writ of mandate is not appealable.

3. Evidence ⇐83(1)

The law presumes that public officers will perform their duties faithfully and punctually, and charter provisions must be interpreted in light of that presumption.

4. Master and servant ⇐69(7)

Under charter provision that civil service commission should certify prevailing wage rate in certain crafts as of July 1 and that board of supervisors should amend the annual appropriation not later than the 25th day of July in each year to include provisions necessary for paying of rates of compensation, where a wage rate was established by collective bargaining as to a particular group after July 1, but prior to the adoption of amendatory ordinances it was not the duty of board of supervisors to fix compensation of members of such group at rates established after July 1. St.1931, p. 3020, § 70; St.1940, 1st Ex.Sess., p. 195, § 71; St.1947, p. 3266, §§ 151.1, 151.3; St. 1948, pp. 193, 195, §§ 69, 72; St.1949, 1st Ex.Sess., p. 46, §§ 151, 151.4; St.1950, 3rd Ex.Sess., c. 10.

Dion R. Holm, City Atty., Norman Sanford Wolff, Deputy City Atty., for appellants.

Milton Marks, Jr., San Francisco, for respondent.

FRED B. WOOD, Justice.

In an action brought by sheet metal workers, who were in the employ of the City and County of San Francisco, against the city and county, the members of its board of supervisors, and the members and secretary of its civil service commission, the superior court rendered judgment October 25, 1949, in which it decreed: (1) That plaintiffs were entitled to receive for their services compensation at the rate of $17 per day from July 1 to December 31, 1948, and at the rate of $18 per day from January 1 to June 30, 1949; (2) that it is the duty of defendants to establish said rates of pay and do all things necessary for the payment of said rates to plaintiffs; (3) that the city and county is indebted to plaintiffs for services rendered, computed at said rates, less the sums paid them, during said periods; and (4) that a peremptory writ of mandate issue requiring defendants to determine and forthwith pay plaintiffs the differential between the amounts payable to plaintiffs at said rates and the amounts paid them during the fiscal year 1948–1949. Plaintiffs had been paid during said year at the rate of $16 per day.

[1, 2] Defendants have appealed from that judgment; also, from the writ of mandate issued pursuant to the judgment; from a minute order of August 15, 1949, which directed judgment for plaintiffs and instructed plaintiffs' counsel to prepare findings and judgment; and from "any and all other judgments in this action" made in favor of plaintiffs and against defendants. The minute order is not appealable because it showed upon its face that it was a mere preliminary entry authorizing the subsequent judgment. Kindig v. Palos Verdes Homes Ass'n, 33 Cal.App.2d 349, 354–355, 91 P.2d 645; see, also, Rule 2(b) (2), Rules on Appeal, and Pessarra v. Pessarra, 80 Cal. App.2d 965, 183 P.2d 279. Nor is the writ of mandate appealable. Kindig v. Palos Verdes Homes Ass'n, supra, 33 Cal.App. 2d at page 355, 91 P.2d 645. The appeals from the minute order and from the writ should be dismissed. The purported appeal from "any and all other judgments in this action" may be disregarded. The record discloses no appealable judgment or order other than the judgment of October 25, 1949.

The correctness or incorrectness of the judgment turns upon the interpretation properly to be placed upon section 151.3 of the San Francisco Charter. The basic feature of that section is a provision to the effect that whenever a group or craft establishes a rate of pay for that group or craft through a collective bargaining agreement with employers and the rate is recognized and paid throughout the industry employing

such group or craft in San Francisco, the same rate shall be paid members of that group or craft engaged in the city and county service. Other provisions of the section establish a procedure for the ascertainment and fixing of such rates for city and county employees. Section 151.3 was added to the charter at the First Extra Session of the Fifty-sixth Legislature and became effective January 9, 1946. Stats. 1st Ex. Sess.1946, ch. 8 of Res., p. 233. It was amended at the 1947 Regular Session, effective January 7, 1947. Stats.1947, ch. 2 of Res., p. 3266. In the amended form it was operative during the period in question. Its significant provisions read as follows:

"Section 151.3. Notwithstanding any of the provisions of section 151 or any other provisions of this charter, whenever any groups or crafts establish a rate of pay for such groups or crafts through collective bargaining agreements with employers employing such groups or crafts, and such rate is recognized and paid throughout the industry and the establishments employing such groups or crafts in San Francisco, and the civil service commission shall certify that such rate is generally prevailing for such groups or crafts in private employment in San Francisco pursuant to collective bargaining agreements, the board of supervisors shall have the power and it shall be its duty to fix such rate of pay as compensations for such groups and crafts engaged in the city and county service. The rate of pay so fixed by the board of supervisors shall be determined on the basis of rates of pay certified by the civil service commission on or prior to April 1st of each year and shall be effective July 1st following: provided, that the civil service commission shall review all such agreements as of July 1st of each year and certify to the board of supervisors on or before the second Monday of July any modifications in rates of pay established thereunder for such crafts or groups as herein provided. The board of supervisors shall thereupon revise the rates of pay for such crafts or groups accordingly and the said revised rates of pay so fixed shall be effective from July 1st of the fiscal year in which the said revisions are determined.

"Should the budget estimates for the several departments be filed with the controller or transmitted to the mayor before any such report of said civil service commission is received by the board of supervisors, the head of each department affected by such report may amend its budget estimate to comply with the provisions of such report. * * *

"Not later than the 25th day of July in each year the board of supervisors shall have power and it shall be its duty, subject to the fiscal provisions of the charter but, without reference or amendment to the annual budget, to amend the annual appropriation ordinance and the annual salary ordinance to include the provisions necessary for paying the rates of compensation fixed by the board of supervisors as in this section provided for the then current fiscal year. * * *"

The question upon this appeal is whether or not, under section 151.3, it is the duty of the board of supervisors, when amending the annual appropriation ordinance and the annual salary ordinance on or before July 25th in any year, to fix the compensation of the members of such a group or craft and provide for payment of such compensation, at the rate established by such a collective bargaining agreement if the agreement is executed after the second Monday in July and prior to the adoption of the amendatory ordinances. This question can best be considered in the light of the specific facts developed at the trial.

On January 16, 1947, an agreement was executed by the Sheet Metal Contractors' Association of San Francisco and Sheet Metal Workers' International Association Local No. 104 of San Francisco, which, among other things, prescribed an eight-hour day and a rate of pay of $2.00 per hour for journeymen sheet metal workers. This agreement by its terms was to be effective from March 15, 1947, to June 30, 1948, and to continue in effect from year to year thereafter unless either party desiring a change should file notice in writing of the change desired at least 90 days prior to any subsequent year ending June 30th. This agreement was still in effect during the fiscal year ending June 30, 1948.

On March 4 and March 20, 1948, the union gave notice to defendant civil service commission that negotiations were under way between the union and the contractors' association for an upward revision of the $2.00 per hour rate for the period July 1, 1948, to June 30, 1949. On March 25, 1948, the civil service commission certified to the board of supervisors the rates of pay established by collective bargaining agreements for organized groups and crafts covering employees in the city and county service, including therein a rate of pay of $16 per day for sheet metal workers. On or about June 8 and again on July 5, 1948, the union informed the secretary of the civil service commission that negotiations with the contractors' association for upward revision of the rate of pay were still pending. On July 7, 1948 (prior to July 12th, the second Monday in July of that year), the civil service commission certified to the board of supervisors the rates of pay in effect as of July 1, 1948, under collective bargaining agreements for certain crafts and groups, and did not include therein any modification of the rate of pay for sheet metal workers as certified by the commission under date of March 25, 1948. On July 12, 1948, the civil service commission reported to the board of supervisors that the commission was informed that negotiations concerning the wage agreement covering sheet metal workers were still pending and possibly would be completed prior to the adoption of the wage schedules by the board of supervisors and a new rate might be effective as of July 1, 1948, but that in the meantime the commission had included the rates for sheet metal workers that were effective under the old wage agreement.

On July 19, 1948, the union and the contractors' association executed a new agreement, which prescribed a rate of pay of $2.12½ per hour from July 1 to December 31, 1948, and of $2.25 per hour from January 1 to June 30, 1949. The union delivered to the secretary of the civil service commission a copy of the new agreement on July 20th and, on July 20th or 21st, a letter directing attention to the change in the rate of pay. On July 23, 1948, the board of supervisors adopted two ordinances, one amending the annual appropriation ordinance, the other amending the annual salary ordinance for the fiscal year ending June 30, 1949, continuing and not modifying the $16 per day rate for sheet metal workers.

From these facts it is clear that in fixing the rate of pay for sheet metal workers in the city and county service for the fiscal year 1948–1949 and in making money available for the payment thereof, the civil service commission and the board of supervisors faithfully and punctually complied with the literal requirements of section 151.3 of the charter. It follows that the rate of $16 per day was duly and regularly established as the rate of pay for journeymen sheet metal workers in the city and county service during 1948–1949, unless there is good reason for departing from a literal reading of the provisions of section 151.3 of the charter.

Respondents contend that the time limits prescribed in the procedural requirements of the section are directory and that the board of supervisors is under a continuing duty, up to the time of adopting its amendatory ordinances on or before July 25th, to fix rates for such crafts in accordance with rates fixed by collective bargaining agreements executed prior to the adoption of such ordinances, whether the agreements are executed before or after July 1st, and whether the civil service commission has certified those rates or different rates or none at all. In support of this contention, respondents represent that this is a remedial statute which should be liberally construed to carry out the legislative intent of giving public employees the same take-home pay as that received by members of the same craft in private industry; the power of the board to fix compensation rates is plenary, to which the special and limited jurisdiction of the commission must yield; the power of the commission to "certify" is a purely ministerial function; that the expression "on or before" is less mandatory than "not later than"; statutory provisions respecting time are directory unless expressly made mandatory; the use of "shall" in a statute concerning time requirements does not necessarily make the time requirements mandatory; where time requirements are used

in a statute to further orderly procedure and aid the conduct of public business by a public body they are merely directory; that the record indicates a contemporaneous interpretation of the section by the commission and the board in harmony with that of the respondents, an interpretation entitled to great weight; and that any other interpretation would lead to the absurd result of enabling the commission to thwart the expressed purpose of the charter by neglecting or refusing to certify rates on or before the dates specified in the charter.

The procedural requirements and the time limits prescribed in section 151.3 may not be thus disregarded. The section deals with the fixing of compensation rates for a fiscal year and the appropriation of money for the payment of such compensation. It, therefore, has a very definite relation to the fiscal and budgetary provisions of the charter. Those provisions, we find, indicate a definite plan and process for the preparation and adoption of the budget for any fiscal year. The fiscal year begins July 1st and ends June 30th of the following calendar year. Not later than the 1st of February, each department head must file with the controller, for check as to form and completeness, two copies of the budget estimate for his department for the ensuing fiscal year. Not later than March 1st following, the controller must complete his check of such estimates, consolidate them, and transmit them to the mayor, together with a summary and recapitulation thereof, and a statement showing estimated revenues for the ensuing year. The mayor holds such public hearings on these budget estimates as he deems necessary, and may increase, decrease or reject any item, within certain limits. Charter, § 69, St.1948, p. 193. The budget estimates must include a schedule of positions and compensations showing any increases or decreases requested. § 70, St. 1931, p. 3020. All increases in salaries shall be determined at the time of the preparation of the annual budget estimates and the adoption of the annual budget and appropriation ordinances, § 71, St.1940, 1st Ex. Sess., p. 195, but salary rates for classes of employment that are subject to salary standardization are fixed in the manner prescribed by other provisions of the charter.[1] Not later than April 15th, the mayor must transmit to the board of supervisors the consolidated budget estimates for all departments for the ensuing fiscal year, including a detailed estimate of revenues. At the same time, he must submit to the board a draft of the annual appropriation ordinance for the ensuing fiscal year, based upon the proposed budget. After public hearing and not earlier than May 15th, nor later than June 1st, the board must adopt the proposed budget as submitted or as amended, and pass the necessary appropriation ordinance. § 72, St.1948, p. 195. The number and rates of compensation for all positions continued or created by the board of supervisors in adopting the budget and each annual or supplemental appropriation ordinance shall be established and enumerated in a salary ordinance, which shall be passed or amended at the same time as the annual or supplemental appropriation ordinance.[2] Rates of compensation enumerated shall be those established by salary standardization schedules. § 73, St.1931, p. 3023. On or before September 15th, the board of supervisors, by ordinance, shall levy a tax which, together with the total amount of receipts and revenues estimated from all sources, will be sufficient to meet all appropriations made by the annual appropriation ordinance. § 78, St.1935, p. 2627.

The civil service commission plays an important part in this budgetary process. Section 151 of the charter makes it the duty of the board of supervisors to fix by ordinance from time to time the compensation of all officers and employees of the city and county, with certain enumerated exceptions. In the fixing of schedules of compensation as in section 151 provided, the civil service commission shall prepare and submit to the

1. The other provisions appear in sections 151–151.5, incl., of the charter, St.1947, p. 3266, St.1949, 1st Ex.Sess., p. 46, St.1950, 3rd Ex.Sess., c. 10.

2. A supplemental appropriation ordinance is one which appropriates surplus moneys. It may be adopted at the last meeting of the board in any month. § 80, St. 1933, p. 2801.

board, and the board adopt, a schedule of compensation which shall include all positions subject to the section. The compensation rates must comply with certain standards expressed in section 151. The schedules recommended by the commission shall be based solely on facts and data obtained by it in a comprehensive investigation and survey concerning wages paid in private employment or in other governmental organizations for like service. The commission shall make a record of its findings as to the generally prevailing rate of pay for each class of employment and recommend a rate of pay for each class in accordance therewith. The commission then transmits to the board the proposed schedules recommended by it, together with a summary of the data obtained and considered by the commission and a comparison showing existing schedules. Before presentation to the board, the proposed schedules and the comparison with existing schedules shall be published once a week for two weeks. The board may approve, amend or reject the schedules of compensations proposed by the commission, but before making any amendment thereto the data which the board considers warrants such amendment shall be transmitted to the commission for review and analysis, and the commission shall make a report thereon to the board, together with a report as to what other changes, and the cost thereof, the proposed amendment will require to maintain an equitable relationship with other rates in the schedule. A schedule of compensations, or amendments thereto, adopted by the board on or before April 1st will become effective at the beginning of the next succeeding fiscal year. A schedule of compensations or amendments thereto adopted by the board after April 1st will not become effective until the beginning of the second succeeding fiscal year.

[3, 4] It is apparent that section 151.3 is, in effect, an amendment of section 151 to the extent of the subject matter covered by section 151.3. In the case of craftsmen in the city and county employ, if private industry, pursuant to collective bargaining agreements, recognizes and pays a certain rate of pay throughout the city, the board of supervisors is empowered to adopt that rate of pay after April 1st. It is authorized to do this as late as July 25th, based upon the prevailing rate in private industry as it existed as late as July 1st. It does this after investigation and certification by the civil service commission, the very agency which collects and appraises data and recommends schedules of compensation for other positions in the city and county service. The dates "on or before" which section 151.3 requires the commission to act (much later than the dates prescribed for the exercise of similar functions under section 151) were doubtless selected as the latest feasible dates consistent with allowing the board of supervisors time within which to introduce, consider and pass the amendatory ordinances necessary for adjustment of rates of pay for inclusion in the annual budget. Whether the functions of the commission are ministerial or not, is of no real aid to the interpretation of section 151.3. They are derived from the charter itself, which, as we have seen, emphasizes and re-emphasizes the pivotal importance of punctual performance by each city and county agency of the part given it by the charter in the orderly and timely development and adoption of the city and county budget. Nor is it any aid to interpretation to suggest that if these time requirements are viewed as mandatory the civil service commission, or any other agency having a contribution to make in this budgetary process, could by failing to act prevent the completion and adoption of the budget as a whole or as to some of its parts. The law presumes that public officers will perform their duties faithfully and punctually. The charter provisions must be interpreted in the light of that presumption. If upon occasion some agency should fail in the punctual performance of its duty in the formulation of a fiscal year budget, the law might well afford a remedy. But that question is not before us upon this appeal. For the commission and the board in ascertaining that $16 per day was the prevailing rate of pay for sheet metal workers during the fiscal year 1948–1949, acted in accordance with the facts and in exact and timely compliance with the requirements of section 151.3 of the charter.

Something, perhaps, should be said concerning the asserted plenary powers of the board of supervisors. Section 9 of the charter, St. 1943, p. 3139, declares that "The powers of the City and County, except the powers reserved to the people or delegated to other officials, boards or commissions by this Charter, shall be vested in the Board of Supervisors and shall be exercised as provided in this charter." This very grant of power imposes limitations upon the board. It withholds power which other provisions of the charter give to "other officials, boards or commissions" (including, of course, the civil service commission). The powers it does give the board must be "exercised as provided in this charter." So, when section 151 says that the board may approve, amend or reject schedules of compensations proposed by the commission and when section 151.3 says a rate of pay fixed by the board shall be determined on the basis of rates of pay certified by the commission, the charter, it well may be said, is prescribing the manner in which the board shall exercise certain of its powers (after and not before, nor in the absence of, action by the commission) as contemplated by section 9. As said by the Supreme Court in a recent decision, "It is apparent from the provisions of the new charter that the framers intended to and did formulate a change in the usual concentration of control in the administration of municipal affairs, and thereby provided for a decentralization of powers. Only those powers of the city which are not reserved to the people or delegated to other officials, boards or commissions, are vested in the board of supervisors, to be exercised as provided in the charter." Kennedy v. Ross, 28 Cal.2d 569, 575, 170 P.2d 904, 908. Furthermore, the powers conferred upon the civil service commission by sections 140 to 157, inclusive, of the charter, include many that call for the exercise of a wide and sound discretion,—a jurisdiction and responsibility of a high order (by no means ministerial) concerning the classification of positions, the establishment of compensation schedules, and the selection and discipline of personnel. See Villain v. Civil Service Commission, 18 Cal.2d 851, 117 P.2d 880; Shannon v. McKinley, 62 Cal.App.2d 169, 144 P.2d 433; Dierssen v. Civil Service Commission, 43 Cal.App.2d 53, 110 P.2d 513.

The judgment appealed from is reversed. The appeals from the writ of mandate and from the minute order of August 15, 1949, are dismissed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; CARTER, J., dissenting.

104 Cal.App.2d 224

PEOPLE v. COKER.

Crim. 753.

District Court of Appeal,
Fourth District, California.

May 15, 1951.

Rehearing Denied May 29, 1951.

Application by James Ernest Coker against the People of the State of California for a writ of error coram nobis. The Superior Court of Imperial County, L. J. Mouser, J., denied the writ and the applicant appealed. The District Court of Appeal, Griffin, J., held that as the coroner's inquest was not a trial or any part of criminal proceeding against him petitioner was not entitled to have counsel appointed to represent him as a matter of constitutional right and as defendant was advised at preliminary hearing of his right to counsel along with his other constitutional rights and waived his right to counsel by announcing he was ready to proceed even though he had no counsel, defendant's rights were fully protected.

Order affirmed.

1. Criminal law ⇐641(1)

Coroner's inquest was not a trial or any part of a criminal proceeding against defendant and he was not entitled to have counsel appointed to represent him as a matter of constitutional right. Const. art. 1, § 13.

2. Criminal law ⇐232

Where defendant was taken before magistrate, complaint was read and ex-

plained to him and he was advised of his right to counsel along with his other constitutional rights and defendant waived his right to counsel by announcing that he was ready to proceed, even though he had no counsel, and defendant was afforded opportunity to cross-examine witnesses who testified against him, defendant's constitutional rights were fully protected. Const. art. 1, § 8.

3. Criminal law ⇐232

It is not mandatory that a defendant be represented by counsel at the preliminary examination where he has been fully advised as to his right to counsel and has been given ample opportunity to secure services of one if he so desires and where he waived such right. Const. art. 1, § 8.

4. Criminal law ⇐997

Where record in coram nobis proceedings showed that defendant was represented by counsel in Superior Court at time of his arraignment and plea to murder charge, that defendant and his counsel appeared in court and asked for permission to withdraw defendant's previous plea and enter plea of guilty to each count, and record failed to show defendant's counsel or defendant ever requested court to produce testimony of any person pertaining to any dying statement indicating that episode was an accident, defendant's application for writ of error coram nobis was properly denied.

Russell Yeager, El Centro, for appellant.

Edmund G. Brown, Atty. Gen., Dan Kaufman, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

On August 6, 1948, defendant entered a plea of guilty to a charge of murder of his wife on July 3, 1948, and to three charges of pimping contained in counts 2, 3, and 4, which involved defendant's wife and two other female persons. Two of these offenses are alleged to have been committed on June 12, and the other on June 26. Defendant was committed to State's prison for life on the first-degree murder charge and for the term prescribed by law on the other charges. Sentences were ordered to run consecutively with that of the first count.

More than two years later, on October 18, 1950, defendant, in propria persona, filed in the Superior Court of Imperial County a purported motion and affidavit reciting that defendant would move the court "for the records * * * that he may again bring his, cause, before this court, with and for the purpose of exomeration and vindication", and cited such cases as People v. Slobodion, 30 Cal.2d 362, 181 P.2d 868; and People v. Perez, 9 Cal. App. 265, 98 P. 870.

The trial court treated the proceeding as an application for a writ of error coram nobis, set it down for hearing, and notified defendant of the necessity of further affidavits in support of the motion. On November 18, 1950, defendant filed an affidavit reciting that since his incarceration he had the opportunity to study the laws of the State of California in the prison library and that he found out that his conviction was a "mistake of facts and violation of the equal protection of the State of California's Constitution", and in violation of "the great act of the common-law act Judicata of the State and the United States".

The force of defendant's argument, from the briefs apparently prepared by defendant himself on appeal, is that he was (1) denied the aid of counsel at the coroner's inquest; (2) denied counsel at the preliminary hearing; (3) not informed by the magistrate of his rights; (4) that he was arraigned in the Superior Court without the advice of counsel; and (5) that defendant's attorney, who was appointed by the court and appeared for him in the Superior Court, failed to call as a witness a person who defendant claims heard the deceased remark in a dying statement that the "episode was an accident".

[1] Since the coroner's inquest was not a trial or any part of a criminal proceeding against him, defendant was not entitled to have counsel appointed to represent him as a matter of Constitutional right. (Art. I, sec. 13, California Constitution.)

[2, 3] The record, offered in evidence at the hearing on the coram nobis proceeding, shows that the defendant was taken before the magistrate, the complaint was read and explained to him, and he was advised of his right to counsel along with his other constitutional rights. The record further shows that defendant waived his right to counsel by announcing that he was ready to proceed, even though he had no counsel, and further that he had an opportunity to cross-examine the witnesses who testified against him. Defendant's rights under Article I, section 8 of the Constitution were fully protected. He had the right to waive counsel at such preliminary hearing. It is not mandatory that a defendant be represented by counsel at the preliminary examination where he has been fully advised as to his right to counsel and has been given ample opportunity to secure the services of one if he so desires and where he waived such right. People v. Rebolledo, 93 Cal.App.2d 261, 209 P.2d 16; People v. Campos, 10 Cal.App.2d 310, 52 P.2d 251.

[4] The record also shows that defendant was represented by counsel in the Superior Court at the time of his arraignment and plea. The minutes of the Superior Court show that on August 6, 1948, defendant came into court with his duly appointed counsel, Russell Yeager, and entered a plea of not guilty as to each count of the information. The case was set for trial for September 20, 1948, and later reset for October 4, 1948, at which time the defendant and his counsel appeared in court and asked the court for permission to withdraw defendant's plea and enter a plea of guilty to each count, which was done. The court then set a date for the purpose of hearing evidence to determine the degree as to the murder charge, and for the imposition of sentence. The record fails to show that defendant's counsel or the defendant ever requested the court to produce the testimony of any person pertaining to any dying statement indicating that the "episode was an accident". The trial court was justified in denying the application for a writ of error coram nobis. People v. Adamson, 34 Cal.2d 320, 210 P.2d 13; People v. Hall, 100 Cal.App.2d 763, 224 P.2d 812; People v. James, 99 Cal.App.2d 476, 222 P.2d 117; People v. Shorts, 32 Cal.2d 502, 512, 197 P.2d 330.

Order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

104 Cal.App.2d 238

HINDIN v. CAINE.

Civ. 4324.

District Court of Appeal, Fourth District, California.

May 16, 1951.

Hearing Denied July 12, 1951.

Dorothy S. Hindin, as testamentary trustee under the last will and testament of Amelia Levis, deceased, sued C. L. Caine, to recover $1,066.64 on a common count of money had and received. The Superior Court of Fresno County, Milo Popovich, J., rendered judgment for defendant and plaintiff appealed. The District Court of Appeal, Griffin, J., held that where plaintiff assigned to defendant all her interest in oil lease for cash payment of $8,000 plus $7,500 each year during term of oil lease and on September 29, 1949 defendant in accordance with terms of assignment quitclaimed his interest in lease back to plaintiff and only benefit he had received thereunder was $1,600 received from oil company on May 20, 1949 which was yearly in advance rental for privilege of deferring drilling operations for one year, plaintiff was not entitled to recover proportionate amount of $1,600 paid by oil company for period from September 29, 1949, to May 10, 1950, when year for which payment was made would terminate.

Judgment affirmed.

1. Landlord and tenant ⇐194(1)

If rent for entire period between rent days is payable in advance, a surrender during period does not operate to discharge rent or any portion thereof for such period since rent payable in advance is considered as accruing on day on which it is due.

2. Mines and minerals ⇐74

Where plaintiff assigned to defendant all her interest in oil lease for cash payment of $8,000 plus $7,500 for each year during term of lease and on September 29, 1949, in accordance with terms of assignment defendant quitclaimed his interest in lease back to plaintiff and only benefit defendant had received thereunder was $1,600 received from lessee for privilege of deferring drilling operations for one year, plaintiff was not entitled to recover proportionate amount of $1,600 paid by lessee for period from September 29, 1949, to May 10, 1950, when year for which payment was made by lessee expired, as rent due her or on ground of unjust enrichment. Civ.Code, § 1935.

Maurice J. Hindin, Los Angeles, for appellant.

Lawrence W. Young, Fresno, for respondent.

GRIFFIN, Justice.

Plaintiff sought to recover from defendant $1,066.64 on a common count of money had and received. Judgment went for defendant. On May 11, 1945, an oil and gas lease was entered into by plaintiff's predecessor with the Tide Water Associated Oil Company, hereinafter referred to as "Tide Water", covering an undivided one-half interest in 320 acres of land in Kern County. The term of the lease was for a period of five years from the 11th day of May, 1945, and provided that during the first three years of the term of said lease, the lessee was not obligated to commence drilling operations on said property, but that commencing with the fourth year of the term of the lease lessee should pay or tender to lessor yearly, in advance, as rental, an equal one-half of the sum of $10.00 per acre per year, or the sum of $1,600.00. (Lessee had not theretofore commenced drilling operations or terminated the lease.)

On November 14, 1948, plaintiff, who was the then owner of the lease, entered into an agreement with the defendant, assigning to defendant, in consideration of the sum of $8,000 in cash and $7,500 each year thereafter during the term thereof, her interest in said oil lease. In accordance with the terms of the assignment defendant was given the right to and did execute a quitclaim deed on September 29, 1949, quitclaiming his interest in the lease back to plaintiff. At that time defendant was not in default under the assignment. The only benefit he received thereunder was the $1,600 received from the Tide Water on May 20, 1949.

By this action plaintiff attempted to recover $1,066.64, the proportionate amount of the $1,600 of money paid by the Tide Water for the period from September 29, 1949, to May 10, 1950. The deferred right of Tide Water was for the period from May 11, 1949, to May 10, 1950. The $1,600 paid by the oil company was paid, according to the lease, "yearly in advance as rental", for the privilege of deferring drilling operations for one year. On May 10, 1949, Tide Water sent to plaintiff its check for $1,600, which was returned by plaintiff to the oil company with instructions to mail it to defendant. This was done on May 20, 1949.

It is plaintiff's position that defendant was entitled to retain only such income as was produced during the life of the agreement with the plaintiff and was not entitled to retain any income earned or accrued after the termination of the agreement, even though such income might have been collected in advance by the defendant during the term of such agreement; and secondly, that plaintiff was entitled to judgment on the theory of unjust enrichment of defendant.

The written agreement between plaintiff and defendant and their relationship is the prime concern of this litigation. It specifically provides for the transfer of the lease "including herewith the transfer * * * of all rights of the lessor, *accrued or to accrue,* in and under the aforesaid oil and gas lease, to receive and enjoy all bonuses, rents, royalties, considerations, and other benefits which are or may be presently due and owing by the lessee thereunder and which *may accrue* thereon or therefrom or from or for any extension thereof, during the term hereof".

The quitclaim deed recites that defendant "does hereby remise, release, reconvey and quitclaim" to plaintiff "all of his right, title and interest in and to that certain real property" and defendant quitclaims to plaintiff "all of the rights granted to the said" defendant under the agreement. The effect of such quitclaim is set forth in Westlake v. Silva, 49 Cal.App.2d 476, 121 P.2d 872.

Plaintiff contends that the $1,600 payment was not rent, but if such payment were rent or money paid for deferred drilling, the written agreement shows that defendant relinquished all of his right to any unearned portion thereof when he quitclaimed his interest in the lease back to plaintiff, and that the common-law rule that rents may not be apportioned was abrogated by section 1935 of the Civil Code which now provides: "When the hiring of a thing is terminated before the time originally agreed upon, the hirer must pay the due proportion of the hire for such use as he has actually made of the thing, unless such use is merely nominal, and of no benefit to him." Citing Mott v. Cline, 200 Cal. 434, 451, 253 P. 718; Silveira v. Ohm, 33 Cal.2d 272, 201 P. 2d 387; and Restatement of the Law of Property, Sec. 120, Comment d, p. 376.

It is defendant's contention that the payment was an advance rental payment as reflected by the very terms of the lease which describe it "as yearly rental in advance * * * until drilling operations are commenced"; that section 1935 of the Civil Code has no application to rents payable and paid in advance and therefore Mott v. Cline, supra, and Silveira v. Ohm, supra, relied upon by plaintiff, have no application. In addition to this contention, defendant also argues that the lease and agreement, when construed together, clearly show that it was the intention of plaintiff to assign to defendant all rights plaintiff had in and to the leasehold property, which included all rights "accrued or to accrue" thereunder, and all "rents * * * considerations, and other benefits which are or may be presently due and owing by lessee", and which "*may accrue* thereon or therefrom * * * during the term hereof".

In McComber v. Kellerman, 162 Cal. 749, 124 P. 431, 433, an oil lease provided that in the event the defendant (lessee) failed to drill for oil in a specified time, that the defendant had the right to retain the land and defer the right to drill upon paying plaintiff (lessor) a specified sum. It was contended that said specified sum for deferred drilling rights was in the nature of liquidated damages. The court held that said specified sum was "clearly in the nature of rental for the premises or compensation for the right, and not an attempt to fix a penalty or liquidated damages." See, also, Allen v. Narver, 178 Cal. 202, 172 P. 980; Pellissier v. Pan-American Petroleum Company, 62 Cal.App. 543, 547, 217 P. 570; and Griffin v. Kent, 111 Cal.App. 569, 572, 295 P. 854.

[1] The general rule is stated in 32 Am. Jur. sec. 915, p. 777: "If the rent for the entire period between rent days is payable in advance, a surrender during the period does not operate to discharge the rent or any portion thereof for such period. The theory of this view is that rent payable in advance is considered as accruing on the day on which it is due."

In Fahrenbaker v. E. Clemens Horst Co., 209 Cal. 7, 9, 284 P. 905, the court says: " 'Rent is not, at common law regarded as accruing from day to day, as interest does, but it is only upon the day fixed for payment that any part of it becomes due. The result of this principle is that, ordinarily, the person who is on that day the owner of the reversion is entitled to the entire installment of rent due on that day, though he may have been the owner of the reversion or rent but a part of the time which has elapsed since the last rent day. * * * When the landlord makes a conveyance of the reversion, the grantee is entitled, in the absence of a contrary stipulation, to all the rent which falls due at the next rent day.' " (Citing cases.) It then quotes with approval the following statement: " 'It is well settled that in all cases of periodical payments, accruing at intervals, and not *de die in diem,* there can be no apportionment, for rent will not be apportioned in respect of time, unless by force of a statute or of some special provision of the lease.' " See, also, Harabedian v. Parnell, 96 Cal.App.2d 358, 359, 215 P.2d 73; and Title Insurance

& Trust Company v. Amalgamated Oil Co., 63 Cal.App. 29, 34, 218 P. 71.

Section 1935 was adopted in 1872, and the provisions thereof were in full effect when these cases were decided.

We are in accord with respondent's contention. The ultimate finding of the trial court is fully supported by the evidence.

[2] We see no merit to the argument that plaintiff should recover from defendant on the ground of unjust enrichment. Defendant paid plaintiff $8,000 in cash as rental for the privilege of obtaining the benefits of the oil lease for a one-year period, which term was subsequently reduced to approximately 10 months by virtue of the quitclaim deed. Apparently there were no returns therefrom during that period other than the $1,600 mentioned. If there were any unjust enrichment it was not defendant who was unjustly enriched.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

104 Cal.App.2d 185

GAMMILL v. NUNES et al.

Civ. 17685.

District Court of Appeal, Second District, Division 2, California.

May 15, 1951.

L. A. Gammill, as administrator of the estate of John Souza Mottos, etc., deceased, brought action against Joe G. Nunes and Katherine O. Nunes to establish a resulting trust, and to quiet title to an undivided ⅔ interest in realty. The Superior Court of Santa Barbara County, Ernest D. Wagner, J., rendered a judgment for the plaintiffs, and defendants appealed. The District Court of Appeal, Wilson, J., held that evidence of defendant was insufficient to overcome presumption of statute providing that when a transfer of realty is made to one person, and consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made.

Judgment affirmed.

1. Trusts ⇦86

The presumption declared by statute that when a transfer of realty is made to one person, and consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made, is rebuttable, and the question is finally as to the intention of the parties at the time. Civil Code, § 853.

2. Trusts ⇦39(2)

In action by administrator to establish a resulting trust in, and to quiet title to, an undivided ⅔ interest in farm, on ground that deceased furnished ⅔ of the purchase price, evidence of defendants was insufficient to overcome presumption of statute that when transfer of realty is made to one person, and consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made. Civil Code, § 853.

3. Evidence ⇦317(18)

Uncorroborated testimony of defendants concerning oral declarations allegedly made by deceased against interest during his lifetime, was the weakest of testimony that could be produced.

4. Evidence ⇦589

In suit to establish resulting trust and to quiet title, trial court was not required to believe testimony of defendants, even though it was uncontradicted.

5. Evidence ⇦589

In suit to establish resulting trust and to quiet title, trial court, in passing on credibility of defendants and weight to be given their testimony, was entitled to consider their interest in the result of the case, their motives, the manner in which they testified, and the contradictions appearing in the evidence.

Jack H. Glines, Marion A. Smith, Santa Maria, for appellants.

Gene M. Harris, Santa Barbara, Preisker, Goble & Twitchell, Santa Maria, for respondent.

WILSON, Justice.

Action to establish a resulting trust in, and to quiet title to, an undivided two-thirds interest in approximately 275 acres of land in Santa Barbara County. Judgment having been rendered in favor of plaintiff, defendants are appealing upon the sole ground that the evidence does not support the findings.

Plaintiff is the administrator of the estate of John Souza Mottos, deceased. The trial court found that during the year 1947 decedent orally negotiated with defendants concerning the purchase of a parcel of farming land near the town of Casmalia; during the month of June, 1947, these negotiations culminated in the making of an offer by decedent and defendants to the owner of the land for its purchase for the sum of $18,000; the offer was accepted and to consummate the sale an escrow was opened on June 28, 1947; the owner of the property having requested that the entire transaction be handled in the name of one person, it was orally agreed by the parties that their dealings, including the escrow and the deed to the property should all be in the name of defendants as a matter of convenience only; pursuant to an oral agreement between decedent and defendants, decedent paid $12,000 of the purchase price and defendants paid $6,000; it was further orally agreed that defendants would take title to the property in their names, holding decedent's interest in trust, and at a future date they would convey to decedent title to his proportionate share; the deed to the property in defendants' names was recorded on October 20, 1947; prior to the date of delivery of the deed decedent became seriously ill and was removed to a hospital where he died on December 19, 1947; decedent's interest in the property is in proportion to the amount paid on the purchase price; defendants hold decedent's undivided two-thirds interest in the property in trust.

The court further found that it is not true that decedent agreed to give defendants the sum of $12,000; it is not true that while at the Santa Maria hospital decedent informed defendants the property belonged to them and they could keep it if he should die; decedent did not at any time prior to his death give or convey to defendants his undivided two-thirds interest; decedent had a survey made of a portion of the property but he did not agree with defendants to accept the portion which he had surveyed as his share of the property in exchange or in consideration for the sum of $12,000 which he had paid on the purchase price and he did not agree that defendants should have the remainder of the property, other than the portion decedent had surveyed, in exchange or consideration for the $6,000 which they had paid on the purchase price.

Defendants contend the evidence does not support the findings of the court that (1) they hold in trust for decedent an undivided two-thirds interest in the whole of the property; (2) decedent did not surrender his interest in the property to them, effective upon his death.

There is no dispute about the fact that decedent paid $12,000 of the purchase price and defendants paid $6,000. Defendants admit that under section 853 of the Civil Code "When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made." They assert, however, that this presumption is rebutted since the following evidence establishes that decedent and defendants intended to acquire separate parcels of the property: In 1945 decedent endeavored to purchase a portion of the property but the owner refused to divide the tract and insisted that it be sold in one piece to one purchaser; thereafter he succeeded in interesting defendants in buying the balance of the property; decedent requested that the owner survey the land for two parcels which the owner refused to do; prior to the close of the escrow decedent had a portion of the property south of the road, containing approximately 126 acres, surveyed and built a fence along the line separating the two parcels; defendants built a fence along their line and subsoiled the portion

north of the road but did not subsoil the 126 acres; decedent had his hut on the 126-acre parcel; the parcels were divided by oral agreement of the parties.

It is defendants' contention that they held in trust only the 126 acres selected by decedent and that decedent surrendered his interest in that portion to defendants when he stated to them, while he was in the hospital, "If I die the property belong to you. I am not going to take anything when I die, just six feet, that's all."

There is evidence that immediately after decedent's death defendants declared they had purchased the property with their own money and decedent had not put any money in it. Later defendants admitted they owned one third and decedent owned two thirds. At that time they also stated there was an agreement between them that decedent was to have the 126 acres he had had surveyed, which they agreed was worth $6,000, and defendants were to have the remainder of the ranch, which was worth $12,000; that they were going to give decedent a deed to the 126 acres and a note and mortgage for $6,000 to cover their share but decedent became ill and they never concluded their arrangements. Still later defendants denied they owed decedent $6,000 and asserted there was no agreement between the parties.

[1] The presumption declared by section 853 of the Civil Code is rebuttable, the question finally being as to the intention of the parties at the time. Owings v. Laugharn, 53 Cal.App.2d 789, 792, 128 P.2d 114. Defendants testified in their deposition and at the time of trial that there was no agreement between the parties as to the division of the property or the amount the respective parties would pay for each parcel. They testified that decedent paid $12,000 and they paid $6,000 of the purchase price; that when a division would be made of the property at a future time decedent wanted to keep the 126 acres and they were to keep the rest. They were repeatedly asked what their agreement was with reference to the division and the amount each would pay for the portion he kept and they consistently replied that there was no agreement.

[2] While it appears from the evidence that decedent and defendants intended at some future time to divide their interests the record supports the finding that at the time of decedent's death no agreement had been reached between them. There is no evidence except defendants' testimony that it was the intention of the parties that decedent was to pay $12,000 for the 126 acre parcel which was worth approximately $6,000 and defendants were to retain 150 acres which was worth $12,000 for their investment of $6,000. The mere statement of such a proposition is sufficient to arouse suspicion of its authenticity. The court upon considering the conflicting statements made by defendants, their testimony at the time of trial, their interest in the outcome and the fact that the lips of decedent were sealed by death, and weighing these factors against the presumption of section 853, reached the conclusion that the presumption was not overcome. This conclusion, which is one of fact, is binding upon us. Owings v. Laugharn, supra.

[3–5] The only evidence in support of defendants' contention that decedent surrendered his interest in the property to them is their testimony concerning his alleged statement to them in the hospital that "the property is in your name. If I die you can keep it." The only witness other than defendants who they claim was present at the time died prior to the trial. The trial court found that decedent did not make such a statement. Testimony concerning oral declarations alleged to have been made by a decedent against interest, unless corroborated by satisfactory evidence, is the weakest of testimony that can be produced. Kent v. First Trust & Savs. Bank, 101 Cal.App.2d 361, 225 P.2d 625; Estate of Emerson, 175 Cal. 724, 728, 729, 167 P. 149. The court was not bound to believe the testimony of defendants, even though it was uncontradicted, and in passing on their credibility and the weight to be given their testimony the trier of fact is entitled to consider their interest in the result of the case, their motives, the manner in which

they testified and the contradictions appearing in the evidence. Huth v. Katz, 30 Cal. 2d 605, 609, 184 P.2d 521.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

104 Cal.App.2d 120

WERTHEIM v. MEARS.

Civ. 18314.

District Court of Appeal, Second District, Division 2, California.

May 10, 1951.

Henrietta Wertheim sued John Henry Mears to recover damages for personal injuries sustained when plaintiff collided with defendant's automobile while walking across a street at a crosswalk. The Superior Court of Los Angeles County, Samuel R. Blake, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, McComb, J., held that the evidence sustained the verdict.

Affirmed.

1. Automobiles ⇐246(57)

In action by pedestrian to recover for personal injuries sustained when he collided with automobile on crosswalk, where there was general denial by defendant of negligence, it was not error for trial court to instruct jury on doctrine of unavoidable accident.

2. Automobiles ⇐245(72)

In action by pedestrian to recover for personal injuries sustained when he collided with automobile on crosswalk, where motorist testified that pedestrian had run into side of his automobile and pedestrian denied that he had done so, question of fact arose upon conflicting evidence for determination by jury. Code of Civil Procedure, §§ 1844, 2061.

3. Automobiles ⇐244(6)

In action by pedestrian to recover for personal injuries sustained when he collided with defendant's automobile on crosswalk, evidence sustained verdict for defendant. Code of Civil Procedure, §§ 1844, 2061.

4. Automobiles ⇐246(60)

In action by pedestrian to recover for personal injuries sustained when he collided with automobile on crosswalk, where jury question was presented as to defendant's negligence, trial court properly gave instruction on burden of proof.

5. Automobiles ⇐246(60)

In negligence action, instruction as to presumption of plaintiff's freedom of contributory negligence should not be given to jury where testimony introduced by plaintiff discloses acts and conduct of injured party immediately prior to or at time of accident.

6. Automobiles ⇐246(60)

In action by pedestrian to recover for personal injuries sustained when he collided with automobile on crosswalk, where there was testimony as to conduct of pedestrian immediately prior to and at time of accident, trial court properly refused to give requested instruction as to presumption of plaintiff's freedom of contributory negligence.

Joseph Lewis, Los Angeles, for appellant.

Bauder, Gilbert, Thompson & Kelly, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before a jury in an action to recover damages for personal injuries, plaintiff appeals.

Facts: The evidence being viewed in the light most favorable to defendant (respondent) discloses that defendant was driving on Franklin Avenue in the city of Los Angeles just east of a crosswalk at Vista del Mar; that as he approached the easterly side of the crosswalk he did not observe any person in it; that he was driving at about 15 miles per hour and plaintiff dashed

out from the curb and ran into the side of his car while he was in the crosswalk.

Questions: First: *Did the court commit prejudicial error in giving the jury an instruction on the doctrine of unavoidable accident?*

[1] *No.* Where as in the instant case there is a general denial by defendant of negligence it is not error for the trial court to instruct the jury on the doctrine of unavoidable accident. (Jolley v. Clemens, 28 Cal.App.2d 55, 64[4] et seq., 82 P.2d 51; Sitkei v. Ralphs Grocery Co., 25 Cal.App.2d 294, 297[4], 77 P.2d 311; Pearce v. Elbe, 98 Cal.App. 101, 105[6], 276 P. 389.)

Wilkerson v. Brown, 84 Cal.App.2d 40, 190 P.2d 958; Eigner v. Race, 54 Cal.App. 2d 506, 129 P.2d 135, and Temple v. DeMirjian, 51 Cal.App.2d 559, 125 P.2d 544, relied on by plaintiff, are not here in point and do not announce a rule contrary to that stated above.

Second: *Was the verdict against the weight of the evidence?*

[2] *No.* In view of defendant's testimony that plaintiff ran into the side of his car which was denied by plaintiff, a question of fact arose upon conflicting evidence, the determination of which was for the jury.

Section 2061 of the Code of Civil Procedure reads in part: "Jury judges of effect of evidence, but to be instructed on certain points. The jury, subject to the control of the court, in the cases specified in this code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. * * *"

Section 1844 of the Code of Civil Procedure reads: "One witness sufficient to prove a fact. The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason."

[3] Therefore it is evident that the jury believed defendant's testimony and not plaintiff's. Consequently the verdict of the jury was supported by the evidence.

[4] Third: *Did the trial court err in instructing the jury as follows: "The law does not permit you to guess or speculate as to the cause of the accident in question. If the evidence is equally balanced on the issue of negligence or proximate cause, so that it does not preponderate in favor of the party making the charge, then she has failed to fulfill her burden of proof. To put the matter in another way, if after considering all the evidence, you should find that it is just as probable that either the defendant was not negligent or, if he was, that his negligence was not a proximate cause of the accident, as it is that some negligence on his part was such a cause, then a case against the defendant has not been established"?*

No. In view of the fact that defendant was not guilty of negligence as a matter of law the trial court properly gave the foregoing instruction relative to the burden of proof.

[5, 6] Fourth: *Did the trial court commit prejudicial error in refusing plaintiff's request to give the following instruction: "At the outset of this trial, each party was entitled to the presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law. These presumptions are a form of prima facie evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. When there is other evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the presumption and any evidence that may support the presumption, to determine which, if either, preponderates. Such deliberations, of course, shall be related to, and in accordance with, my instructions on the burden of proof"?*

No. In a negligence action an instruction as to the presumption of plaintiff's freedom of contributory negligence should not be given to the jury where the testimony introduced by plaintiff discloses acts and conduct of the injured party immediately prior to or at the time of the accident. (Speck v. Sarver, 20 Cal.2d 585, 587 [2], 128 P.2d 16.)

In the present case the witnesses testified as to the conduct of plaintiff immediately prior to and at the time of the accident. Hence under the foregoing rule the trial

court properly refused to give the requested instruction.

Anthony v. Hobbie, 25 Cal.2d 814, 155 P.2d 826, is not applicable to the facts of the instant case because in the cited case the injured party was dead, while in the case before us plaintiff was alive and testified as to her conduct prior to and at the time of the accident.

Affirmed.

MOORE, P. J. and WILSON, J., concur.

104 Cal.App.2d 218

PEOPLE v. COX.

Crim. 4593.

District Court of Appeal, Second District, Division 3, California.

May 15, 1951.

Robert B. Cox was convicted in Superior Court of Los Angeles County, Percy Hight, J., for violations of Penal Code, § 288, committed upon the person of his daughter, a child of 12 years, and he appealed. The District Court of Appeal, Shinn, P. J., held that the evidence was sufficient to sustain the conviction.

Judgments affirmed.

1. Infants ⇐20

Evidence was sufficient to sustain conviction of violations of Section 288 of the Penal Code. Pen.Code, § 288.

2. Criminal law ⇐260(11)

The credibility of witnesses and reconciliation of discrepancies in the evidence, are questions to be determined by the trier of fact and its determination will not be disturbed on appeal where there is substantial evidence to support it.

3. Criminal law ⇐553

In prosecution for violations of Section 288 of the Penal Code, upon a female child of 12 years, alleged contradictory statements did not render child's story inherently improbable or unworthy of belief. Pen. Code, § 288.

4. Infants ⇐20

Corroboration of child's testimony is not necessary in prosecution for violation of Section 288 of the Penal Code. Pen. Code, § 288.

Eugene V. McPherson, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Defendant, Robert B. Cox, appeals from judgments of conviction of three counts of violations of section 288 of the Penal Code committed upon the person of his daughter, a child of twelve years. Trial by jury was waived.

Defendant contends that the evidence was insufficient to support the judgments; that the testimony of the prosecuting witness was contradictory, inconsistent, inherently improbable and uncorroborated.

[1–4] We have examined the record and find the evidence more than ample to sustain the judgments. We do not deem it necessary to repeat here the facts giving rise to the charges brought against the defendant. The alleged inconsistencies and contradictions in the child's testimony consisted of minor deviations in the stories told at the preliminary hearing and at the trial. It is elementary that the credibility of the witness and the reconciliation of any discrepancies in the evidence are questions to be determined by the trier of the facts and its determination will not be disturbed on appeal where there is substantial evidence to support it. The alleged contradictory statements here were not such as to render the child's story inherently improbable or unworthy of belief, and we find support in the evidence for the determination of the trial court. Defendant's contention that error was committed because the prosecuting witness' story was uncorroborated also is without merit. There was some corroboration, although it is not necessary in a case of this type. People v. Carlson, 73 Cal.App.

2d 933, 167 P.2d 812. The record shows that the trial judge was fully conscious of his grave responsibility and that he weighed the evidence understandingly and with great care.

The judgments are affirmed.

WOOD and VALLÉE, JJ., concur.

104 Cal.App.2d 321

BOYLAN v. MARINE.

Civ. 18371.

District Court of Appeal, Second District, Division 3, California.

May 18, 1951.

Action by Elizabeth Boylan against Adrian Marine. From a judgment of the Superior Court of Los Angeles County, Arthur Crum, J., plaintiff appealed and defendant filed a petition for an order directing the Superior Court to pass upon the merits of an application for correction of a claimed clerical error in the findings. The District Court of Appeal, Per Curiam, held that trial court had inherent power and a plain duty to remedy clerical errors, but that reviewing court could not act in the matter otherwise than in a proceeding in mandate.

Petition denied.

1. Courts ⇐116(1)

Trial court has the power and a plain duty to remedy clerical errors, as distinguished from judicial errors, which may be corrected only through motion for new trial or by appeal, and the performance of such duty will be enforced in the furtherance of justice.

2. Mandamus ⇐27

Mandate is a proper remedy to enforce performance of trial court's duty to remedy clerical errors.

3. Appeal and error ⇐653(1)

The purpose of rule on appeal relating to the correction of alleged omissions or errors in the record on appeal is to insure that the record presented to reviewing court states the truth respecting the records of trial court and correction of the records of trial court is not within the scope of the rule. Rules on Appeal, rule 12(c).

4. Appeal and error ⇐440
Courts ⇐116(1)

The power of trial court to correct its own records is inherent and is not abrogated or superseded by the pendency of an appeal nor is such power lost through lapse of time.

5. Courts ⇐116(1)

The duty of trial court to correct its own records, as distinguished from the record on appeal, is not dependent upon any order of a reviewing court under the Rules on Appeal or otherwise. Rules on Appeal, rule 12(c).

6. Appeal and error ⇐648

While trial court may be required by mandate to pass upon the merits of an application to correct alleged errors in its records, or to make appropriate corrections, a reviewing court will not act upon such matter by mere order addressed to the trial court.

7. Appeal and error ⇐648

Reviewing court could not direct superior court to pass upon the merits of an application for correction of a claimed clerical error in the findings otherwise than in a proceeding in mandate, even though it was obvious from a mere reading of the finding that it should be corrected to make it consistent with the judgment, and in the interest of accuracy.

Richard A. Perkins, Los Angeles, for appellant.

William J. MacCabe, Los Angeles, for respondent.

PER CURIAM.

There has been filed herein by defendant and respondent a verified petition for an order directing the Superior Court to pass upon the merits of an application heretofore made for the correction of a claimed

clerical error in the findings. It is represented in the petition that the trial court refuses to make the correction upon the sole ground that it is without jurisdiction so to do unless and until this court makes an order under Rule 12(c), Rules on Appeal, submitting for decision the question whether the findings contain a clerical error and directing the trial court to determine that question on the merits.

We denied a similar application herein upon the ground that the trial court has exclusive jurisdiction and the duty to correct its own clerical errors, and so stated in our order. It is alleged in the present petition that thereafter the court again denied a request for correction of the findings.

[1, 2] The law is clear on the point. "Not only has the court power to remedy clerical errors, as distinguished from judicial errors, which may be corrected only through motion for new trial or by appeal, but it is a plain duty to remedy them, the performance of which will be enforced in the furtherance of justice." Chadwick v. Superior Court, 205 Cal. 163, 270 P. 192, 193. Mandate is a proper remedy.

[3] Rule 12(c), Rules on Appeal, relates to the correction of alleged omissions or errors in the record on appeal. The purpose is to insure that the record presented to the reviewing court states the truth respecting the records of the trial court. Correction of the records of that court is not within the scope of the rule.

[4–6] The power of the trial court in the premises is inherent and is not abrogated or suspended by the pendency of an appeal, Haynes v. Los Angeles R. R. Corp., 80 Cal.App. 776, 782, 252 P. 1072, nor is it lost through lapse of time. Wilson v. Nichols, 55 Cal.App.2d 678, 681, 131 P.2d 596. The duty of the trial court to make proper corrections of its own records, as distinguished from the record on appeal, is not dependent upon any order of a reviewing court, under the Rules of Appeal or otherwise. Although the trial court may be required by mandate to pass upon the merits of an application for a correction of alleged errors, or to make appropriate corrections, it is not a matter in which a reviewing court will act by mere order addressed to the trial court.

[7] If the trial court herein remains in doubt as to its jurisdiction in the premises, we cannot properly act in the matter otherwise than in a proceeding in mandate.

It is obvious from a mere reading of the finding in question that it should be corrected to make it consistent with the judgment, and in the interest of accuracy.

For the foregoing reasons the petition is denied.

104 Cal.App.2d 137

BILLETER v. RHODES & JAMIESON, Ltd. et al.

Civ. 14560.

District Court of Appeal, First District, Division 1, California.

May 14, 1951.

Hearing Denied July 12, 1951.

Action by George J. Billeter against Rhodes & Jamieson, Ltd., a California corporation, and another for injuries sustained by foreman for general contractor when fingers of his left hand were amputated between steel fin on outside of revolving drum of subcontractor's cement mixer and steel cross brace. The Superior Court in and for the County of Contra Costa, Harold Jacoby, J., entered judgment on a verdict in favor of defendants and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that, the evidence was sufficient to support implied finding that foreman was contributorily negligent in grasping steel cross brace in attempting to climb on mixer, instead of using steel ladder on the other side of equipment.

Judgment affirmed.

1. Negligence ⇐20, 32(1)

Generally owner or occupier of premises, who, by express or implied invitation induces, or knowingly permits, workman to enter the premises for performance of mutually beneficial duties, must use reasonable

care to furnish reasonably safe appliances and place to work.

2. Negligence ⇐48

A contractor is ordinarily not liable for injuries to workman resulting from defects which are clearly visible or obvious or are actually or constructively known to workman.

3. Master and servant ⇐234(4)
Negligence ⇐67

Workman is not charged with knowledge of latent or concealed defects and may recover for injuries resulting from such defect of which he had no knowledge, if employer or licensor knew, or should have known of defect and failed to remedy it or give a warning.

4. Master and servant ⇐217(7)

An employee is not bound to use any degree of care to discover defects in things with which employee must work, and employee will be held to have assumed risk of defects, only when he knew of such defects.

5. Master and servant ⇐234(4)
Negligence ⇐66(1)

An employee or invitee will be held to have known of defects in things with which he must work, when defects are so obvious that employee must have known of them, or refused to open his eyes and see, or when he was put upon inquiry by some discovery or suggestion of danger which it was gross carelessness for him to neglect.

6. Negligence ⇐136(15)

Whether an employee of one contractor is a licensee of another contractor or is a trespasser is ordinarily a question of fact.

7. Negligence ⇐136(15)

A person may be an invitee as to one portion of premises and a mere licensee or even a trespasser as to other portions, and the question as to extent of the invitation is one of fact and not of law.

8. Negligence ⇐65, 80

Contributory negligence of invitee will bar recovery, the test being whether invitee acted as a reasonably prudent person under the circumstances.

9. Negligence ⇐136(26)

Whether an invitee was contributorily negligent is a question of fact.

10. Negligence ⇐135(4)

In action by foreman for general contractor against subcontractor and operator of its cement mixer for loss of foreman's fingers amputated between clearly visible steel fin on outside of revolving drum of mixer and steel cross brace, evidence supported implied finding that foreman was contributorily negligent in grasping cross brace in attempting to climb on mixer instead of using steel ladder on the other side of equipment, and hence could not recover, even if foreman was an invitee as to part of the equipment.

11. Trial ⇐252(8)

Evidence sufficient to sustain implied finding that plaintiff was contributorily negligent, warranted the giving of instructions on the issue of contributory negligence.

12. Appeal and error ⇐760(1)

Reviewing court would not discuss requested instructions refused by trial judge which were not argued in appellant's brief, but referred to only by reference to their numbers and the pages on which they appeared in reporter's transcript.

13. Appeal and error ⇐730(1)

Assignment of error predicated on refusal to give instructions which properly state the law must point out wherein the subject of refused instruction was not in fact covered by the instructions given.

14. Trial ⇐203(1)

Each party is entitled to have his theory of case submitted to jury, if such theory is supported by substantial evidence.

15. Negligence ⇐121(2)

"Res ipsa loquitur" doctrine is applicable only if accident was of a kind which ordinarily does not occur in absence of negligence, was caused by an agency or instrumentality within the exclusive control of defendant, and was not due to any voluntary action or contribution by plaintiff.

See publication Words and Phrases, for other judicial constructions and definitions of "Res Ipsa Loquitur".

16. Negligence ⇐121(3)

In action by foreman for general contractor against subcontractor and operator of its cement mixer for loss of foreman's fingers amputated between steel fin on outside of revolving drum of mixer and steel cross brace, "res ipsa loquitur" doctrine was not applicable, since the facts as to how and why accident occurred were fully known to all parties and it could not be said under the facts or from common experience that accident was more likely caused by defendants' than by plaintiff's negligence.

17. Negligence ⇐121(2)

Where the evidence of how and why accident occurred is equally open and known to all parties, res ipsa loquitur doctrine has no application.

18. Negligence ⇐121(2)

The applicability of res ipsa loquitur doctrine depends on whether it can be said, in the light of common experience, that the accident was more likely than not the result of defendants' negligence.

Fitz-Gerald Ames, Sr., San Francisco, James F. Hoey, Martinez (James A. Himmel, San Francisco, of counsel), for appellant.

Joseph F. Rankin, Ricksen, Freeman & Johnson and Stanley C. Smallwood, all of Oakland, for respondent.

PETERS, Presiding Justice.

George Billeter, the plaintiff, and foreman for the general contractor on a construction job, had three fingers of his left hand amputated while he was attempting to climb on a cement mixer owned and operated by Rhodes & Jamieson, Ltd., a subcontractor on the same job. Plaintiff brought this action against the subcontractor and its employee, Louis Robbiano, on the theory that he, the plaintiff, was, at the time of the accident, an invitee of the subcontractor, and that the defendants failed to supply him with a safe place in which to work or to warn him of the dangers involved in using the equipment. The jury brought in a verdict for the defendants, and, from the judgment entered on this verdict, plaintiff appeals.

DeLucca & Sons, as general contractor, had a contract to build a filter plant at Orinda, California. Respondent, Rhodes & Jamieson, had the subcontract to furnish the concrete. In performing this subcontract, dump trucks belonging to Rhodes & Jamieson would carry dry cement to the job and there it would be mixed in mobile cement mixers, called mixermobiles. A mixermobile is a large industrial type of cement mixer mounted on wheels. Attached to it is a wooden tower erected to the height from which it is desired that the cement should be poured. This equipment was moved from place to place as the requirements of construction necessitated. The subcontractor was supposed to have its mixermobiles spotted on the job as directed by the general contractor, and ready to pour cement by 8 a. m. of each work day. It usually required the cooperation of two men to set up and spot the equipment. Usually it was done by the operator of the mixermobile and a dump truck operator, both employees of Rhodes & Jamieson. Occasionally, however, the truck drivers would not arrive on the job at the proper time, in which event the plaintiff, Billeter, would assist the operators.

Billeter was the general foreman for DeLucca & Sons. One of his main duties was to see that everything was ready to receive the poured concrete, and to see to it that the mixermobiles were properly spotted and ready to pour at 8 a. m.

Louis Robbiano was a mixermobile operator in the employ of Rhodes & Jamieson, and in charge of the specific piece of equipment involved in the accident. Admittedly, at the time of the accident, he was acting in the course and scope of his employment with Rhodes & Jamieson.

Toward the rear of the mixermobile is a large circular metal drum which revolves, in which the cement is mixed. Attached to the exterior of this drum is a metal flange or fin, which is a piece of metal welded to the outside of the drum and extending out one and a half to two inches from the drum. The drum so revolves that, on the right-

hand side of the mixer, the metal fin comes from the top towards the bottom of the equipment. The purpose of this fin is to trip a counting and timing device located near the bottom of the drum by which a record is made of the number of revolutions of the drum. On the right-hand side of the mixermobile, and extending diagonally across and attached to the frame which encases and holds the drum, there is a steel bar, some two inches in diameter, which acts as a rigid brace for the equipment. As the drum revolves it passes underneath this stationary cross brace. From the surface of the drum to the underside of this cross brace is a little over two inches. But when the steel fin attached to the drum passed under the cross brace this distance was greatly reduced.

There was some dispute over the precise clearance between the fin and the cross brace. The witness Tillman, who was the superintendent in charge of the job for De-Lucca & Sons, testified that the normal clearance between the fin and the inner surface of the cross brace was from one-half to three-quarters of an inch. Robbiano testified that the normal clearance was about a half an inch. Tillman testified that he examined the particular mixermobile here involved shortly after the accident occurred and that there was no clearance at all between the fin and the cross brace—in fact, the steel fin had cut into the cross brace about a half an inch. Robbiano testified that at normal speeds there is about half an inch clearance, but at high speeds, at least when the drum is loaded, the drum "climbs" towards the cross brace so that it rubs, and that this was characteristic of this model of mixermobile. At the time of the accident the drum was revolving at idling speed, with no mix in it.

Billeter testified that on the morning of the accident he had told Robbiano where to set up his mixer, and where to pour the cement; that, there being no truck driver of Rhodes & Jamieson there that morning, he, at Robbiano's request, helped Robbiano to spot the equipment at the proper place; that Robbiano told him that he had lost some needle bearings used on the wooden tower machinery attached to the mixer, and asked him, Billeter, to help look for them; that Billeter found some of these bearings on the ground near the equipment and gave them to Robbiano who proceeded to climb up the equipment to insert the bearings where needed; that Robbiano called down to Billeter and asked him if he had found any more bearings, and, when Billeter replied that he had, Robbiano requested Billeter to hand them up to him; that Billeter went over to the right side of the mixermobile, placed his left hand on the cross brace and reached up with his right hand towards Robbiano; that Robbiano was so high on the machinery that he, Billeter, could not reach Robbiano's outstretched hand; that he, Billeter, then slipped his left hand further up on the cross brace, put one foot on the wheel hub of the mixermobile, and started to hoist himself up. His left hand was then at the point on the cross brace directly opposite to the rotating fin. As the fin passed the cross brace, there being insufficient clearance between the fin and the brace, the fin cut off three of Billeter's fingers.

Robbiano's story of the accident was substantially different from that told by Billeter. Robbiano admitted that, on prior occasions, he had asked Billeter to give him a hand in setting up the mixermobile, but he stated that on the morning of the accident he had performed this task himself, and that he did not see Billeter until after the mixer had been spotted; that Billeter then appeared on the scene while he, Robbiano, was picking up the bearings. Robbiano positively denied asking Billeter to assist him in finding the lost bearings. He testified that he had dropped the bearings and had found almost all of them when Billeter appeared and asked him what he was doing; that at this time he was going around the back end of the mixer and told Billeter that he was looking for the bearings; that he then climbed up on the machine and started to insert the bearings he had found. Robbiano remembered that Billeter picked up some of the bearings, but did not remember reaching down to get them from Billeter, nor did he remember that Billeter had tried to hand them up to him. He testified that, while he was in-

serting the bearings that he had found, Billeter called to him: "Here are three or four more"; that he simply replied "O.K." and nothing more; that he continued to insert the bearings then in his possession, when, out of the corner of his eye, he saw Billeter start to climb up on the machine, and then the accident happened; that the accident happened so quickly that it was impossible to warn Billeter of the danger. He admitted that at no time did he warn Billeter of the danger created by the fin, and stated that there was no warning device or sign or guard on the machine indicating possible danger from grabbing the cross brace. He had never discussed with his superiors or fellow employees the fact that the fin was hitting the cross brace, nor had he ever discussed with them the possibility of putting up a safety guard or a warning sign.

Tillman contradicted a portion of Robbiano's testimony. He stated that, immediately after the accident, Robbiano told him that Billeter had been helping him set up the mixer, and that he asked Billeter to hand up the bearings that Billeter had found. Robbiano denied that such a conversation had taken place.

Tillman also testified that his instructions to Billeter were that Billeter should assist the mixermobile operators in setting up their equipment, and should also, when requested, help such operators repair their machines. Tillman knew that Billeter had been requested to and did perform such services in the past.

Billeter testified that, before the accident, he did not know that there was a steel fin on the revolving drum; that no one had ever warned him about this fin; and that he had no knowledge of the clearance between the fin and the cross brace. He admitted, however, that he had worked around this and similar mixermobiles for several months, had helped to spot them and set them up, and had helped to repair them. For twenty-five years or more he had worked around heavy construction jobs and was familiar with heavy construction equipment, including cement mixers. For five months in 1945–6 he had operated a business for himself doing concrete work. He admitted that he knew that there were various kinds of counting devices on cement mixers, but asserted that he did not know about this metal fin type of counter. He also testified that it was not his duty to check the number of revolutions made by each mixer, that task being performed by an inspector of the East Bay Municipal Water District.

The accident happened on the right-hand side of the mixer. On that side there is no device specially constructed for the purpose of assisting those desiring to climb up on the machine. On the left side of the mixer, however, is a steel ladder leading from the ground to the operator's platform. Had Billeter used this ladder he would have avoided the revolving drum without danger, but he would have had to climb from the operator's platform, to the platform on the right side of the equipment, where Robbiano was inserting the bearings. Billeter admitted that he knew that the mixer was equipped with this ladder, but denied ever using it to get to the operator's platform. Robbiano testified that Billeter had used the ladder several times to get to the platform.

Appellant first urges insufficiency of the evidence to support the verdict. In this connection he urges that the evidence shows that he was in a place in which he was required to be as foreman; that there is no evidence that he left a place of safety and went into a place of danger; that he had no knowledge that there was not sufficient clearance between the fin and the cross brace to prevent the cross brace from being used as a hand hold; that the relationship between Rhodes & Jamieson and appellant was that of invitor and invitee; that Rhodes & Jamieson was bound to exercise ordinary care to provide appellant with a reasonably safe place in which to work, and with reasonably safe appliances and equipment.

[1–3] It is undoubtedly the law that an invitor owes to an invitee the duty to exercise ordinary care towards an invitee, and to provide him a reasonably safe place in which to work. The correct rule was thus stated in Miller v. Pacific Constructors, Inc., 68 Cal.App.2d 529, 545, 157 P.2d 57, 65:

"The general rule in that regard is that an owner or occupier of premises, who, by invitation express or implied, whether the invitation is pursuant to a written contract or otherwise, induces, or knowingly permits, a workman to enter the premises for the performance of duties mutually beneficial to both parties, is required to use reasonable care to protect the workman by supplying him with a reasonably safe place in which to work and to furnish and maintain appliances in connection therewith which are reasonably safe for the purposes embraced therein. [Citing a case.] "It is true that a contractor is not ordinarily liable for injuries sustained by a workman as a result of defects which are clearly visible or obvious to him, or when he has actual or constructive knowledge of the existence of such defects. * * * That principle is so well established that it requires no authorities to support the doctrine. But it is equally well settled that a workman is not charged with knowledge of a latent or concealed defect and that he may recover damages resulting from such latent defect of which he has no knowledge, provided the employer or licensor knew, or by the exercise of reasonable care should know of such defect and fails to remedy or warn the workman of that danger."

[4, 5] It is also true that an invitee is not required to look for hidden traps. Appellant correctly relies upon the following rule stated in Emery v. Pacific T. & T. Co., 43 Cal.App.2d 402, 409, 110 P.2d 1079, 1084:

" 'The employe is not required to use any degree of care or diligence to discover defects. He will be held to have assumed the risk only when he knew, and will be held to have known when the defect was so obvious that he must have known, or simply refused to open his eyes and see, or when he was put upon inquiry by some discovery or suggestion of danger which it was gross carelessness for him to neglect.'

"This principle is as applicable to an invitee, as was plaintiff, as to that of an employee."

[6, 7] There can be no doubt that in a proper case an employee of the main contractor or of a subcontractor may be an invitee of another subcontractor. Whether an employee of one contractor is an invitee or licensee of another contractor, or is a trespasser, is normally a question of fact. Biondini v. Amship Corp., 81 Cal.App.2d 751, 185 P.2d 94. Moreover, it is the law that a person may be an invitee as to one portion of the premises, and a mere licensee or even a trespasser as to other portions, and that the question as to extent of the invitation is one of fact and not of law. Biondini v. Amship Corp., supra, 81 Cal.App.2d at page 760, 185 P.2d 94; Gastine v. Ewing, 65 Cal.App.2d 131, 150 P.2d 266; Buckingham v. San Joaquin Cotton Oil Co., 128 Cal.App. 94, 16 P.2d 807; Dobbie v. Pacific Gas & Electric Co., 95 Cal.App. 781, 273 P. 630; Medcraft v. Merchants Exchange, 211 Cal. 404, 295 P. 822; Scott v. George A. Fuller Co., 41 Cal.App.2d 501, 107 P.2d 55. Respondents, in this connection, comment on the evidence of Robbiano that he had not asked appellant to assist him in finding the bearings, and had not asked him to climb on the equipment and hand the bearings to him. They also point out that the jury could have found that, even though appellant was an invitee as to part of the mixer, the means he used to climb thereon were not the usual or proper means, so that the jury could have found that the implied invitation did not extend to the portion of the mixer on which the accident occurred. They point out that there was a steel ladder, of which appellant had knowledge, on the left side of the equipment that had been installed for the use of those who desired to climb on the equipment. This is evidence of a weak type it is true, that supports the implied finding of the jury that appellant was not invited by Rhodes & Jamieson to use the cross brace in the fashion in which it was used.

[8–10] Even if appellant were an invitee he could not close his eyes to dangers that were obvious, and blindly enter a place that he knew or should have known was dangerous. If he was contributively negligent he may not recover. Hill v. Eaton & Smith, 65 Cal.App.2d 11, 149 P.2d 762; Miller v. Pacific Constructors, Inc., 68 Cal. App.2d 529, 157 P.2d 57. The test is

whether the invitee acted as a reasonably prudent person under the circumstances. In the present case contributory negligence was pleaded by respondents. Whether an invitee is or is not contributively negligent is a question of fact. In our opinion, the evidence, and the reasonable inferences therefrom, although conflicting, is sufficient to support the implied finding that appellant was contributively negligent. The evidence shows that appellant had worked on heavy construction jobs for some twenty-five years and was thoroughly familiar with construction equipment, including cement mixers. He was thoroughly familiar with the mixer here involved, having assisted the operator not only in setting it up, but also in repairing it. One of his duties was to see that this particular machine was properly set up and ready to pour at 8 a. m. Large photographs of the equipment were introduced into evidence. They show the drum, the fin and the cross brace quite clearly. They demonstrate that the fin was on the outside of the drum and clearly visible. From this evidence the jury could, and evidently did, find that appellant did not act reasonably in grabbing the cross brace—that he knew, or should have known, of the existence of the fin and its proximity to the cross brace. This being so, the evidence is sufficient to sustain the judgment.

Appellant next objects to certain instructions on contributory negligence. The first told the jury that one cannot go from a place of safety into a place of danger without using his eyes or ears to see or hear anything that might be a source of danger, and that if the danger is visible and obvious the law will presume he saw it. The second was a normal and correct instruction on contributory negligence. The third told the jury that "Whether or not it is negligence for one to proceed into a dangerous situation of which he had previous notice is a question of fact not always and necessarily to be answered in the affirmative. If at the time he was aware of the danger and also appreciated its extent, and if he voluntarily and unnecessarily exposed himself to it, then he was negligent as a matter of law. But to forget a danger once known to exist or to be in a state of abstraction or absent-mindedness may or may not be negligent, depending on whether or not in the circumstances it shows a want of ordinary care. Also the jury must consider the character of the notice received, whether recent or remote, and the impression such information would make upon the mind of an ordinary prudent person in a like situation."

[11] The main attack on these instructions is not on their form but on the ground that there was no evidence to warrant the giving of any instruction at all on the issue of contributory negligence. As already pointed out, there was substantial evidence, and reasonable inferences therefrom, on this issue not only sufficient to warrant the giving of instructions on the issue, but to sustain the implied finding that appellant was contributively negligent.

[12, 13] After the record was filed in this court an amendment to the reporter's transcript was filed setting forth some twenty-one instructions proposed by appellant and refused by the trial judge. In his opening brief appellant claims that it was error not to have given these twenty-one instructions. He only sets forth some six of the twenty-one instructions, simply referring to the other fifteen by a reference to their numbers and pages where they appear. Under such circumstances this court is under no duty to, and will not, discuss the instructions not argued. As was said in Re Estate of McDonald, 191 Cal. 161, 171, 215 P. 545, 549; "It is not a sufficient predicate for a claim of error that instructions which properly state the law have been rejected. The assignment must go further and point out wherein the subject of the instruction was not in fact covered by those actually given." (See cases collected 2 Cal.Jur. p. 730, § 421, at p. 731.) In his reply brief, appellant practically concedes this to be the rule, and, in effect, abandons his assertion of error as to these fifteen instructions. (App.Closing Br. p. 17.)

The other six refused instructions all relate to the doctrine of *res ipsa loquitur*. The court did not instruct on this issue, and

appellant urges that he was entitled to instructions on this doctrine.

[14] Of course, it is the law that each party is entitled to have his theory of the case go to the jury when there is substantial evidence to support the theory in question. Stickel v. Durfee, 88 Cal.App.2d 402, 199 P.2d 16; Ferrula v. Santa Fe Bus Lines, 83 Cal.App.2d 416, 189 P.2d 294. The question then is whether the evidence heretofore reviewed warrants an instruction on the doctrine.

It is well settled that a triad of conditions must exist before the doctrine may be applied.

[15] "The doctrine of res ipsa loquitur has three conditions: '(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.'" Ybarra v. Spangard, 25 Cal.2d 486, 489, 154 P.2d 687, 689, 162 A.L.R. 1258; see, also, Raber v. Tumin, 36 Cal.2d 654, 226 P.2d 574.

[16] The doctrine is not applicable to the facts here involved because all the parties knew the facts relating to the injury. They all knew not only how the appellant was injured, but why he was injured—there was insufficient clearance between the fin and the cross brace. Under such circumstances the doctrine should not be applied.

The California authorities on this subject are by no means consistent and clear. It is possible to find authority in this state for many different statements of the elements of the doctrine. (See cases collected and commented upon in Leet v. Union Pac. R. R. Co., 25 Cal.2d 605, 155 P.2d 42, 158 A. L.R. 1008; see, also, an excellent article on the subject by William L. Prosser entitled "Res Ipsa Loquitur in California," in 37 Cal.L.Rev. 183.)

[17, 18] Regardless of this apparent conflict, it is perfectly clear that, where the evidence of how and why the accident occurred is equally open and known to all parties, the doctrine has no application. As was stated in Ybarra v. Spangard, 25 Cal. 2d 486, 490, 154 P.2d 687, 689, 162 A.L.R. 1258, quoting from Wigmore on Evidence: "If the doctrine is to continue to serve a useful purpose, we should not forget that 'the particular force and justice of the rule, regarded as a presumption throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person.'" See, also, Alexander v. Wong Yick, 25 Cal.App.2d 265, 268, 77 P.2d 476. In the instant case we cannot say, under the facts or from common experience, that this accident was more likely caused by respondents' than by appellant's negligence. The probability that the accident was caused by appellant's negligence is equally as great as that it was caused by the negligence of respondents. As was said in Raber v. Tumin, 36 Cal.2d 654, 659, 226 P.2d 574, 577: "It has also been more specifically pointed out that 'the applicability of the doctrine of res ipsa loquitur depends on whether it can be said, in the light of common experience, that the accident was more likely than not the result of their (defendants') negligence. (Citations.) "Where no such balance of probabilities in favor of negligence can be found, res ipsa loquitur does not apply."'"

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; GIBSON, C. J., and CARTER, J., dissenting.

104 Cal.App.2d 250

PEARMAN v. PEARMAN.

No. 14632.

District Court of Appeal, First District, Division 1, California.

May 17, 1951.

Divorce action by Chester Edward Pearman against Elvira Alarid Pearman. The defendant filed a cross-complaint for a divorce. From an order entered by the Superior Court, in and for the City and County of San Francisco, Preston Devine, J., modifying the interlocutory decree with respect to a provision for support by increasing monthly payments to wife, plaintiff appealed. The District Court of Appeals, Agee, J., pro tem., held that under the circumstances trial court was justified in concluding that monthly payments to wife for support and maintenance provided for in interlocutory decree which confirmed parties' property settlement agreement were intended to and were in nature of alimony and not a division of property.

Order affirmed.

1. Husband and wife ⇐279(1)

No single factor can be relied on in any given case to determine whether monthly payments are in nature of property or alimony and agreement of parties must be taken as a whole, and a consideration given as to circumstances under which it was made and nature and value of property being divided and its relation to amount of periodic payments.

2. Divorce ⇐245(1), 254

If monthly support payments provided for in divorce proceedings are in nature of property they may not be modified but if payments are in nature of alimony, court has power to modify, whether such payments are based on agreement of parties and whether agreement is incorporated in decree.

3. Husband and wife ⇐279(1)

Fact that monthly payments referred to in divorced parties' agreement which was confirmed by interlocutory decree were referred to as "support and maintenance" was not conclusive but was indicative of alimony, rather than property.

4. Divorce ⇐245(1)

Where parties' property settlement agreement which was confirmed by interlocutory decree provided wife was to receive all of personalty, referred to monthly payments to be paid wife as "support and maintenance", provided payments were to terminate on wife's death or remarriage, that husband was to maintain $10,000 life policy on his life with wife as beneficiary and that husband had right to change beneficiary if wife remarried or predeceased him, and no other provision was made for support of wife in event of husband's death, and wife always maintained a right to alimony, trial court was justified in concluding at modification hearing that monthly payments were intended to and were in nature of alimony.

5. Divorce ⇐286

Determination by trial court that stipulation and agreement of divorced parties for support payments to wife was a part of settlement of property, or was one solely for alimony or support money, if not unreasonable, will not be disturbed on appeal even though a contrary finding might be equally tenable.

Hancock, Rothert & Low, and Duncan Low, all of San Francisco, for appellant.

Franklin C. Stark and Stanley E. Sparrowe, Oakland, for respondent.

AGEE, Justice pro tem.

This is an appeal from an order modifying a provision in a divorce decree increasing monthly payments to the wife and awarding attorney's fees for services rendered in connection with the application for such modification.

After a marriage of 12 years, appellant (husband) filed suit for divorce against respondent (wife). Thereafter, the parties signed an agreement in which its purpose was stated to be "to finally settle, adjust and determine their property rights and to provide for the maintenance and support" of the wife and minor child of the parties. A few days later the wife filed a cross-

complaint praying that she be awarded a divorce, custody of the minor child, approval of the agreement, and "a reasonable sum for her support and maintenance and for the support and maintenance of said minor child." At the hearing the wife was awarded an interlocutory decree in which the agreement was "confirmed and approved" and the husband was ordered to pay the wife the sum of $100 per month "for the support and maintenance of said * * * [wife] * * * in accordance with the terms of the aforesaid agreement."

Thirteen years later the wife had a heart attack and became unable to work full time. She applied for a modification of the interlocutory and final decrees and was awarded an increase to $125 per month and $150 for attorney's fees. The attorney's fees also covered an application to increase the amount of the child support and there is no way of determining what portion was allocated to this. However, the sole question is whether the trial court had the power to modify the monthly support payments to the wife. If it did, then appellant concedes that the award of attorney's fees was proper (Civ.Code, §§ 139, 137). If it did not, then the attorney's fee award, so far as the wife's application to increase her monthly payments is concerned, was improper. McClure v. McClure, 4 Cal. 2d 356, 49 P.2d 584, 100 A.L.R. 1257.

The implied finding of the trial court in making the modification order is, of course, that the monthly payments provided for in the interlocutory decree constituted alimony. In fact, the minute order fixing the payments at $125 per month designates the payments to be "alimony." The facts and circumstances justifying this finding are as follows: The agreement of the parties recited that it was "to finally settle, adjust and determine their property rights *and* to provide for the maintenance and support of First Party [wife]" (emphasis added); the only property described in the agreement is the "furniture, musical instruments and household equipment" in the former home of the parties; the husband agreed to pay the wife $100 per month "for her support and maintenance. Should at any time the marriage now existing between the parties hereto be dissolved by judicial decree, and should First Party [wife] thereafter remarry, then upon such remarriage said payments of One Hundred Dollars ($100.00) per month shall cease and determine and Second Party [husband] shall be under no obligation to continue said payments. Said payments shall likewise cease on the death of First Party." The agreement also provided that the husband should take out and maintain a policy of life insurance in the amount of $10,000 to be paid to the wife in the event of the husband's death, expressly reserving to the husband the right to change the beneficiary or otherwise deal with the policy in the event the wife remarried or predeceased the husband. The wife's cross-complaint alleged "That plaintiff [husband] has ample means and abilities properly to support and maintain defendant and cross-complainant * * *." This allegation was found by the trial court to be true. Such an allegation and finding would be irrelevant to an award of money as a part of the division of community property. It would not only be relevant, but necessary to an award of alimony. The cross-complaint prayed "that defendant and cross-complainant be awarded a reasonable sum for her support and maintenance." The interlocutory decree ordered that "defendant and cross-complainant be awarded and plaintiff be required to pay defendant and cross-complainant monthly the sum of One Hundred Dollars ($100.00) for the support and maintenance of said defendant and cross-complainant in accordance with the terms of the aforesaid agreement." Without objection, the wife testified on the modification hearing that it was alimony which she sought and obtained at the divorce hearing. "Q. Now, recalling the time, Mrs. Pearman, that you asked for the divorce originally, you in your [cross] complaint sought alimony, didn't you ask for it? A. Yes. Q. At the hearing you asked for it and the Judge granted it, is that correct? A. Yes. Q. That alimony is what you refer to when you speak of the $100 a month paid to you, is that right? A. Yes, sir." The foregoing testimony stands undisputed in the record of the modification

hearing and no attempt was made to refute it, either by what transpired therein or at the divorce hearing. While it may involve a legal conclusion, certainly it shows the intention and understanding of the wife. If this was not also the intention and understanding of the husband, his counsel at the divorce hearing should have made that known to the judge and to the plaintiff. It should be noted that the husband's counsel on this appeal are different than either his counsel who appeared for him at the divorce hearing or at the modification hearing. The record shows that at the time of the interlocutory decree appellant was earning $750 per month. At the time of the modification hearing he was making $13,250 per year.

[1–3] No single factor can be relied upon in any given case to determine whether monthly payments are in the nature of property or alimony. The agreement must be taken as a whole and consideration given as to the circumstances under which it was made and the nature and value of the property being divided and its relation to the amount of the periodic payments. Puckett v. Puckett, 21 Cal.2d 833, 841–842, 136 P.2d 1. If the monthly payments are in the nature of property, they may not be modified. Puckett v. Puckett, supra, 21 Cal.2d at page 840, 136 P.2d 1. But if the payments are in the nature of alimony the court has the power to modify, whether such payments are based upon an agreement of the parties and whether or not the agreement is incorporated in the decree. Adams v. Adams, 29 Cal.2d 621, 624–626, 177 P.2d 265; Hough v. Hough, 26 Cal.2d 605, 612, 160 P.2d 15. The monthly payments referred to in the agreement and in the decree as "support and maintenance" are not conclusive but are indicative of alimony, rather than property. Weedon v. Weedon, 92 Cal.App.2d 367, 369, 207 P.2d 78. The payments are to terminate upon the wife's remarriage or death. This, again, is indicative. Ettlinger v. Ettlinger, 3 Cal.2d 172, 44 P.2d 540; Fields v. Fields, 94 Cal.App.2d 56, 59, 209 P.2d 977; Cameron v. Cameron, 85 Cal.App.2d 22, 25, 192 P.2d 89; Weedon v. Weedon, supra. As was said in the Weedon case, "The agreement itself provides for appellant to pay respondent $66.67 monthly for her support and maintenance until her death or remarriage. If the payments had been her share of the community estate, why should they cease before a specified sum should be fully paid?" Weedon v. Weedon, supra, 92 Cal.App.2d at page 369–370, 207 P.2d at page 80. The fact that the agreement recites it is in full settlement and releases the husband of all further claims does not preclude the court from inquiring into and determining whether the monthly payments are "property" or "alimony." Puckett v. Puckett, supra; Ettlinger v. Ettlinger, supra. The only property expressly referred to in the agreement is disposed of therein as follows: "All personal property, furniture, musical instruments [except piano] and household equipment formerly in the home occupied by the parties * * * is hereby made and declared to be the sole, separate and exclusive property of First Party [wife]." The piano was agreed to be the property of the minor child. The relation of the amount of the property being disposed of by the agreement to the amount of the monthly payments is important in determining whether such monthly payments to the wife are in the nature of compensation for property being retained by the husband or are in the nature of alimony. See Cameron v. Cameron, supra. Here, it would appear that the wife got *all* of the property, except the piano, and therefore the monthly payments were not to compensate her for property being retained by the husband. It is true that the husband's divorce complaint alleges that there were also "life insurance policies on the lives of both plaintiff and defendant." The trial court found this allegation to be untrue, and these policies were not mentioned in the agreement. What disposition was made of them is not disclosed by the record.

The agreement does provide that the husband was to take out and maintain a $10,000 life insurance policy on his life with the wife as beneficiary and with the right to the husband to change the beneficiary if the wife remarried or predeceased him. This was undoubtedly for the purpose

of providing for the support and maintenance of the wife in the event the husband died while she was still otherwise entitled to receive monthly payments and would be in lieu thereof. This is for the reason that upon the husband's death the wife's right to receive such monthly payments (*if* alimony) would cease. If the parties intended said monthly payments to be in the nature of property, then the obligation of the husband would not cease by reason of his death and would be a charge against his estate. It seems obvious that this provision as to the insurance policy was made because the parties intended the monthly payments to be alimony. No other provision was made for the support of the wife in the event of the husband's death. Of course, appellant argues that no such provision was necessary because the monthly payments were not alimony and therefore would be a charge against the husband's estate. This is just another point which the trail court apparently resolved in favor of its implied finding that the payments constituted alimony.

The record shows that the wife has always maintained a right to alimony. Five days after the signing of the agreement, she filed a cross-complaint alleging that there was no community property and that "all the *property* rights" had been settled by written agreement. (Emphasis added.) Then in the following separate paragraph she alleges: "That plaintiff has ample means and abilities properly to support and maintain defendant and cross-complainant." Her prayer (subd. 4) asks that the agreement be confirmed and approved and, separately (subd. 5), asks that she "be awarded a reasonable sum for her support and maintenance."

The interlocutory decree awarded to the wife provides: (1) that the wife is entitled to an interlocutory decree; (2) that the agreement of December 13, 1935, "be and the same is hereby confirmed and approved"; (3) that the custody of the minor child is awarded to the wife; (4) that the husband pay the wife $75 per month for the support of the child; (5) that the husband shall have the right of reasonable visitation of the child; and (6) "that defendant and cross-complainant be awarded and plaintiff be required to pay defendant and cross-complainant monthly the sum of One Hundred Dollars($100.00) for the support and maintenance of said defendant and cross-complainant in accordance with the terms of the aforesaid agreement." Appellant argues that this last provision of the decree was merely a recital of a part of the agreement and is not an award of alimony. Respondent argues that the trial court, having already in the first part of the decree "confirmed and approved" the agreement, then provided in the last and separate part thereof for an *award* of monthly payments which, "in accordance with the terms of the aforesaid agreement," were to be made until the death or remarriage of the wife. We have already commented on the wife's understanding and intent that she was seeking and obtaining alimony. If all that was intended by the trial court was to treat the monthly payments as property and not alimony, then why provide therefore in a separate paragraph at the end of the decree when it had already confirmed and approved the agreement?

It should also be noted that no specific reference was made in the decree to the household furniture or any other property. This would indicate that all property matters were disposed of in paragraph 2 of the decree and that the money payments provided for in paragraph 6 were not intended to be a part of the disposition of property.

[4, 5] All of the foregoing facts and circumstances certainly permitted the trial court at the modification hearing to conclude that the monthly payments were intended to and were in the nature of alimony and not a division of property. "The determination of such issue of fact by the trial court, if not unreasonable, will not be disturbed on appeal even though a contrary finding might be equally tenable." Weedon **v.** Weedon, supra, 92 Cal.App.2d at page 369, 207 P.2d at page 79.

The order appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

101 Cal.App.2d 53

In re RONAYNE'S ESTATE.

RONAYNE v. ADAY et al.

Civ. 18389.

District Court of Appeal, Second District, Division 3, California.

May 4, 1951.

Proceeding in the matter of the estate of Rose S. Cook Ronayne, wherein George B. Ronayne filed a petition to set aside a homestead and exempt property and Norah Bangs Aday, and others, filed a motion to dismiss the petition. From an order of the Superior Court, Los Angeles County, H. J. Borde, J., dismissing the petition, the petitioner appealed. The District Court of Appeal, Vallee, J., held that no homestead existed which petitioner was entitled to have set apart to him absolutely, but that the trial court should have made an order with respect to a probate homestead and personal property exempt from execution.

Order reversed.

1. Husband and wife ⇐266

Where wife executed a declaration of homestead on jointly owned property and husband thereafter conveyed his interest in property to wife, property became wife's separate property and upon death of husband homestead vested absolutely in wife. Civ.Code, § 1265; Probate Code, § 663.

2. Homestead ⇐167

Where wife executed a declaration of homestead on jointly owned property, but husband thereafter conveyed his interest in property to wife and subsequently died, the title vested in surviving wife, although it retained characteristic of a homestead in being exempt from forced sale for her debts, and she had power to dispose of it, encumber it or devise it and title was not affected by her subsequent marriages. Civ.Code, § 1265; Probate Code, § 663.

3. Homestead ⇐140

Where wife executed declaration of homestead on jointly owned property, but husband thereafter conveyed his interest in property to wife, wife's subsequent husband who survived her was not entitled to have homestead set aside to him as surviving husband. Civ.Code, § 1265; Probate Code, § 663.

4. Executors and administrators ⇐194(1)

The statute authorizing court to set apart a homestead for use of surviving spouse and minor children where no homestead has been selected is mandatory and probate court has duty upon proper application to set apart such homestead where deceased was in possession of property at time of death. Probate Code, § 661.

5. Executors and administrators ⇐179

The right of a surviving spouse to a probate homestead is independent of and in addition to any other right or property he or she may have, whether acquired under will of decedent or otherwise. Probate Code, § 661.

6. Executors and administrators ⇐194(3)

Although petition requesting that homestead and exempt property be set aside to surviving husband did not specifically request that a probate homestead be set aside, probate court when issue was raised at trial had duty under prayer for general relief to set aside probate homestead. Probate Code, §§ 660, 661.

7. Executors and administrators ⇐175

Where probate homestead was to be selected from separate property of deceased wife, duration thereof could not exceed life time of surviving husband. Probate Code, § 661.

8. Executors and administrators ⇐181

Where petitioner was surviving spouse, there was no community property from which a homestead could be selected, none had been selected during decedent's lifetime, real property was separate property of decedent and inventory and appraisement had been returned and filed, proper basis existed for setting aside of a probate homestead. Probate Code, § 661.

Merrill L. Granger, Santa Monica, for appellant.

Gandy & Cockins, Santa Monica, for respondents.

VALLÉE, Justice.

Appeal by George B. Ronayne, surviving husband of decedent, from an order dismissing his petition to set aside a homestead and exempt property. The petition prayed that the homestead and exempt property be set aside to petitioner "absolutely and for such other and further relief as may be proper." At the close of petitioner's case, respondents moved to dismiss the petition on the sole ground "that the statutory requirements for creation of a homestead inuring to the benefit of the petitioner have not been complied with," which motion was granted.

On June 9, 1927, decedent, then the wife of John Cook, executed and recorded a declaration of homestead on jointly owned property for the joint benefit of herself and her then husband. On April 16, 1929, Cook conveyed his interest in the property to decedent. Subsequently Cook died. Thereafter decedent married one Fred Lapp, who also predeceased her. On November 7, 1940, decedent married petitioner and resided with him on the property until her death. She died testate on June 15, 1949, In re Estate of Ronayne, Cal.App., 230 P. 2d 423, without issue. The items of personal property petitioner seeks to have set aside to him as exempt property are household furniture, furnishings, and equipment located in the homesteaded property. There was no community property.

It is appellant's contention that the homestead declared by decedent in 1927, while the wife of another, inured to his use and benefit.

Civil Code section 1265[1] and Probate Code section 663[2] determine the devolution of a homestead.

[1, 2] The effect of the deed from Cook to decedent was to vest in her the interest conveyed as her separate property. What formerly had been community or jointly owned property when the declaration was filed became, by Cook's conveyance, decedent's separate property. Wall v. Brown, 162 Cal. 307, 310, 122 P. 478. Upon the death of Cook, the homestead vested absolutely in decedent, the survivor. So far as the legal title was concerned it vested in her as fully and perfectly as though no homestead had ever been carved out of it, although it retained the characteristic of a homestead to the extent that it was exempt from forced sale for her debts. Wall v. Brown, supra, 162 Cal. 307, 310, 122 P. 478; In re Estate of Beer, 178 Cal. 54, 56, 171 P. 1062; In re Estate of Teel, 34 Cal.2d 349, 352, 210 P.2d 1; Brandon v. Faria, 99 Cal. App. 594, 597, 279 P. 192; In re Estate of

1. "From and after the time the declaration is filed for record, the premises therein described constitute a homestead. If the selection was made by a married person from the community property, or from the separate property of the spouse making the selection or joining therein, the land so selected, on the death of either of the spouses, vests in the survivor, subject to no other liability than such as exists or has been created under the provisions of this title; in other cases, upon the death of the person whose property was selected as a homestead, it shall go to the heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent; but in no case shall it, or the products, rents, issues or profits thereof be held liable for the debts of the owner, except as provided in this title; and should the homestead be sold by the owner, the proceeds arising from such sale to the extent of the value allowed for a homestead exemption as provided in this title shall be exempt to the owner of the homestead for a period of six months next following such sale."

2. "If the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both were living, was selected from the community property, or from the separate property of the person selecting or joining in the selection of the same, it vests, on the death of either spouse, absolutely in the survivor. If the homestead was selected from the separate property of the decedent without his consent, it vests, on death, in his heirs or devisees, subject to the power of the court to set it apart for a limited period to the family of the decedent, as hereinabove provided. In either case it is not subject to the payment of any debt or liability existing against the spouses or either of them, at the time of the death of either, except as provided in the Civil Code."

Wrenn, 61 Cal.App. 602, 606, 215 P. 909; Tyrrell v. Baldwin, 78 Cal. 470, 474, 21 P. 116; Dickey v. Gibson, 113 Cal. 26, 31, 45 P. 15. She had the power to dispose of it, encumber it, and it was subject to her testamentary disposition. Title to the property was not affected by her subsequent marriages. " 'The marriage changed her social *status,* but did not change her right to the property. In its title and use it remained vested in her as the true owner, usable by her for her exclusive benefit, and disposable by her, without the consent of her husband, in the manner provided by law * * *.' " Dickey v. Gibson, 113 Cal. 26, 33, 45 P. 15, 17. There was, therefore, to all practical intents and purposes, no homestead in existence upon the property when decedent married Lapp and when she thereafter married petitioner. In re Estate of Wrenn, 61 Cal.App. 602, 606–607, 215 P. 909; In re Estate of Clavo, 6 Cal.App. 774, 779, 93 P. 295. See also Zanone v. Sprague, 16 Cal.App. 333, 336, 113 P. 989; In re Estate of Mendes, 63 Cal.App. 11, 13, 217 P. 1077; Dickey v. Gibson, 113 Cal. 26, 31, 45 P. 15.

In Estate of Clavo, supra, 6 Cal.App. 774, 93 P. 295, an heir of decedent appealed from an order setting aside a homestead absolutely to decedent's widow (his second wife), contending that the property upon which a homestead had been declared by decedent while married to his first wife, who predeceased him, vested in his heirs and devisees. After his second marriage, the decedent filed a second declaration of homestead upon the same property. In affirming the judgment, the court said, 6 Cal.App. at page 779, 93 P. at page 296: "Upon the death of the first wife the title to the property became vested absolutely in the husband, and he was clothed with complete dominion over it, but by virtue of the statute [sec. 1474, Code Civ.Proc., now Prob.Code, sec. 663], it still retained some characteristics of a homestead, among them being exemption from execution. While that exemption continued, he could not select another and different homestead. *But the title having vested completely in the husband upon the death of his wife, the property could not, in the very nature of the case continue as a homestead for the benefit of the second community. The unqualified title of one of the spouses to the property is inconsistent with the existence of a homestead for the benefit of both.* After his second marriage, in order to clothe the property with all the attributes of a community homestead, it was necessary for the husband to file another declaration." (Italics added.) See also In re Estate of Wrenn, 61 Cal.App. 602, 606, 215 P. 909; In re Estate of Mendes, 63 Cal.App. 11, 13, 217 P. 1077; In re Estate of Sequeria, 63 Cal.App. 14, 217 P. 1078.

The case of Vieth v. Klett, 88 Cal.App.2d 23, 198 P.2d 314, relied on by appellant, is inapplicable to the facts here. The case distinguishes Estate of Clavo, 6 Cal.App. 774, 93 P. 295, to which we have heretofore referred. The Clavo case squarely decides the issue now being considered.

[3] While the court, by reason of the foregoing, was justified in denying the petition insofar as it sought to have a declared homestead set apart to the surviving husband, it erred in not making an order with respect to a probate homestead and with respect to the personal property exempt from execution.

At the trial, petitioner urged that if he were not entitled to have the declared homestead set over to him he was, in the alternative, entitled to a probate homestead. Respondents concede that the "case at bar is concerned with Section 660 and 661 of the Probate Code." Section 660, in part, provides: "* * * Thereupon [when the inventory is filed], or at any subsequent time during the administration, the court, on petition therefor, may in its discretion set apart to the surviving spouse, or, in case of his or her death, to the minor child or children of the decedent, all or any part of the property of the decedent exempt from execution * * *."

[4, 5] Under section 661,[3] where no homestead has been selected, the court *must* set apart a homestead for the use of the

3. "If none has been selected, designated and recorded, or in case the homestead was selected by the survivor out of the separate property of the decedent, the

surviving spouse out of the community property or out of real property owned in common by the decedent and the surviving spouse, and if none, out of the separate property of the decedent. The provisions of section 661 are mandatory, and it is the imperative duty of the probate court upon proper application to set apart such a homestead where the deceased was in possession of the property at the time of death. In re Estate of Shively, 145 Cal. 400, 402, 78 P. 869; In re Estate of Claussenius, 96 Cal. App.2d 600, 611, 216 P.2d 485; In re Estate of Mason, 76 Cal.App. 315, 320, 244 P. 629; In re Estate of Barkley, 91 Cal.App. 388, 391, 267 P. 148. The only restriction imposed by this section is that if the homestead is selected from the separate property of the decedent, its duration must be for a limited period, in no case beyond the lifetime of the surviving spouse. The right of a surviving spouse to a probate homestead is independent of and in addition to any other right or property he or she may have, whether acquired under the will of decedent or otherwise. In re Estate of Firth, 145 Cal. 236, 238, 78 P. 643; In re Estate of Barkley, supra, 91 Cal.App. 388, 391, 267 P. 148.

[6–8] While the petition does not specifically pray that a *probate* homestead be set aside to petitioner, under the prayer for general relief and under the facts alleged and the proof made, it was incumbent upon the court to make such an order for a prescribed period of time, not exceeding the lifetime of petitioner. The question of a probate homestead was placed directly in issue at the time of the trial. In seeking to have a probate homestead designated from the separate property of the decedent, the following facts furnish the basis for the jurisdiction of the court: 1) petitioner is the surviving spouse; 2) there is no community property from which a homestead can be selected; 3) no homestead had been selected and recorded by either of the spouses during decedent's lifetime; 4) the real property is the separate property of decedent; 5) and the inventory and appraisement has been returned and filed. In re Estate of Claussenius, 96 Cal.App.2d 600, 612, 216 P.2d 485; In re Estate of Rosland, 76 Cal.App.2d 709, 711, 173 P.2d 830. The foregoing facts were substantially before the trial court and it was error not to make an order with respect to the homestead and the personal property exempt from execution.

Reversed.

SHINN, P. J., and WOOD, J., concur.

CHAMPION v. BENNETTS et al.
Civ. 17968.

District Court of Appeal, Second District, Division 2, California.
May 18, 1951.

Rehearing Denied June 5, 1951.
Hearing Granted July 12, 1951. *

Harry E. Champion sued Frederick A. Bennetts and others for damages sustained because of defendants' alleged negligence in connection with a surgical operation performed by named defendant on plaintiff. From a judgment of the Superior Court, Los Angeles County, Samuel R. Blake, J., for named defendant notwithstanding a jury's verdict against him, plaintiff appealed. The

decedent not having joined therein, the court, in the manner hereinafter provided, must select, designate and set apart and cause to be recorded a homestead for the use of the surviving spouse and the minor children, or, if there be no surviving spouse, then for the use of the minor child or children, out of the community property or out of real property owned in common by the decedent and the person or persons entitled to have the homestead set apart, or if there be no community property and no such property owned in common, then out of the separate property of the decedent. If the property set apart is the separate property of the decedent, the court can set it apart only for a limited period, to be designated in the order, and in no case beyond the lifetime of the surviving spouse, or, as to a child, beyond its minority; and, subject to such homestead right, the property remains subject to administration."

* Subsequent opinion 236 P.2d 155.

District Court of Appeal, Moore, P. J., held that the evidence was insufficient to take to the jury the question whether atrophy of plaintiff's testicle, necessitating removal thereof, was due to the presence of a drain tube inserted in his diseased scrotum by named defendant after the operation, as required to render such defendant liable under the res ipsa loquitur doctrine or any other theory of negligence.

Judgment affirmed.

Wilson, J., dissented.

1. Physicians and surgeons ⇐18(8)

To establish surgeon's liability for malpractice, expert testimony is required to prove affirmatively not only his negligence in failing to exercise degree of care, skill and learning ordinarily possessed and exercised by reputable practitioners under same circumstances in same or similar locality, but whether a thrombosis, necrosis, or diseased or atrophied nerve, vein or organ of patient was caused by such negligence.

2. Physicians and surgeons ⇐18(6)

The res ipsa loquitur doctrine applies in malpractice action against physician or surgeon only when a layman can say, as matter of common knowledge and observation, that consequences of professional treatment of patient were not such as would have followed had due care been exercised.

3. Physicians and surgeons ⇐18(9)

In action for malpractice in surgical operation for removal of varicose veins from plaintiff's testicle, evidence was insufficient to take to jury question whether testicle's atrophy, necessitating removal thereof, was due to presence of drain tube inserted by defendant in diseased scrotum after operation, rather than thrombosis and necrosis of testicle, so as to render defendant liable under res ipsa loquitur doctrine or any other theory of negligence.

Sheppard, Mullin, Richter & Balthis, Gordon F. Hampton and E. Talbot Callister, all of Los Angeles, for appellant.

Reed & Kirtland and Henry E. Kappler, all of Los Angeles, for respondents.

MOORE, Presiding Justice.

Plaintiff appeals from a judgment notwithstanding the verdict which had been returned against defendant Bennetts. The action was for damages allegedly sustained by appellant by reason of asserted negligence on the part of Dr. Bennetts, his assistant, Dr. Gummess, and the California Lutheran Hospital in connection with a surgical operation performed upon appellant. The surgery was for the purpose of removing certain varicose veins from appellant's left testicle. The trial court directed a verdict in favor of the hospital; the jury found in favor of defendant Gummess. Although appellant perfected his appeal against all defendants he now urges reversal of the judgment only in regard to Dr. Bennetts. The appeal as to the hospital was dismissed by this court on January 1, 1951.

For approximately twenty years appellant suffered from a varicocele in the left testicle. This condition became progressively worse until March 12, 1948, when he consulted respondent Bennetts, a urologist. The doctor's examination disclosed a large mass of veins in the left side of the scrotum which felt "like a sac of worms," and the testicle was very soft which usually indicates an advanced degree of atrophy. The doctor advised surgical removal of these veins. Appellant was hospitalized on March 23 and the operation was performed the following day. The scrotum was entered through a four-inch incision in the left upper region. The surgeon there found, on exposing the spermatic cord, a "mass of large, distended veins full of blood . . . tortuous or crooked and greatly enlarged." The surgery consisted of dissecting and removing such veins from the spermatic cord. Although the left testicle was small enough to indicate degeneration which had "resulted from progressive changes over a long period of time" yet its removal was not then deemed necessary. The doctor inserted a rubber drain which he testified was placed in a stab wound at the lower part of the scrotum with one end protruding. On the day after surgery appellant complained of great pain. The scrotum and penis had become

so swollen and dark that it was necessary to clip the tape holding operative dressings to relieve the pressure. His temperature rose to 101.2 degrees. On March 26th his pain continued to such degree that it was necessary for an interne to remove the surgical dressings and replace them with a small pad over the scrotum incision. Penicillin was prescribed by respondent from the 26th through March 30th. On the 27th the pain was so severe that appellant was given morphine. His temperature rose to a peak of 103.4 degrees. March 30th the doctor opened a portion of the incision and probed the wound with surgical forceps for the purpose of releasing any blood from the scrotal cavity to prevent a clot and its consequent pressure on the spermatic cord. Appellant was then ordered to take sitz baths each day. In taking such baths he was assisted by his friend, Mr. Greene, who made daily visits to the hospital.

On April 13 appellant was permitted to leave the hospital by ambulance for his home and instructed to continue his sitz-bath treatment. On April 26th appellant visited Dr. Bennetts' office for an examination and was instructed to apply hydrogen-peroxide to the incision and to cleanse it with swab sticks. On the 28th when appellant was cleansing pus from the wound he and his mother noticed deep in the incision a substance resembling a muscle or segment of pus. Upon touching this object the end of a rubber tube flipped up and protruded from the incision. Appellant became alarmed and attempted to reach Dr. Bennetts by telephone, but without success. Appellant testified that he had never been informed of any tube's having been placed in the scrotum. The next morning the tube came out adhered to a dressing. That day appellant succeeded in contacting Dr. Bennetts who when informed as to what had occurred said, "That is fine. I left it for a drain. I am glad you found it."

On the next day appellant visited respondent for an examination and was advised that he should undergo further surgery for complete removal of the left testicle. Appellant then visited another physician for an examination and this doctor's diagnosis was apparently in accord with the opinion of respondent. Accordingly, arrangements were made and on May 6th Dr. Bennetts performed the operation. Recovery was uneventful and appellant was able to return to work May 18th.

Appellant's charge of negligence on the part of respondent is that the rubber drain was so negligently placed and so carelessly maintained that as a result thereof appellant was forced to undergo the second operation for the removal of the testicle. The jury were evidently convinced of the truth of such claims and it cannot be denied that they were persuaded by substantial evidence. Appellant testified that he was able to observe the scrotum; the left side was blue-purple and about the size of a medium orange; the lower part was drawn up over the abdomen so that he "could see it very plainly"; there was no opening in the scrotum other than the four-inch incision and nothing protruded from the scrotum. Mr. Greene's testimony was substantially the same with reference to the swollen area and the absence of a protruding rubber drain and the stab wound. Appellant was corroborated also by his mother and Mrs. LeFevre, a neighbor who observed the wounded organ daily. Both testified that they observed the entire scrotum, but saw neither a protruding drain nor opening, nor scar in the bottom of the scrotum.

[1, 2] Such testimony was contradicted by respondent and his assistant in testifying that the tube was inserted for drainage purposes; a quarter inch of it protruded from a separate "stab wound"; only they had knowledge of the presence of the drain and respondent had "overlooked" mentioning the drain and stab wound in his operative report as it was routine procedure. Without laboring the point further, suffice it to say that, conceding respondent to have been negligent as claimed by appellant, it was not established that the presence of the rubber drain within the diseased scrotum until April 29th was the sole cause of, or that it proximately contributed to, the degenerated necrotic condition of appellant's scrotum necessitating

the removal of the left testicle. The structure of the human body with its respiratory and circulatory and nervous systems; its glands and their interdependent relationships; the atrophy, degeneration and disease of its various parts—these things have been the subject of study, investigation, and experimentation for centuries. So complicated is the organization of all parts of the human mechanism that only those who have explored the subject seriously and become learned in the science of physiology are equipped to speak as to the causes of bodily changes. So universally recognized is the truth of the foregoing observation that it has become the established rule in the field of malpractice that not only must a surgeon's negligence be affirmatively proved by expert testimony to the effect that the accused physician has failed to exercise that degree of care, skill and learning ordinarily possessed and exercised by reputable practitioners, under the same circumstances, in the same or similar locality, Moore v. Belt, 34 Cal.2d 525, 529, 212 P.2d 509; Sinz v. Owens, 33 Cal.2d 749, 753, 205 P.2d 3, 8 A.L.R.2d 757, but it is equally the law that such expert proof is required to establish whether a thrombosis, a necrosis, a diseased or atrophied nerve, vein or organ of a complainant was caused by the established negligence of the physician. Appellant assumes that if he has proved the negligence of respondent it is a logical sequitur that the pathology was caused by such neglect. And, also, in order to minimize the effort to be expended in proving negligence, he has invoked the doctrine of *res ipsa loquitur*. In this he is not supported by the authorities. That doctrine is properly applied only in that class of cases where a layman is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as would have been followed if due care had been exercised. Moore v. Belt, supra, 34 Cal.2d 530, 212 P.2d 509; Engelking v. Carlson, 13 Cal.2d 216, 221, 88 P.2d 695.

Appellant contends that it was established either that the rubber drain was at first completely enclosed in the scrotum or that if it protruded at all, it slipped inside, became lodged therein, and had no access to the outside until discovered 25 days later when it was removed. Therefore, he maintains, laymen may determine that such behavior falls short of the requisite standard of prudent, surgical practice in the community of Los Angeles.

In support of his argument, appellant relies upon the "sponge cases," namely, Ales v. Ryan, 8 Cal.2d 82, 64 P.2d 409; Key v. Caldwell, 39 Cal.App.2d 698, 104 P.2d 87; Armstrong v. Wallace, 8 Cal.App.2d 429, 47 P.2d 740. These decisions involve surgical operations where laparotomy sponges, used during surgery to aid in staunching the flow of blood and to ward off various organs from the operative field, were negligently permitted to remain in the body after operation. In the Ales case the sponge remained in plaintiff's abdomen four months before removal. The only defense urged was that the surgeon had a right to rely on the attending nurse's sponge count. The facts of the other decisions are similarly distinguishable from the case at bar. The sponges were inadvertently left in the incision and played no part in the after care or treatment of the patient, their function having ceased at the conclusion of the operation.

Appellant cites a number of decisions from other jurisdictions where the *res ipsa loquitur* doctrine was held to be applicable to drains intentionally placed in surgical incisions, but in each the wound was permitted completely to heal before discovery of the drain. See Reeves v. Lutz, 179 Mo. App. 61, 162 S.W. 280; Saucier v. Ross, 112 Miss. 306, 73 So. 49. In Sontag v. Ude, 191 Mo.App. 617, 177 S.W. 659, the defendant physician permitted a drainage tube to slip within an infant's body, but there was strong evidence of negligence in that the doctor searched for the tube, actually performing surgery in an effort to locate it, but failed. A second operation two weeks later was necessary in order to remove the drain which had been left in the body and carelessly overlooked by the doctor. The evidence showed the baby to have been "getting along fine" after bronchial pneumonia surgery at the time the drain slipped into his body, but thereafter be-

came progressively weaker until he died three weeks after the accident. Huysman v. Kirsch, 6 Cal.2d 302, 57 P.2d 908, also cited, was concerned only with when a cause of action accrued where a surgeon left a drain in the plaintiff's body for two years. No mention was made of the applicability of the *res ipsa* doctrine.

[3] The foregoing "sponge cases" bear primarily upon the subject of negligence which we concede to have been established for the purposes of this decision. However, they have been analyzed in answer to the assumption that the necrosis of the scrotum and the withering of the testicle were caused by the presence of the drain tube. Such assumption is without practical or scientific support. The uncontradicted testimony of Dr. Bennetts and three other urological experts was that considerable atrophy or degeneration of the appellant's left testicle had taken place over the years preceding the operation; the varicose veins removed were tortuous and crooked and six times their normal diameter; appellant's history of this condition indicated a progressive, degenerative change in the testicle; the post-operative laboratory examination of the removed testicle established the presence of "arteriosclerosis of branches of the testicular artery with old and recent thrombosis and extensive necrosis of the testicle." Respondent testified that the arteries were diseased; that the thickening of the artery lining and the thrombose formation in the blood vessels prevented a normal supply of blood from reaching the tissues of the scrotum before the variocelectomy. Such testimony was supported by that of Dr. DeLos Reyes and by the pathological report of Dr. Wright.* Moreover, respondent's testimony that "bacterial infection never played a causative role in the complication that developed" was not questioned by appellant. There was no evidence received that the pathology of the scrotum was caused by the presence of the rubber drain. In view of the proof of a pathology that existed before appellant and respondent met, and continued until the removal of the testicle—can it be said by laymen as a matter of common knowledge that the presence of the tube was the proximate cause of the subsequent complications terminating with the removal of the organ? The record certainly does not establish a balance of probability in favor of the finding that damage resulted from any negligence on the part of Dr. Bennetts. The contrary determination by the jury was necessarily based upon mere conjecture and speculation.

We must conclude that neither the doctrine of *res ipsa loquitur,* La Porte v. Houston, 33 Cal.2d 167, 170, 199 P.2d 665, nor any other theory of negligence on the part of respondent is material to a determination that the doctor is not responsible for the condition that necessitated the removal of the testicle or that caused appellant's suffering. Only by surmise could the jury have concluded that the testicle's atrophy was due to the presence of the drain and not to the thrombosis and subsequent necrosis. They could return no such verdict upon the finding that it was probable for respondent's negligence to have been the proximate cause of the pathology. McKellar v. Pendergast, 68 Cal.App.2d 485, 489, 156 P.2d 950. In view of the foregoing, discussion of the assignment that negligence was established by Dr. Gummess

* Dr. DeLos Reyes' diagnosis of appellant's condition made before the second surgical operation was that "the vessels * * * giving blood * * * were impaired. Therefore, there was not sufficient blood supply to the part * * * that there would be necrosis in there at that time." He testified that the later laboratory report bore out his opinion. It was his conclusion that the condition was not the result of any infection.

In his "special laboratory report," Dr. Wright said: "The lumina of a number of the arteries are filled with recanalized organized thrombi. Some of the arteries contain recent thrombus material. There is extensive necrosis with virtually complete obliteration of the testicular detail.

"The diagnosis is: arteriosclerosis of branches of testiculae artery with old and recent thrombosis and extensive necrosis of testicle."

would add nothing to prove respondent's liability. The court's ruling was correct.

The judgment is affirmed.

McCOMB, J., concurs.

WILSON, Justice.

I dissent.

The majority of the court have thrown into the discard the rule which has heretofore been followed without exception that the power of the court to grant a motion for the entry of judgment notwithstanding the verdict of the jury is the same as its power to grant a nonsuit or a motion for a directed verdict. Such motion may be granted only when it appears from the evidence, viewed in the light most favorable to the successful party, indulging every legitimate inference that may be drawn from plaintiff's evidence and disregarding all evidence in conflict therewith, that there is no substantial evidence to support the verdict. Devens v. Goldberg, 33 Cal.2d 173, 177, 199 P.2d 943; Estate of Arnold, 16 Cal.2d 573, 581, 107 P.2d 25. If there is any substantial evidence, or any reasonable inference to be drawn therefrom in support of the verdict, the court is without power to grant such motion. Brandenburg v. Pacific Gas & Elec. Co., 28 Cal.2d 282, 284, 169 P.2d 909.

The majority opinion affirming the judgment entered notwithstanding the verdict is a repudiation of the foregoing rule. Its effect is a declaration that there is no evidence of sufficient substantiality to support the verdict in favor of plaintiff. The contrary is manifest from the abundance of sustaining evidence in the record—in fact from that which is quoted in the opinion in an attempt to show there is none. The majority has assumed the role of jury, weighing and comparing the evidence, accepting that which it may use in order to affirm the trial court and rejecting that which sustains the verdict.

Plaintiff and two witnesses testified they observed plaintiff's scrotum almost immediately after the operation and for several succeeding days. Another witness saw it shortly thereafter. All four of them testified that the incision was sewed up, tightly closed, and that nothing was protruding therefrom; that there was no wound in the scrotum other than the operative incision. Following the operation defendant stated to plaintiff's mother that "the left testicle appeared a little smaller than the other one but it appeared healthy and he would not take it out."

The operation was performed on March 24. Six days later defendant removed some of the sutures and probed the wound by inserting surgical forceps deep into the incision. Defendant testified that such probing was for the purpose of establishing drainage. The rubber tube was not brought forth at that time. The hospital record does not contain any reference to the insertion of a drainage tube at the time of the operation or its presence at the time of the probing. On April 28, after plaintiff had been removed to his home, the end of the rubber tube "flipped out." Plaintiff and the same three witnesses who had previously examined him on several occasions, saw it protruding. They had never seen it before. On the next morning the rubber tube adhered to a dressing and came out dripping with pus.

On May 4 defendant advised further surgery for the removal of plaintiff's left testicle. The operation was performed on May 6th. Both the hospital records and the operative records of the latter operation, in contrast to the first, show that as a part of the operation a rubber tube was left protruding from a stab wound in plaintiff's scrotum.

Although at the time of the operation defendant reported to plaintiff's mother that plaintiff's left testicle appeared healthy and for that reason he did not take it out, on the following May 6 the testicle was in such condition that its removal was deemed necessary. Was defendant wrong in his first diagnosis and conclusion or did the organ deteriorate in so short a time that it had to be removed?

The complaint alleges damage to plaintiff not only for loss of his testicle but for the pain and suffering he experienced as the result of the enclosure of the tube with-

in his scrotum. For such suffering he is entitled to recover compensation without regard to the removal of the testicle or to the cause thereof.

The majority opinion concedes that in reaching the verdict the jury "were persuaded by substantial evidence." With this statement I agree. But the opinion then proceeds to balance the positive substantial evidence against expert evidence given by defendant and other physicians. The jury was not required to accept the expert evidence. It was not compelled to and did not consider such evidence to be so superior in quality to the direct and positive eye-witness evidence given by other witnesses as to justify a verdict for defendant. This court is without power to substitute its opinion for that of the jury.

The majority has also disregarded the doctrine of *res ipsa loquitur*. A complaint alleging negligence in general terms, without allegations of specific acts, does not prevent the application of such doctrine. Ales v. Ryan, 8 Cal.2d 82, 93, 64 P.2d 409.

The tube was foreign matter placed within an organ of plaintiff's body by defendant. Medical skill or science is not necessary for the purpose of aiding a layman in arriving at the conclusion that such a foreign substance so enclosed must have caused harm to plaintiff's body, and that such a thing cannot ordinarily happen except as a result of negligence. Ales v. Ryan, supra, 8 Cal.2d at pages 95, 98, 64 P.2d 409. In the case of Key v. Caldwell, 39 Cal.App.2d 698, 104 P.2d 87, where a surgeon had left a laparotomy sponge in plaintiff's body and closed the incision it was held that the doctrine of *res ipsa loquitur* applied and the finding that the surgeon did not use reasonable care and skill was not rendered ineffective by evidence that he followed the practice or custom ordinarily used by surgeons in the same locality. At this point it should be noted that one of defendant's expert witnesses testified on cross-examination that under proper medical and surgical practice in this locality a surgeon does not intentionally permit a wound to close leaving a rubber tube within the scrotum with no part of it protruding. In the Ales case, supra, the defendant claimed it was customary and good practice to rely absolutely upon nurses to count the sponges and that the operating surgeons were so intently engaged in the active performance of the operation that it would be imposing an unreasonable burden upon them to charge them with keeping count of the number of sponges used in the operation as a check against mistake, and that such circumstance alone brought the case within the rule that the degree of skill or care required by a surgeon is that ordinarily exercised by physicians and surgeons in good standing practicing in the same locality. The court, 8 Cal.2d at page 100, 64 P.2d 409, rejected this theory and stated that failure to remove a sponge from the abdomen of a patient is negligence of the ordinary type and it does not involve knowledge of *materia medica* or surgery. The court further declared that a layman needs no scientific enlightenment to see that the omission can be accounted for on no other theory than that someone has committed actionable negligence. See also Huysman v. Kirsch, 6 Cal.2d 302, 57 P.2d 908, wherein the surgeon had allowed a drainage tube to remain inside the patient's abdomen for several weeks after the operation.

A surgeon is liable to his patient for damage resulting from the presence of a rubber tube in the patient's body whether the tube was left completely enclosed within the operative incision at the time of the operation, Saucier v. Ross, 112 Miss. 306, 73 So. 49, 50; Reeves v. Lutz, 179 Mo.App. 61, 162 S.W. 280, 285, or, if left protruding, was so insecurely fastened that it thereafter slipped completely inside the patient's body. Evans v. Munro, R.I., 83 A. 82, 83; Sontag v. Ude, 191 Mo.App. 617, 177 S.W. 659, 660–661.

The judgment entered notwithstanding the verdict should be reversed with directions to the trial court to enter judgment upon the verdict.

Rehearing denied; WILSON, J., dissenting.

TURNER et al. v. LOWELL AVE. MUT. WATER CO. et al.

Civ. 17942.

District Court of Appeal, Second District, Division 3, California.

May 15, 1951.

As Modified on Denial of Rehearing June 1, 1951.

Hearing Denied July 12, 1951.

Action by Frederick R. Turner and Bessie Turner against Lowell Avenue Mutual Water Company, a corporation, and others, to establish plaintiffs' right to receive domestic water supply through existing distributing system. The Superior Court of Los Angeles County, Kurtz Kauffman, J., decreed that plaintiffs had no interest in water system, that system was owned by defendants and that plaintiffs take nothing by their action, and plaintiffs appealed. The District Court of Appeal, Shinn, P. J., held that plaintiffs had acquired easement to connect to water system now owned by defendants and to receive water.

Judgment reversed, and remanded for further proceedings in accordance with opinion.

1. Waters and water courses ⇐154(1), 156(2)

Where owner of lot was granted easement by owner of well to use of water and to connect with water system, and easement ran to heirs, executors, administrators and assigns of owner of lot, and plaintiffs purchased land from owner of lot on oral agreement by owner to install and to connect water line, and oral agreement was fully executed, such executed oral agreement vested easement in water system in plaintiffs as assigns and was binding upon owner grantor of lot and all claiming under him subsequent to date and with notice.

2. Waters and water courses ⇐154(1), 156(5)

Where owner of land was granted easement running to his heirs, executors, administrators and assigns to construct water system and attach it to water line running from well and to use water for his land, provided that water was paid for at cost to owner of well, and plaintiffs purchased lot from owner of land prior to construction of water system and subsequently received conveyance from successor of owner of land of any and all easements appurtenant to plaintiffs' lot, plaintiffs acquired title to easement to receive water through distributing system which had been constructed.

3. Waters and water courses ⇐154(1)

Where plaintiffs who were owners of lot and easement of right to receive water through pipeline joined association which had acquired right to use distributing system for benefit of its members but which had received no transfer of water rights, plaintiffs did not, by joining association, transfer or lose their easement of right to receive water through pipeline.

4. Waters and water courses ⇐153

The transfer of water right which is appurtenant to land to mutual water company in exchange for stock does not impair original water right of transferor.

5. Waters and water courses ⇐156(5)

Where plaintiffs were owners of lot and right appurtenant thereto to receive water at cost through water system running from well, corporation's acquisition of physical property of water system did not destroy plaintiffs' easement from original owner of well and corporation could elicit no greater charge than provided by easement nor could it cut off plaintiffs' enjoyment of such easement.

6. Waters and water courses ⇐158½(1)

Where plaintiffs owners of lot and appurtenant right to receive water through water system brought suit against corporation and individuals who had subsequently acquired title to physical property of water system for damages and to compel them to furnish water to plaintiffs' lot in accordance with easement owned by plaintiffs, and there was evidence from which it could be inferred that one of individual defendants had been active in procuring severance of plaintiffs' water line, granting of nonsuit in favor of such individual defendant was improper.

7. Trial ⇐165

On motion for nonsuit, evidence and inferences must be considered in light most favorable to plaintiffs.

William H. Keepin, Glendale, for appellants.

J. Q. Gilchrist and Everett H. Smith, Los Angeles, for respondents.

SHINN, Presiding Justice.

Plaintiffs Turner brought this action to establish their right to receive through an existing distributing system a domestic water supply upon a portion of Lot A, Tract 1881, in the La Crescenta District of Los Angeles County. They claim under a right appurtenant to their land. Lowell Avenue Mutual Water Company, a corporation, referred to as defendant, claims to be the sole owner of the distributing system. It shut off plaintiffs' water because they did not pay their water bills at rates fixed by the corporation. The judgment decrees that plaintiffs have no interest in the water system, that it is owned by defendant, and that plaintiffs take nothing by their action. Plaintiffs appeal.

In October, 1942, Carl M. Bergman, then the owner of Lot A, subdivided the same and sold building lots and garden sites to numerous persons, including plaintiffs, whose parcel had dimensions of 200 x 500 feet. At the time plaintiffs purchased, Bergman was negotiating for a water supply with Hillcrest Sanitarium, Ltd., a corporation, which had a well located on Lot A. When plaintiffs made a deposit on their purchase Bergman agreed in writing that the deposit would be returned unless a water line was completed within 60 days. On October 19, 1942, Hillcrest Sanitarium granted easements to Bergman, his heirs, executors, administrators and assigns consisting of the right to install and maintain water pipes and other facilities over the land of Hillcrest to distribute water for the use and benefit of Lot A, or any part thereof; also the right to connect Bergman's proposed water system serving Lot A with Hillcrest's pipeline then maintained over Lot A, and also the right of the grantee, his heirs, executors, administrators and assigns, to take water from the Hillcrest supply for the use of the owners of Lot A and portions thereof, "provided grantee shall pay to grantor the actual cost to grantor of the water so used by grantee, his heirs, executors, administrators and assigns." The several privileges were granted for a period of fifty years. In October and November, 1942, Bergman laid a pipeline and connected with the Hillcrest system. One Moorhouse, who had a home on Lot 10 adjoining and also owned other property in the vicinity, paid one-third of the cost, and by agreement with Bergman acquired a one-third interest in the pipeline. Plaintiffs thereupon entered upon their land, constructed a house, landscaped the property, connected with and used water from the pipeline and continued to receive water from that source until August, 1948, when defendant corporation entered upon the land, cut off plaintiffs' water supply, and installed a bypass to carry water around plaintiffs' property. Since that time plaintiffs have been obliged to install a water tank on their property and haul water from Tujunga, a distance of some 2½ miles. They allege that as a consequence they lost 29 fruit trees and 2 shade trees, for which they seek $1,400 as damages.

In the meantime Bergman had conveyed his interest in plaintiffs' land to one Drescher, and on January 19, 1944, Drescher and wife conveyed the land to plaintiffs by grant deed. This conveyance transferred any and all easements which were then appurtenant to the land.

[1] The court found "that the plaintiffs did not at any time acquire or own an or any interest in or to the easement granted to said Carl M. Bergman by Hillcrest Sanitarium." This finding is without support in the evidence. Defendant attempts to justify it upon the ground that Bergman's water line was not installed and in use at the time plaintiffs made a deposit on their purchase. They say that as no water system was then in operation no easement in the system could have been acquired by plaintiffs as appurtenant to the land, and that plaintiffs did not acquire an easement in any other manner. The argument ignores the broad basis of plaintiffs' claims. The rights granted by Hillcrest ran in favor of plaintiffs as assigns of Bergman, not only as to the use of water but also as to a connection with and use of the Hillcrest line. The Hillcrest grant so provides. Plaintiffs pur-

chased the land and the water right. Bergman, as part consideration for the purchase, proceeded at once to install the line in order to serve the buyers of his lots. According to Mr. Turner, $100 was added to the prices of the lots to help defray the cost. The oral agreement was fully executed. Upon the strength of it plaintiffs paid for the land, built their house and planted and developed an orchard. They have paid, or offered to pay, for the water at cost and have thus complied with the condition upon which they were privileged to enjoy their rights. This executed oral agreement was binding upon Bergman and upon all claiming under him of subsequent date, and with notice. Defendant does not claim any right as a bona fide purchaser.

[2] Moreover, the conveyance of Drescher and wife, Bergman's grantees, transferred to plaintiffs as appurtenant to the land the right to the use of the distributing system which had been in operation and serving plaintiffs' property for more than a year. Franscioni v. Soledad Land & Water Co., 170 Cal. 221, 224, 149 P. 161; Relovich v. Stuart, 211 Cal. 422, 428, 295 P. 819. Plaintiffs had a sound title to an easement consisting of a right to receive their water through the distributing system.

The defendant contends that if plaintiffs ever had a right to receive water through the Bergman system, they had lost that right before their service was disconnected. The claims are that the water users, including plaintiffs, transferred their rights in the system to an unincorporated mutual water system which they organized and later incorporated; that if their rights were not actually transferred to the association the members surrendered all control to the association and are bound to pay for water at rates fixed by the corporation as successor of the association. These theories prevailed in the trial court.

Among the conclusions of law is the following: "The Court concludes that said Lowell Avenue Improvement Association was the sole owner of the right to the use of said water system, pipe lines, pump, pump house, and all other appurtenant equipment, and that, by becoming members thereof, plaintiffs herein transferred and conveyed to said association any and all rights and interest they may or might have had in and to said pipe line, system, and equipment." Also, running through the findings are statements which suggest the theory that the association had the power to take action which would nullify plaintiffs' right to use the system except on terms specified by the association, and the further theory that plaintiffs had received benefits through the association which estopped them from questioning the authority of the association to prescribe the terms upon which they might make use of the system.

A narration of the events which led to the present dispute will disclose that there is no factual basis in the findings, nor basis in the evidence, for a conclusion that plaintiffs have transferred, surrendered or forfeited their easement in the distributing system.

The County of Los Angeles acquired the Hillcrest property shortly after plaintiffs made their purchase and a change was made in the system of distribution. The Bergman line was disconnected from the Hillcrest line and connected with the source of supply. A new line was run to the Hillcrest property and separate meters were installed, one for the Hillcrest property and the other for the Bergman property. The portion of the Hillcrest line that Bergman had been using was surrendered to him. Individual meters were installed by the users on Lot A. For some undisclosed reason during an interval of two or three years no collections were made for water used.

The users in Lot A associated themselves together as Lowell Avenue Improvement Association. Bergman, with the approval of Moorhouse, gave the association written permission to use the water line and equipment free of charge upon conditions that the property of Moorhouse be served thereby, as well as the owners in Lot A, and that the association bear all costs of maintenance and improvement. There was no transfer to the association of the physical property. No water rights were transferred to the association and it owned nothing other than the right to use the distributing system for the benefit of its members. It was merely an agency to serve

the convenience of its members and it had no contractual rights with them and no obligations other than those which were agreed upon from time to time.

The association appointed a Mr. Morrell as agent to collect water bills upon the individual meter readings. At the direction of the county, collections as made, including charges for past service, were paid over to Southern California Water Company at the rates that company charged for the water, which were supposedly based upon cost as provided in the Hillcrest agreement. The members of the association agreed in writing that they would pay their bills to Mr. Morrell and that upon their failure to pay their supply might be cut off. In May, 1945, it was also agreed that an emergency fund of $300 would be created, and the charges were voluntarily increased above those of the water company in order to accumulate this sum. According to the evidence payments were made by all members, including plaintiffs, at an increased rate until this sum had been accumulated. It does not appear that any other concerted action was taken by the members while plaintiffs belonged to the association, which had a material bearing upon the issues.

[3, 4] Plaintiffs did not, by joining the association, or otherwise, transfer to the association or lose their right to receive water through the pipeline. Even the transfer of a water right which is appurtenant to land to a mutual water company in exchange for stock does not impair the original right. Woodstone Marble & Tile Co. v. Dunsmore etc. Co., 47 Cal.App. 72, 190 P. 213.

In August, 1946, Mr. Turner resigned from the association and shortly thereafter the remaining members of the association formed defendant corporation. Bergman, Moorhouse and a majority of the members of the association conveyed to the corporation their interests in the distributing system. The corporation procured a permit to issue stock and gave all the water users, including plaintiffs, an opportunity to buy a share of stock for $150. Under its by-laws no one but stockholders would be served with water, and these would be served only at rates fixed by the corporation. Plaintiffs refused to purchase a share of stock or to pay charges for water in excess of the rates charged by Southern California Water Company. They computed the amounts they owed for water according to the rates charged by the company and offered to pay these amounts, but they were refused by the corporation. Solely for this reason their water was shut off.

Defendant contends that plaintiffs are bound by all the acts of the association and cites the rule stated in Dingwall v. Amalgamated Ass'n Etc., 4 Cal.App. 565, 569, 88 P. 597, 599: "The constitution and rules and by-laws of a voluntary unincorporated association constitute a contract between the association and its members, and the rights and duties of the members as between themselves and in their relation to the association, in all matters affecting its internal government and the management of its affairs, are measured by the terms of such constitution and by-laws." Defendant frequently alludes to this supposed agreement between the plaintiffs and the association and the duty of plaintiffs to comply therewith. Plaintiffs reply, correctly, that the association had no constitution, by-laws, rules or regulations, nor any agreement with plaintiffs except those we have mentioned. There was no contractual limitation of plaintiffs' rights.

The court found that from May, 1944, until August 2, 1946, plaintiffs were members of the association and received the benefits of membership. It is clear that these benefits were none other than small conveniences afforded the members and that plaintiffs paid proportionately with other members for the advantages they received. When plaintiffs resigned the accounts were balanced. Plaintiffs had given nothing to the association and had received nothing for which payment had not been made. There is no basis in these facts for a claim that plaintiffs surrendered any of their rights as water users.

[5] The court found that the corporation is the sole owner of the water system. There was evidence that it does own the

physical property that goes to make up the system. But the evidence also established that plaintiffs have an easement consisting of a right to receive through the system their share of water under the Hillcrest grant upon payment of the cost of production of the same.

The court concluded that plaintiffs are entitled to receive water provided they pay all delinquent bills and render full and complete compliance with all the rules, regulations and by-laws of the corporation, which would include the requirement that they must purchase a share of stock in the corporation. But the judgment, as we have said, does not define plaintiffs' rights; it merely provides that they shall take nothing by their action. The effect of it is to deprive them of all right to enjoy their easement in the use of the water system and to practically destroy their water right.

It will be noticed that when Moorhouse joined Bergman in transferring to the association the use of the water system, it was provided that the Moorhouse property also would be served. It was in evidence that the system serves users other than those in Lot A. It has been operated by defendant corporation for the benefit of all stockholders who are also users of water.

Defendant must reconnect plaintiffs' property with the system at its own cost. If the parties cannot agree the court should determine whether, and to what extent, plaintiffs should contribute to the future expense of maintenance of the system, insofar as it serves the users in Lot A. The record does not present that question.

[6, 7] The court entered a judgment of nonsuit in favor of defendant Moorhouse. We think there was sufficient evidence from which it could have been inferred that Moorhouse took an active part in procuring the severance of plaintiffs' water line. Under the rule that on a motion for nonsuit the evidence and inferences must be considered in the light most favorable to plaintiffs, the judgment in favor of Moorhouse should be reversed. There are other individual defendants. Their position in the litigation has not been argued specially and therefore has not been considered separately from that of the defendant corporation. Moreover, the court made no findings as to their responsibility for the interference with plaintiffs' rights and that question is not before us for decision.

The judgment is reversed as to all defendants for further proceedings in accordance with the views herein expressed.

WOOD and VALLÉE, JJ., concur.

104 Cal.App.2d 242

PEOPLE v. GOODALL et al.

Cr. 829.

District Court of Appeal,
Fourth District, California.
May 16, 1951.

Warren Arthur Goodall and Donald Forrest Dean were convicted in the Superior Court, Tulare County, Frederick E. Stone, J., of the offense of burglary of a building, and they appealed. The District Court of Appeals, Griffin, J., held that the evidence sustained the convictions.

Affirmed.

1. Criminal law ⇐552(1)

A finding of guilty may be based upon circumstantial evidence.

2. Burglary ⇐42(1)

Where one is found to be in possession of stolen articles, it may be presumed not only that he stole them but also that he made use of means by which access to them was obtained.

3. Criminal law ⇐572

Where burden of establishing an alibi is not met and the asserted alibi is defective because of false and inconsistent statements, trier of facts is justified in rejecting defense, because such proof must be so certain and convincing as to raise reasonable doubt in minds of jury.

4. Burglary ⇐36

Fact that both defendants were familiar with burglarized premises was circumstance which could be considered by jury in burglary prosecution.

5. Burglary ⇐41(1)

Burglary convictions were sustained by evidence.

6. Burglary ⇐45
Criminal law ⇐1169(1)

In burglary prosecution, trial court did not err prejudicially in allowing in evidence slip of paper containing numbers indicating safe combination, notwithstanding absence of any evidence that combination was that of particular safe taken by burglars, and whether defendant's explanation that figures on slip were property measurements was a proper one was question for jury to determine.

7. Criminal law ⇐1130(2), 1141(2)

It is duty of appellants to show error, and that means that appellants are under affirmative duty in that respect and it is not proper to attempt to shift that burden upon court or respondent, and therefore, on appeal from burglary convictions, where counsel for defendants failed to point out instructions claimed to have been erroneously given and failed to discuss point or cite any supporting authorities in his brief, appellate court would not consider assignment that trial court had erred in instructing jury on matters of law.

8. Criminal law ⇐911

In burglary prosecution, where evidence supported verdicts of guilty, no prejudicial error appeared, and there was no showing that jury had not been fully and properly instructed, trial court did not abuse its discretion in denying motions for new trial.

J. M. Lopes, Visalia, for appellants.

Edmund G. Brown, Atty. Gen., Stanford, D. Herlick, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendants were convicted by a jury of the offense of burglary of a building occupied by the Tulare-Kings Counties Trades Council, in Visalia, on the night of July 28, 1950. Defendant Goodall admitted a prior conviction of burglary.

The Trades Council building was partitioned into three sections. The front section was a waiting room containing a desk and chairs. The middle section was the business office, which contained a safe measuring 22x23x33 inches, and weighing about 420 pounds, in which had been left $97.00 in cash and money orders and some 1949 Union dues "stamps" similar to small postage stamps. The third section was a meeting hall.

Shortly before the burglary, the defendant Goodall joined a Trades Council Union. On the night of July 28th at about 10 p. m. Goodall and defendant Dean drove to the front of the building, inquired as to where a certain union meeting was being held, entered the front office, looked around, and after a while they drove away in Goodall's 1938 maroon-colored convertible Ford. The hall doors were locked about 10:15 p. m. The next morning, upon entering the office, one of the union officials saw broken glass from a window, a door had been pried open, the safe removed and track marks on the floor indicated something heavy had been removed through the back door. Immediately outside the rear door, near the alley, were automobile tire-track marks indicating a car had been backed up to the door. A photographer took photographs of the tire marks made by the right and left rear tires.

Goodall was awakened at his home, arrested, and ordered to drive the officer in his 1938 maroon-colored convertible Ford to a parking lot near the police station. Photographs were taken of it as well as the left and right rear tire-mark impressions that were made on white paper. Under the front seat two chisels were found. On the seat was a folded blanket and, when unfolded, six loose union "stamps", similar to those left in the safe, were found. Some foreign grayish paint was adhering to the bottom part of the trunk of the car and a sample was taken. Weeds were removed from the undercarriage of it. There was a small cardboard box of tools in the trunk.

There was evidence of two indentation markings on the lid of the turtleback about 22 or 23 inches apart, evidently made by a sharp-cornered object. Samples were taken of the dirt found on the front-seat floor boards as well as on the floor of the trunk. All of these exhibits were forwarded to the F.B.I. laboratory for analysis.

When Goodall was arrested, a probation officer, who was at the police station, recognized him. Goodall pretended he did not know the probation officer who had been previously informed about the case. He asked Goodall "if he was guilty" and Goodall said: "Well, ask Floyd (the arresting officer). He knows." He then asked Goodall why he did not "cop out" (plead guilty) and get it over with and Goodall said "Why should I? I know all about the safe, but I am going to have some fun out of this."

In the conversation with the chief of police and others, Goodall was asked to tell of his whereabouts and movements on the night of July 28th. He stated he was out with defendant Dean, drove to Tulare in the above-mentioned Ford, and returned to Dean's home about 11 p.m., played some cards until 2 a. m. and then they decided to go fishing; that they went to one Mitchell's house, awakened him, and borrowed his equipment and drove out to the "East Fork" near a bridge; that it was about daylight at that time and they decided they did not want to fish so they turned back and went to their respective homes to bed.

Defendant Dean was apprehended and asked the same questions. His story was substantially the same as Goodall's except he stated that when they arrived at Mitchell's home about 1:30 a. m. Mitchell was not interested in going fishing so they all sat around and played cards until 3 a. m. and they then returned home.

He was specifically asked if they went fishing and he said that they talked about it but did not go. Dean asked what punishment he could expect if he were implicated and that the chief told him that he was in no position to make any promises; that it was strictly up to the court, but in view of the fact that he had no previous record he might be able to get probation; that the offense could be punishable by a jail sentence. The chief then went to the outer office, obtained a copy of the Penal Code, opened it to the section on burglary and let him read the section, which he did. Later, when confronted with the discrepancies in their two stories about fishing, Goodall stated: "If Dean said we went fishing, I must have gone by myself." Neither defendant ever mentioned about going to the Trade Council's office that evening.

In Goodall's billfold was a combination of numbers written upon a paper which might well indicate that they constituted a combination to a safe. He was questioned about these figures and he stated: "That is no safe combination"; that someone had written it out and gave it to him; that he did not know who it was. Also found on him was a drawing or diagram of a building resembling, to some extent, the arrangement of the Trades Council building. When asked what it was he stated he did not know, but "some guy" drew it and gave it to him.

On July 30th two hunters found the battered safe under a bridge two miles east of Visalia. The bottom of the safe had been torn open and a peculiar form of cement used therein had been crumbled and was exposed to observation. Samples of the cement and paint on the safe were taken. The contents of the safe were missing. Several of the "1949 Union stamps" were scattered about. Faint tire marks indicated a car had been driven to that point. Scratches were noticed on the railing of the concrete bridge and marks indicated the safe had been dragged under it. The safe was brought to the court and admitted in evidence as an exhibit.

Two FBI investigators, assigned to the laboratories at Washington, D. C., after qualifying as experts, testified and gave as their opinions that the chisel found in the Ford fitted perfectly into an indentation made in the safe insulation cement; that the cement particles found on the chisel were of the same peculiar texture as that found in the safe; that the tire marks of the left and right rear tires in the photographs were the same as the photgraphs of the tire marks of the car made at the

Trades Council building; that the foreign paint found in the trunk of the car had the same metallic composition and color as the paint from the safe and that the particles of paint found on the front and trunk floor boards were comparable to particles of the cement insulation found in the safe.

The defendant Goodall, in testifying in his own behalf, admitted his previous conviction of a felony and said he sat at the Mitchell house until 3:30 that night, did not go out to the bridge to fish but only talked about it. When asked why he did not mention about going to the Trades Council building that evening he said: "It was just a minor thing, I never even thought about it. I was only there three or four minutes and was gone." He stated the paper found was not a combination to a safe but was probably some figures he took or made in connection with his work with the gas company, such as "property measurements". He said the chisels found in his car were some he used in connection with his work. He denied the conversation claimed to have been related to the probation officer, denied any knowledge of or participation in the crime and produced his relative witnesses indicating he was home at the hours indicated and was at Mitchell's home until about 3:30 a. m.

Defendant Dean related about the same story, denied he knew anything about the crime, denied the conversation with the chief or seeing the Penal Code, and produced relative witnesses (the Mitchells) corroborating his story about being at their home at the hours indicated by Dean.

Defendants first question the sufficiency of the evidence to support the verdict. They do not question the fact that a burglary was proved. It is their contention that the evidence upon which their convictions were based was all circumstantial and was insufficient to convict them of the charge.

[1] A finding of guilty may be based upon circumstantial evidence. People v. Mercer, 103 Cal.App.2d 462, 229 P.2d 411; People v. Mercer, 103 Cal.App.2d 782, 230 P.2d 4; People v. Green, 13 Cal.2d 37, 42, 87 P.2d 821; People v. Koenig, 29 Cal.2d 87, 91, 173 P.2d 1; People v. Kittrelle, 102 Cal.App.2d 149, 227 P.2d 38.

[2] That defendant Goodall's car was used in carrying away the safe appears to be well established, as indicated, particularly through comparison of tire tracks with the tires on his car, the damage to the "turtleback" of his car and marks on its turtleback door; through a comparison of paint found in and upon his car with that on the safe; by comparison of the chisels found in his car with marks found on the safe; and by comparison of particles of cement and paint found on the chisels which undoubtedly came from this very safe; also, the fact that "stamps" which could only have come from inside the safe, were discovered in Goodall's car by investigating officers. Defendant Goodall did not explain the presence of these stamps in his car but only denied any knowledge thereof. Even in the face of this denial the jury could well infer that Goodall had knowledge of these items. People v. Torres, 98 Cal. App.2d 189, 193, 219 P.2d 480; People v. One 1940 Chrysler, 77 Cal.App.2d 306, 311, 175 P.2d 585. Where one is found to be in possession of stolen articles, it may be presumed not only that he stole them but also made use of the means by which access to them was obtained. Such evidence, when coupled with the equivocal statements as to defendants' whereabouts that night, the comparison of tire marks, the unsatisfactory explanation of possession of some of the stolen goods, and other evidence here shown, may well support a burglary conviction. People v. Lang, 142 Cal. 482, 76 P.2d 232; People v. Platnick, 71 Cal.App. 2d 767, 163 P.2d 766; People v. Russell, 120 Cal.App. 622, 8 P.2d 209; People v. Kittrelle, supra; People v. Colletta, 100 Cal.App.2d 1, 4, 222 P.2d 922.

[3] Where the burden of establishing an alibi is not met, and the asserted alibi is defective because of false and inconsistent statements, the trier of fact is justified in rejecting the defense because such proof must be so certain and convincing as to raise a reasonable doubt in the minds of the jury. People v. Alexander, 92 Cal.App. 2d 230, 234, 206 P.2d 657; People v. Alexander, 78 Cal.App.2d 954, 958, 178 P.2d

813; People v. Ash, 88 Cal.App.2d 819, 825, 199 P.2d 711.

[4] As to defendant Dean, the evidence shows that he was with Goodall the entire evening and both were familiar with the premises after their visitation to it that same evening. This is a circumstance which may be considered by the jury. People v. Flynn, 73 Cal. 511, 15 P. 102. The circumstances in connection with his complicity show that a safe weighing 420 pounds, requiring the strength of at least two men to lift, was removed from the office through a rear door and placed in a waiting automobile. This indicates that someone other than Goodall participated in removing the safe. People v. Mercer, supra.

The testimony of both defendants precludes the theory that any person, other than Dean, was Goodall's partner in this crime. It should also be noted that Dean found it convenient to withhold the fact that he had been to the Trades Council hall that night. He also denied that he went to the bridge with Goodall to go fishing. Yet his own mother testified that he came home about 11 p. m. and changed his clothes to go fishing. The jury was entitled to infer from this evidence and the admissions made that defendants never intended to go fishing but were prefabricating an alibi in case they were seen near the bridge where the safe was abandoned. As to this fishing trip, both defendants made inconsistent statements.

The jury might well infer that since Dean inquired as to the punishment for the crime and read the Penal Code he was struggling to decide whether to plead guilty or stand trial. People v. Hurst, 108 Cal. App. 24, 25, 290 P. 887. These inferences are strengthened by the fact that neither defendant admitted that he was at the Trades Council hall that evening until the prosecution proved the fact by eyewitness testimony at the trial.

[5] We have enumerated the salient circumstances as they presented themselves to us and as a result thereof we are of the opinion that the circumstances reasonably justify the conclusion of the jury as expressed in its verdict. People v. Martinez, 31 Cal.App. 413, 160 P. 868; People v. Mattmueller, 30 Cal.App.2d 532, 86 P.2d 838; People v. Bisbines, 132 Cal.App. 239, 22 P.2d 762; People v. King, 4 Cal.App. 2d 727, 41 P.2d 593.

[6] The main contention of defendant Goodall is that the court prejudicially erred in allowing in evidence the slip of paper containing the numbers indicating a safe combination. It is true that there was no evidence in the record showing that it was the combination to this particular safe. The defendant admitted the figures might have been made by him in figuring the size of the property in connection with his work. The figures read generally: 1–40 left; 1–3–40 right; 1–1–25 left; 1–1–92 right. Whether defendant's explanation of these figures was a proper one, and whether the figures were of property measurements were questions for the jury to determine. No prejudicial error resulted. People v. Pianezzi, 45 Cal.App.2d 576, 114 P.2d 601; People v. Owens, 79 Cal.App.2d 290, 179 P.2d 401; People v. Bashaw, 80 Cal.App.2d 974, 183 P.2d 41.

[7] The next complaint is that the court erred in instructing the jury on matters of law. Counsel for defendants failed to point out the instructions claimed to have been erroneously given, and has failed to discuss this point or cite any supporting authorities in his brief.

It is the duty of the defendants to show error, and that means defendants are under an affirmative duty in that respect. It is not proper to attempt to shift that burden upon the court or respondent. People v. Shafer, 101 Cal.App.2d 54, 224 P.2d 778; People v. Daniels, 85 Cal.App.2d 182, 185, 192 P.2d 788.

[8] Lastly, it is claimed that the court erred in not granting defendants' motions for new trial. No grounds are stated for reversal of this ruling other than those already discussed. We have read the entire record and have fully examined the instructions, both given and refused. There was sufficient evidence, if believed by the jury, to support the verdicts. No prejudicial error appears. There is no

showing that the jury was not fully and properly instructed. There was no abuse of discretion in denying the motions for a new trial. People v. Chavez, 100 Cal.App. 2d 214, 223 P.2d 44.

Judgment and orders denying new trial affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

104 Cal.App.2d 227

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. SUPERIOR COURT OF STATE, IN AND FOR LOS ANGELES COUNTY et al.

Civ. 18424.

District Court of Appeal, Second District, Division 2, California.

May 16, 1951.

Rehearing Denied June 1, 1951.

Hearing Denied July 12, 1951.

Petition for writ of review by Security-First National Bank of Los Angeles, a corporation, as trustee, against the Superior Court of the State of California, in and for the county of Los Angeles and Cora St. Clair, real party in interest, to annul an order of the Superior Court directing petitioner to make certain designated payments to and for benefit of beneficiary out of a fund held by it as trustee under a declaration of trust. The District Court of Appeal, Wilson, J., held that the order entered in action brought for declaratory relief for reformation and cancellation of the declaration of trust, requiring trustee to pay income to her in accordance with terms of trust agreement did not in any way diminish share in which any contingent remaindermen might have an interest.

Order affirmed.

1. Trusts ⇐366(1)

Where trust agreement by which trustor reserved to herself income for life provided that in event estate company, the 300 shares of which comprised corpus of trust, should be dissolved, or should for any reason make distributions of its capital assets as distinguished from dividends, income dividends should be distributed to trustor, order entered after estate company was dissolved, which directed trustee to pay to trustor that which was incontrovertibly income on assets held by it did not diminish share in which any contingent remainderman might have an interest and was not void for failure to join contingent remaindermen.

2. Trusts ⇐366(1)

Indispensable parties to a suit by a party to obtain benefits of a trust are such persons as have undetermined interest in the same trust fund.

Lindstrom & Bartlett and J. W. McKinley, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, William E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

Warren E. Libby, Los Angeles, for Real Party in Interest.

WILSON, Justice.

In an action for declaratory relief, for reformation and for cancellation of a declaration of trust, entitled Cora St. Clair v. Security-First National Bank of Los Angeles, a corporation, as Trustee, and Leonard St. Clair, the superior court made an order directing the bank to make certain designated payments to and for the benefit of the beneficiary out of a fund held by it as trustee under the declaration of trust. The validity of such order is the sole question for decision here.

The trust was established in February, 1929, with Cora St. Clair as the trustor and defendant Security-First National Bank of Los Angeles (petitioner here) as trustee. The corpus of the trust consisted of 300 shares of the common capital stock of the St. Clair Estate Company. The trust agreement provided that the trustee "shall pay the entire net income received from the trust estate hereof and available for distribution, in equal monthly payments * * * to the Trustor" and upon her death to "pay and distribute said net income to

Leonard St. Clair Cooper, son of the Trustor, until he becomes thirty (30) years of age." The declaration of trust further provided that the trust "shall finally cease and terminate upon the death of the Trustor after her said son shall have reached the age of thirty (30) years, and thereupon the entire corpus of this trust, together with the undistributed net income therefrom, shall, by said Trustee, be distributed to him."

In 1938 Cora St. Clair instituted the instant action. On July 20, 1949, she filed her third amended and supplemental complaint to which answers were filed by both defendants. In paragraph V of that complaint plaintiff alleges that a controversy has arisen relating to the legal rights and duties of the respective parties with respect to the declaration of trust in the following particulars:

"(a) That at the time of the creation of said trust and the execution and acceptance of said Declaration of Trust, the said Trustee and plaintiff understood that all dividends paid by said Estate Company [St. Clair Estate Company] to the Trustee as the owner of said three hundred (300) shares of stock were to be considered as income and that after making the proper deductions therefrom as provided for in said trust, the net income remaining was to be paid to plaintiff, and at all times since the execution of said Declaration of Trust and prior to the commencement of this action all monies received by said Trustee as dividends have been paid to plaintiff as income; but said Trustee is now raising the question as to what portion, if any, of said monies received by it and paid or to be paid to plaintiff is 'net income' under the terms used in said Declaration of Trust as specifying monies to be paid to said plaintiff and what portion thereof, if any, represents 'capital assets' as contemplated by said Declaration of Trust and to be accumulated for the benefit of the remainderman, the defendant Leonard St. Clair.

"(b) That at the time of the execution of said Declaration of Trust, plaintiff was told by the Trustee and, for that reason, has at all times since, understood and contended that the only corpus of said Trust was such distributions to the stockholders of said corporation as were exclusive of dividends, and that such was the meaning of the clause 'capital assets as distinguished from dividends' as used in said Declaration of Trust, and that this would limit the corpus of said Trust to $6,000.00, the original capital represented by said stock. That at the same time plaintiff was also told by said Trustee that any and all sums received by said Trustee excepting that paid in liquidation of said amount of $6,000.00 would be 'dividends, interest and income from the trust property' from which would be deducted taxes and the expenses of said trust, and that the balance remaining would be the 'net income' to be paid plaintiff by said Trustee under the terms of said Declaration of Trust, but said Trustee now contends to the contrary.

"(c) Plaintiff contends that the only corpus or 'capital assets' of said trust as contemplated by said Declaration of Trust consists of $6,000.00; that $6,000.00 represents the original capital represented by said three hundred (300) shares of common capital stock of the Estate Company, and that any and all sums received by said Trustee excepting that paid in liquidation of said amount of $6,000.00 as representing the capital of said Estate Company is 'dividends' or 'income' or 'net income' as contemplated and defined in said Declaration of Trust, but that said Trustee contends to the contrary."

By its answer the defendant bank "admits that it is raising the question as to what portion, if any, of the monies received by it are net income, and what portion, if any, of the monies received represent 'capital assets'" and denies every allegation contained in subdivision (b).

The action has never been brought to trial. On November 3, 1950, plaintiff, Cora St. Clair, joined by defendant Leonard St. Clair, petitioned the superior court for an order directing the trustee to pay out of the account entitled "Receipts on Assets Received in Dissolution of St. Clair Estate Company" (1) the income taxes assessed against her by the federal government in the sum of $1,117.51 with accrued interest; (2) to pay her the entire balance held by

the trustee in the account; (3) to pay her pending the trial of her action, monthly, the entire net balance remaining in the account after deducting reasonable fees for its services as trustee. In her petition she alleged that from the inception of the declaration of trust and continuing thereafter throughout the year 1948, the entire corpus of the trust consisted of 300 shares of the common stock of St. Clair Estate Company; that on or about December 23, 1938, the Estate Company adopted resolutions to dissolve and on or about January 6, 1939, all the parties to the action, as petitioners, filed in the superior court, in and for the county of Kern, a shareholders' petition for court supervision of winding up proceedings of the Estate Company; during the year 1949 the trustee, as owner of the 300 shares of Estate Company stock, received from that company in final distribution assets of a distributive value of $119,917.21; subsequent to the distribution of such assets there has been paid to the trustee income consisting of dividends and oil royalties upon the assets so distributed amounting to $5,515.92 as of August 15, 1950, and since that date additional dividends and oil royalties amounting to not less than $1,000.

No answer to this petition was filed by defendant bank and the superior court issued its order to show cause. Upon the hearing of the petition and the order to show cause the court issued its order of January 16, 1951, directing the trustee to make the payments as prayed for in the petition.

Defendant bank thereafter filed its "Notice of Motion for Order Vacating Order of January 16, 1951; for Order Bringing in Additional Parties Defendant or for Dismissal of Action." Defendant's motion was denied and it thereupon filed this petition to review and annul the order of the superior court upon the ground that it is a nullity because (1) it construes the declaration of trust in advance of trial; (2) it is a "hybrid preliminary order purporting to function as a piece-meal final judgment"; and (3) parties indispensable to jurisdiction are lacking.

Defendant contends that one of the principal issues to be determined in the pending action is whether the assets in the hands of the trustee are principal or income; that by its order the superior court has adjudicated this issue without trial and in so doing has exceeded its jurisdiction; that the order, "prior to entry of final judgment in the lawsuit is in effect a purported piecemeal money judgment, the consequences of which are serious and irreparable both to the trustee and to the remaindermen of the trust." Plaintiff asserts that what part or portion of the distributions by St. Clair Estate Company upon its being dissolved is income as opposed to corpus, is the question sought to be determined by the declaratory relief action and that no question as to whether the "receipts on assets received in dissolution of St. Clair Estate Company" are income or corpus of the trust is in any way an issue under the first count of the declaratory relief action. In her complaint she alleges that it was the understanding of the parties that all *dividends* paid by the Estate Company to the Trustee as owner of the 300 shares of its stock were to be considered as income and that the trustee is now raising the question as to what portion if any of *such* moneys received by it and paid or to be paid to plaintiff is net income and what portion represents capital assets.

The fund which the court has ordered the bank to disburse does not consist of dividends paid by the Estate Company but consists of dividends and oil royalties received by the bank upon the $119,917.21 in assets distributed to it upon the final dissolution of the St. Clair Estate Company in 1949. Whether all the assets distributed to the bank by the Estate Company are capital or whether, as contended by plaintiff, only $6,000 thereof is capital, or whether all or any part of any dividends paid by the Estate Company constituted capital or income, which are the issues raised by the third amended and supplemental complaint and the answers thereto, has not been determined by the order of January 16, 1951. The trust agreement provides, in paragraph III thereof, that "In the event the St. Clair Estate Company shall be dissolved, or shall for

any reason make, at any time, and from time to time, distributions of its capital assets as distinguished from dividends, then in any and all of such events, the said capital distributions which are not income shall by said trustee, be held as corpus of this trust, subject to all the terms and conditions hereof, and any income dividends [shall be] distributed to the trustor." By its decree the court merely ordered the trustee to comply with its duties as trustee and to pay to the beneficiary, pursuant to the plain and unambiguous terms of the trust agreement, that which is incontrovertibly income upon assets held by it. Whether it be finally determined that those assets are all capital distributions and therefore constitute corpus or whether it be determined that part of such assets are capital distributions and the balance net income, the dividends and oil royalties upon such assets, whatever they may be, are income to which the beneficiary is entitled under the terms of the declaration of trust.

[1] The contention of the bank that the court exceeded its jurisdiction and that the order of January 16, 1951, is void because of nonjoinder of indispensable parties, is predicated upon its misconception that the court was deciding an issue affecting the rights or interests of contingent remaindermen. The declaration of trust provides that the trust "shall finally cease and terminate upon the death of the Trustor after her said son shall have reached the age of thirty (30) years, and thereupon the entire corpus of this trust, together with the undistributed net income therefrom, shall, by said Trustee be distributed to him * * * If, upon the death of the Trustor, her said son be not then living, distribution of such principal and income shall, by said Trustee, be made in accordance with the terms and provisions of her Last Will and Testament, and should she die intestate, then distribution thereof shall be made in accordance with the laws of Succession of the State of California then in full force and effect." It is conceded that Leonard St. Clair has reached the age of thirty years. The bank asserts that should Leonard predecease his mother and she die intestate, her three brothers and the issue of Leonard would be her heirs at law; that as such they have an interest in the trust as contingent remaindermen and are therefore necessary and indispensable parties; that since Leonard has joined with his mother in her petition there can be no virtual representation of these two classes of potential heirs.

[2] As has been hereinabove pointed out the court did not determine any issue which would affect potential beneficiaries of the trust. Indispensable parties are such persons as have undetermined interests in the same trust fund. Bank of California, Nat. Ass'n v. Superior Court, 16 Cal.2d 516, 521, 106 P.2d 879; Ambassador Petroleum Co. v. Superior Court, 208 Cal. 667, 671, 284 P. 445. The parties who the bank contends are indispensable may be necessary to a trial of the pending action, a question which we need not determine at this time, but Cora St. Clair is the only person entitled to any of the income from the trust during her lifetime. The court by ordering the trustee to pay the income to her in accordance with the terms of the trust agreement did not in any way diminish the share in which any contingent remainderman might have an interest.

Order of superior court affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.

104 Cal.App.2d 167

WILSON v. WILSON.

Civ. 14557.

District Court of Appeal, First District, Division 1, California.

May 15, 1951.

Rehearing Denied June 14, 1951.

Hearing Denied July 12, 1951.

Divorce action by Barbara Wilson against Francis A. Wilson wherein plaintiff moved for an increase in alimony. The Superior Court, in and for the City and County of San Francisco, Twain Michelsen, J., made an order increasing alimony, allowing an attorney's fee and requiring defendant to post security, and defendant appealed. The District Court of Appeal, Bray, J., held that the evidence justified the finding that there was a change in circumstances, and that the court properly exercised its discretion in increasing alimony but had abused its discretion in requiring the posting of security.

Judgment for counsel fees affirmed, order and judgment directing posting of security reversed, and order and judgment affirmed in other respects.

1. Divorce ⇐245(2)

Order awarding alimony cannot be modified unless there is a change subsequent in conditions or circumstances.

2. Divorce ⇐245(3), 286

Determination of whether there is such change in conditions or circumstances subsequent to alimony order as would justify modification rests largely in discretion of trial court, and its determination cannot be upset by reviewing court in absence of abuse of discretion.

3. Divorce ⇐286

In determining whether trial court abused its discretion in modifying alimony order, question is not what appellate court would have done in first instance, but whether there is substantial evidence to support trial court's determination.

4. Divorce ⇐245(3)

In proceeding to modify alimony order, trial court did not abuse discretion in finding that circumstances concerning divorced wife's health had changed since original order.

5. Divorce ⇐245(2)

In proceeding to modify alimony order, court was not barred from making increased allowances to wife for repairs to house and replacements no matter what might happen in the future because court in prior hearings had before it the fact that house was old, dilapidated and in need of repairs, and that pipes had broken and were likely to burst and heaters might have to be replaced.

6. Divorce ⇐245(2)

In proceeding to modify original alimony order and to obtain increased allowance for maintenance of house, question was not whether conditions were similar to conditions previously known, but whether conditions were new or additional to ones for which allowance had originally been made.

7. Divorce ⇐245(3)

In proceeding to modify alimony order, there was evidence to support a finding that due to new and changed conditions in house awarded to wife additional expenditure for repairs was necessary.

8. Divorce ⇐239

In determining basis for alimony, there need not be particularity as to each item which would be required were a creditor suing on each item, but there need only be a showing upon which court can determine approximately what needs of wife are.

9. Divorce ⇐245(3)

In proceeding to modify alimony order, evidence justified court in finding that there was a change in circumstances, and in exercising its discretion to increase alimony in view of wife's monthly doctor bills, dentist bills, estimates for repairs of house and garage, and condition of wife's health.

10. Divorce ⇐286

In proceeding to modify alimony order, wherein husband claimed that evidence showed that wife's financial condition had changed for the better, credibility of wife regarding expenses in operation of her art business was for the trial court.

11. Divorce ⇐223

In proceeding to modify alimony order, allowance to moving wife of $1,000

attorneys' fee was not an abuse of discretion.

12. Divorce ⇐244

In proceeding to modify alimony order, court had power to make order requiring husband to post security even though no notice of intention to apply therefor was given but could not make order without any request at hearing and without any intimation that making of such order was being considered, and court was required to give husband opportunity to make showing as to why security should not be awarded. Civ.Code, § 140.

13. Divorce ⇐244

In proceeding to modify alimony order, court abused its discretion in requiring husband to post security without first giving him opportunity to be heard. Civ.Code, § 140.

Louis Ferrari, San Francisco, for appellant.

Lucille F. Athearn, San Francisco, for respondent.

BRAY, Justice.

Appeal from an increase of alimony from $600 to $1000 per month, allowance of $1000 attorney's fees and a requirement that defendant post security in the sum of $24,000 to guarantee payment of future alimony.

Questions Presented

1. Was there a change in condition between the time of the previous awards of alimony and now? In determining this question is the court barred from considering new but similar conditions to those previously considered? **2.** Was the security requirement proper? **3.** Attorney's fees.

Record

On April 4, 1945, plaintiff, after a protracted and bitterly contested trial before Honorable George W. Schonfeld, was granted an interlocutory decree of divorce against defendant, in which plaintiff was awarded $500 per month as permanent support and maintenance. Each party was awarded a half interest in the community real property consisting of a dwelling house and premises. Plaintiff was awarded all the furniture therein and the sole right to the use, occupancy and control of the real property "so long as she shall choose to so use, occupy or control the same." Defendant unsuccessfully appealed from this decree. Wilson v. Wilson, 76 Cal.App. 2d 119, 172 P.2d 568. During the pendency of the appeal plaintiff's alimony was increased by order of court from $500 to $600 per month, with a provision that if the decree were affirmed, the amounts paid thereunder would be credited against the amounts payable under the decree. Later on, the credit was made in such manner that plaintiff actually received only $500 per month. A final decree of divorce, which followed the provisions of the interlocutory decree, was entered as of December 5, 1946. That same month plaintiff moved for an increase in alimony to $1000 per month. This motion was denied, Honorable Lile T. Jacks presiding. May 20, 1948, plaintiff again moved to increase the alimony, and on August 5th, Honorable Milton D. Sapiro presiding, the court increased it to $600. May 13, 1949, plaintiff again moved to increase the alimony to $1000 per month on the ground that since the previous order was made circumstances and conditions had changed (1) as to her health and physical condition, and (2) as to the necessity for extensive repairs and replacements to the home because of its age and condition, and particularly because on May 2, 1948 (a clerical error, as the evidence shows the true year was 1949) the pipes in the house burst, causing damage to two floors, ruining furniture, walls, rugs, and ceilings. There was a contested hearing. Defendant's main contention was that these matters had been in contemplation of the court in the previous alimony orders. The court found that since the last order the conditions and circumstances surrounding the parties had materially changed so that plaintiff can no longer maintain herself upon the same standard contemplated by the previous orders. (1) The health and physical condition of plaintiff had changed materially for the worse in that she is presently under the constant

care of physicians and nurses necessitating monthly outlay of moneys for treatments, medicines and incidentals not contemplated by the court, and which will continue indefinitely. (2) The dwelling house has so deteriorated by age, obsolescence "and breaking down of plumbing and/or heating facilities and fixtures, with resultant necessary replacement and repair, as well as resultant damage and consequential repair to the interior walls, ceilings, and wall coverings of the interior of the house, that the rehabilitation of the same has caused plaintiff to incur necessary obligations in the sum of $13,825.00;" "that further breakage and recurrent damages to said premises may reasonably be anticipated in the future because of the age of said dwelling-house, and that the same will in the future be the source of necessary expenditures of like amount on the part of the plaintiff." The court further found that defendant is a millionaire (no claim is made that plaintiff is not able to make the payments ordered) and that a necessary adjunct to the order granting plaintiff the exclusive occupancy of the home is the right to have it restored to a habitable condition. The court made an order increasing the alimony and requiring security and a separate order for attorney's fees. The appeals from both orders were consolidated by stipulation.

Change of Conditions on Account of Plaintiff's Health

[1-3] Both parties agree that an order awarding alimony cannot be modified unless there be a change in conditions or circumstances subsequent to such order. See Molema v. Molema, 103 Cal.App. 79, 283 P. 956; Triest v. Triest, 67 Cal.App.2d 320, 154 P.2d 2. The determination of whether or not there is such a change rests largely in the discretion of the trial court and its determination cannot be upset by a reviewing court unless there is an abuse of discretion. See Triest v. Triest, supra; Lent v. H. C. Morris Co., 25 Cal.App.2d 305, 77 P.2d 301. It is not a question of what this court would have done in the first instance, but whether there is substantial evidence to support the trial court's determination.

Defendant's main attack on the court's findings is his claim that the evidence shows that the conditions are (1) the same, or (2) similar to those before the court at the prior proceedings. Plaintiff was the only witness. Defendant produced no witnesses, standing on his cross-examination of plaintiff, his contention that plaintiff had not made out a case, and the introduction of transcripts of the prior hearings.

Plaintiff testified regarding the change in her health, that she is under treatment by Dr. Schwartz for a nervous affliction growing out of this litigation; that she visits him about every second day for medication, therapy and injection; that he has informed her this treatment will continue indefinitely and will cost approximately $85 per month. At the hearing before Judge Sapiro in 1948 she testified that with the then allowance she did not have any money as she had been ill and in the hospital about Easter and had paid out several hundred dollars for doctors and hospitalization.

[4] It is obvious that the circumstances in 1948 and now were not the same nor even similar. In 1948 she was testifying about past expenses which had cut into her alimony (she had recently been confined to a hospital). There apparently was no testimony that she was then in need of medical care. It is a reasonable inference that if Judge Sapiro, in the $100 per month increase which he allowed, included anything for medical expenses, it was for past expenses, not future ones. She also testified that she had dentistry to be done for which an estimate of $1000 had been given her. We cannot say that the trial court abused its discretion in finding that the circumstances concerning plaintiff's health had changed.

The Home

The trial court found that in awarding plaintiff the use of the home it was contemplated that it should be restored to a habitable condition; that plaintiff had incurred necessary obligations therefor in the sum of $13,825. Defendant contends that the items comprising this sum are (1) the

same, or (2) similar to those theretofore considered. The house is old. It contains twenty or more rooms, a number of bathrooms and about fifteen outlets for hot water.

Similarity of Conditions

[5, 6] Before discussing the items of expense in detail, we will dispose of the following contention made by defendant. He contends that any increased allowances for repairs and replacements, no matter what might happen in the future, are barred because the court, on the prior hearings, had before it the facts that the house was old, dilapidated and in need of repair, that the pipes had broken and were likely to burst and that heaters might have to be replaced. There is no such rule. The absurdity of such a rule is shown when it is considered that if the entire floor of one of the stories of the house were to fall in, such a rule would bar plaintiff from seeking an increase in alimony to meet the situation merely because the prior judges knew that the house was in bad condition. The question is not whether the conditions are similar to conditions theretofore known, but whether the conditions are new or additional to the ones for which allowances had been made.

[7] Plaintiff testified that the pipes had broken on five occasions, the last being approximately May 2, 1949. She then testified that as a result of this last bursting of the pipes she had received estimates of $2010 for the necessary replacement of plumbing and $3000 for necessary repair, painting and papering. She introduced in evidence the estimate of Emil Appelman, a licensed painting contractor who estimated the cost of interior work at $3857 and exterior work at $2278, a total of $6135. Adding the $2010 for plumbing to this, there was evidence to support a finding by the court that, due to a new and changed condition resulting from the last bursting of the pipes, an expenditure of $8145 was necessary. Defendant contends that the $2010 estimate for replacement of pipes is the same as the Peterson estimate dated 1946. The evidence does not support this claim. Rather it refers to the results of the last bursting of the pipes.

Defendant requested a continuance of the hearing so that he might have his own architect and plumber examine the house to determine if plaintiff's testimony concerning the recent damage done by the bursting of pipes, and her estimates of the repair, were true. It is significant that after a visit to the house by the architect (it is not clear if a plumber went, too), defendant offered no evidence to dispute plaintiff's testimony concerning the damage nor the cost of repairs.

Same Items

The findings state that plaintiff had incurred $13,825 for the rehabilitation of the old house. Of this sum approximately $4144.95 were expenditures which were before Judge Sapiro at the prior hearing. This sum is comprised of the following items: (1) bill of H. Campbell for $1120, headed "Plumbing and Repairs," dated September 27, 1947; (2) Goss Sheet Metal Works, dated February 12, 1947, for installation of furnaces, $1195, and a statement dated May 21, 1948, showing the full payment of this bill; (3) estimate of Demarta Marino Co., painters, dated December 20, 1946, $574; (4) proposal of Albert Massagli, dated December 20, 1946, to repair sidewalk, $58; (5) estimate of S. Peterson & Son, dated December 23, 1946, for replacing pipes, $995 (this work was apparently not done); (6) bill for Venetian Blind Laundry, $202.95, dated December 16, 1946.

There was also included a figure of approximately $1300 which plaintiff had expended on back taxes. Plaintiff also had paid minor bills for upkeep for which she did not keep receipts, the amounts of which were not determined nor included in the court's total. There is some confusion in plaintiff's testimony between gas and water heaters and furnaces. The furnaces are covered by the Goss bill, and were evidently the gas heaters to which plaintiff referred. There may have been gas water heaters bought or needed. Apparently, however, the court did not include these

in its figures. Plaintiff testified that the roof needs repair and the garage leaks. No figures were included for these items.

[8] It is apparent from the findings that the court's purpose in referring to the $13,825 was to show how expensive the maintenance of the old house had been to plaintiff and as foundation for the court's additional finding that conditions requiring further expenditures in the future might reasonably be expected. Thus, in a situation where over a past period of time the repairs amounted to $13,825 and repairs in the future probably would be required in the same degree, it was not unreasonable to make the allowance which the court did, even though a portion of the named amount had been theretofore considered. There was definitely facing plaintiff an expenditure of $8145 for repairs and replacements to the home and a certainty from past history that even with these repairs and replacements, there would continue to be more expenditures. Moreover, plaintiff was faced with an expenditure for medical services of $85 per month or $1020 a year, plus $1000 for dentistry. Thus, there was at least $10,165 to be expended by her within the year, and there was the fact that the future would require additional expenditures. The increased allowance of $400 per month would amount to only $4800. It is obvious that the court in making such allowance to help plaintiff meet that situation did not abuse its discretion. In determining a basis for alimony, there does not have to be the particularity as to each item which would be required were a creditor suing on each item. There need be only a showing upon which the court can determine approximately what the needs of the wife are.

[9] Taking into consideration the monthly doctor bill, the amount to be incurred for dentistry, the $8145 estimates, the fact that there must be repairs to the roof and garage, the fact that plaintiff's health condition would apparently continue, and that the house would continue to require repair and replacement, the evidence was sufficient to justify the court in finding that there was a change in circumstances and in exercising its discretion in increasing the alimony.

[10] Defendant contends that the evidence shows that plaintiff's financial condition changed for the better, rather than for the worse. He bases this contention on her testimony that within the preceding year she had received $2400 for paintings which she had painted. However, she testified it cost her $100 a month for frames, paints, brushes and canvasses, and that she spent $1800 a year in entertainment for the purpose of advertising her work. Her income tax report shows that for that year she took a $1475 loss in the operation of her "art" business. Her credibility in this respect was for the trial court.

Attorney's Fees

[11] While the appeal is also from the order allowing attorney's fees, defendant makes no point concerning them in his briefs. The court found that plaintiff did not have sufficient funds to pay her own fees. The record discloses no abuse of discretion by the court in allowing $1000 attorney's fees.

Security

[12] Defendant's attack on the order requiring him to post security is that the court had no power to make such order in view of the fact that no notice was given of intention to ask that security be required, and that no intimation was given at any time during the hearing that the court was even considering the matter. The court had the power to make such requirement, even though no notice of intention to apply therefor was given. Section 140 of the Civil Code gives the court this power, as incidental to the granting of alimony. This, however, does not give the court the power to make such order out of a clear sky, without any request at the hearing therefor and without any intimation that the making of such order was being considered. Before such an order can be made the court must give the defendant an opportunity to make a showing as to why security should not be ordered. The record shows no mention of security until the order was made.

[13] Even though the record discloses, as found by the court,[1] that "the plaintiff has encountered extreme difficulty in the past in the collecting of her monthly alimony allowance," still the court abused its discretion in requiring the posting of security without first giving defendant an opportunity to be heard upon the subject. Our reversal of the order of the trial court in this respect is without prejudice to a redetermination of the matter upon giving defendant an opportunity to be heard.

The judgment for counsel fees is affirmed. That portion of the order and judgment directing defendant to post security is reversed. In all other respects the order and judgment is affirmed. Plaintiff will recover costs.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

104 Cal.App.2d 118

HARTLEY v. WELLER.

Civ. 17846.

District Court of Appeal, Second District, Division 1, California.

May 10, 1951.

Action by Willard C. Hartley against Earle S. Weller to recover damages for breach of oral agreement to form a limited partnership to conduct oil well drilling business. The Superior Court of Los Angeles County, Arnold Praeger, J., entered an order sustaining a general and special demurrer to the complaint and plaintiff appealed. The District Court of Appeal, Hanson, J., held that the plaintiff failed to state a cause of action for the damages alleged in the complaint.

Affirmed.

1. Partnership ⇐352

In action for damages for the breach of an oral agreement to form a limited partnership to conduct an oil well drilling business, the profits which the proposed partnership might have received from a prospective drilling contract could not be recovered as damages, as they were too speculative. Civ.Code, § 3300.

2. Partnership ⇐352

In action for damages for breach of an oral agreement to form a limited partnership, in absence of any charge that defendant actually or impliedly requested plaintiff to render any services or incur any indebtedness in his behalf or that of the proposed partnership which would give rise to an obligation thereof in favor of plaintiff, the items of expense for loss of services and expenses incurred by plaintiff were not recoverable.

J. Q. Gilchrist, Los Angeles, for appellant.

Raymond Tremaine, Robert J. McGowan, Los Angeles, for respondent.

HANSON, Justice pro tem.

The question presented is whether the second amended complaint stated a sufficient cause of action in damages for the breach of an oral agreement to form a limited partnership to conduct an oil-well drilling business. The trial court sustained a general and special demurrer to the second amended complaint, but gave plaintiff leave to amend. The plaintiff elected not to do so and appeals.

The complaint avers an oral agreement under the terms of which the parties agreed to enter into a limited partnership with their rights and liabilities to be governed by the terms of an unsigned written partnership agreement which is set forth as an exhibit. That document discloses that the defendant was to be a limited partner and the plaintiff a general partner.

The complaint does not allege the existence of a partnership between the parties but merely an agreement to form a partnership. The complaint goes on to aver that the defendant refused to execute

1. The record is not before us.

the written partnership agreement (which would have created a partnership), and as a consequence the plaintiff was damaged in that he expended, in anticipation of the execution of the document, for gas, oil, hotel accommodations and attorney's fees the sum of $227.46 and was caused to lose three weeks of his time of the reasonable value of $325.00. Additionally he avers that he had procured prior to the oral agreement a contract with a drilling company to assign contracts it had to drill wells which at the time of the oral agreement the parties had orally agreed should be assigned to the proposed partnership. It is then averred that due to the refusal of the defendant to enter into the partnership agreement, the drilling contract was lost to the damage of plaintiff in the sum of $4,100 being one half of the net profit the drilling company derived from its contracts for the drilling of the wells, the total profit of $8,200 being what the partnership would have received.

[1] Under the substantive law which is here controlling, it is plain, that the only damages the plaintiff was entitled to recover, and as to which he could state a good cause of action, were such as were proximately caused by the breach, or which, in the ordinary course of things, would be likely to result from such a breach. Civ.Code, sec. 3300. The profits which might or might not ensue from the drilling contract could not be recovered as they were too speculative. The profits the drilling company actually received from drilling the wells is no criterion as to the profits the proposed partnership could have derived from the drilling contract had it been assigned to the proposed partnership. The ability of the drilling company to make profits in the drilling of these or any other wells, has no tendency to show that the members of the proposed partnership had any such ability. Had it been launched it would still have been an inexperienced partnership without a history even though the individual members may have had the experience and the history.

[2] There remains to consider the allegation of the complaint that appellant expended the sum of $227.46 and additionally was caused to lose the value of his services in the sum of $325.00. For aught that is disclosed in the complaint appellant incurred this damage voluntarily. The complaint does not charge that respondent had actually or impliedly requested appellant to render any services or incur any indebtedness in his behalf or that of the proposed partnership which would give rise to an obligation therefor in favor of appellant. Even if the partnership had been launched the items would not have been a liability of the partnership short of a ratification thereof. In short, the items were not incurred by appellant as a partner, as none was in existence, and they were not incurred as an agent for respondent as no agency was alleged. Accordingly, the plaintiff-appellant failed to state a cause of action for these alleged damages aggregating $552.46.

The judgment entered upon the order sustaining the demurrer is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

104 Cal.App.2d 331

SEVERIN v. COX.

Civ. 4100.

District Court of Appeal, Fourth District, California.

May 18, 1951.

Action by Richard H. Severin against Victor Cox for personal injuries sustained through crashing into barricade with motorcycle. The Superior Court, Fresno County, Paul A. Eymann, J., entered a judgment for Severin, and Cox appealed. The District Court of Appeal, Mussell, J., held that contributory negligence was a question of fact for the jury, whose determination was binding.

Judgment affirmed.

1. Automobiles ⇐304(3)

Burden of proving contributory negligence of motorcyclist, who crashed into barricade, was upon defendant, plumbing contractor, who had excavated across part of road.

2. Negligence ⇐136(9)

Contributory negligence is not established as matter of law unless only reasonable hypothesis is that such negligence exists.

3. Automobiles ⇐308(11)

Whether plaintiff motorcyclist, who crashed into barricade, which had been lighted at center of street and curb line but not in center of traffic lane and where no signs had been posted indicating closed traffic lane by plumbing contractor, who had excavated trench across part of road, had been negligent was question of fact for jury.

4. Automobiles ⇐308(11)

If motorcyclist,who crashed in barricade, erected by plumbing contractor whose excavation blocked street and which was lighted at center of street and east curb line, was negligent, question of whether his negligence was proximate cause of accident was question for jury.

5. Appeal and error ⇐1001(1)

Determination of jury on facts is binding, where there is evidence to support finding.

6. Automobiles ⇐261

Plumbing contractor, who excavated trench blocking half of street, was chargeable with ordinary care to see that such obstruction did not cause injury.

7. Automobiles ⇐308(6)

Where plumbing contractor, who excavated trench blocking half of street, erected barricade lighted at center of street and curb line, sufficiency of barrier and lights as adequate warning to motorcyclist, who crashed into barrier, was question of fact for jury.

8. Appeal and error ⇐110

Order denying motion for new trial is not appealable.

Emmett R. Burns and Edward A. Friend, San Francisco, for appellant.

L. Kenneth Say, Fresno, for respondent.

MUSSELL, Justice.

Plaintiff, a young college student, while riding his motorcycle in a northerly direction on Orange Avenue in the city of Fresno, struck a barricade erected along an open trench across the east side of the avenue. He filed the present action for damages against the defendant, a plumbing contractor, who excavated the trench to put in a sewer connection. A jury awarded plaintiff damages in the sum of $6,000.

Appellant's argument is devoted entirely to the contention that, under the evidence, plaintiff was guilty of contributory negligence as a matter of law, and that the judgment should therefore be reversed.

On the date of the accident, February 19, 1949, defendant, in connecting a dwelling house on the east side of Orange Avenue with the city sewer system, dug a trench from the property westward to the center of the avenue. The trench was approximately 20 inches wide and 4 feet deep, and at the time of the accident, (shortly after sundown), the dirt which had been removed was piled on the north and south sides of the excavation. At about 4:00 P.M., a workman employed by the defendant erected a barrier of boards along the trench. He was ordered by the job superintendent to place four bomb-shaped kerosene flares near the trench, one on each side thereof at the west end, and one on each side half way between the center of the street and the curb line. The workman, however, placed two of the flares on the curb line and two at the end of the ditch in the center of the street. He did not place any light in the normal northbound traffic lane or half way between the center of the street and the curb line, as directed. A photograph (defendant's exhibit A) shows that a cross-walk for pedestrian traffic had evidently been constructed across the trench east of the two lights on the west end of the trench, indicating that the board barricade may not have closed the ditch to cross-walk traffic at the time of the accident,

and that the dirt was piled so as to indicate a passageway north and south across the excavation. The distance between the two flares at the curb line and those in the center of the avenue was approximately 12 feet, and plaintiff traveling north at a speed of 35 to 40 miles per hour saw the light in the center of the avenue but did not notice those on the curb line. He testified that when he saw the light in the center of the street he stayed on his own side of the road, and when asked why he did so instead of turning to the left stated: "Well, I figured it could just be to the left as easily as to the right. I was just approaching it"; that he did not observe any barricade to the east of the center of the street; that he had his motorcycle light on high beam and could see "quite a ways"; that he assumed that his side of the road was clear; that he struck the barrier and was thrown from his motorcycle. In this connection it may be observed that there were no signs of any kind placed south of the trench indicating that the north-bound traffic lane was closed to vehicular traffic.

[1, 2] The burden of proving contributory negligence was upon the defendant and the cases in which it can be said that the negligence of a plaintiff contributes proximately to the accident as a matter of law are rare. See Anthony v. Hobbie, 25 Cal.2d 814, 818, 155 P.2d 826, 829, where it is said: "The rule has been stated in various ways in a legion of cases, that contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion. (Citing many cases.)"

This language was approved in Pewitt v. Riley, 27 Cal.2d 310, 316, 163 P.2d 873; and in Finnegan v. Royal Realty Co., 35 Cal.2d 409, 429, 218 P.2d 17, 30, where it was said: "Where contributory negligence is set up as a defense, it seldom happens that the question is so clear from doubt that the court can undertake to say as a matter of law how the jury should find upon the issue."

[3–5] Whether plaintiff was negligent was a question of fact for the jury, and if he were negligent, the question of whether his negligence was a proximate cause of the accident was likewise one of fact for the jury. In our opinion, the facts would warrant a different conclusion than that reached by the jury. However, its determination is binding upon us, since we cannot say, as a matter of law, that there is no evidence to support it. Inai v. Ede, 42 Cal.App.2d 521, 527, 109 P.2d 400.

In County of Alameda v. Tieslau, 44 Cal. App. 332, 186 P. 398, in an action for damages for the death of a traffic officer, it appears that the officer was riding a motorcycle on a state highway in the course of construction by the defendants; that to avoid a collision with an approaching automobile he turned to the right and ran into loose rock piled on the roadway; and that there were no lanterns, guards or signs on the gravel piles. The court, in affirming a judgment for plaintiff, said in 44 Cal. App. at page 335, 186 P. at page 399: "The theory of the appellants in regard to contributory negligence is that under the circumstances it was negligence as a matter of law for Green to ride over the road open for partial traffic only at the rate of speed at which he was going. It is only where reasonable men can draw but a single conclusion from the facts that courts may determine the question of negligence of either party as a matter of law. The appellants rely on the rule that, where a traveler uses a defective highway with knowledge of its defects, and in reckless disregard of them, he may not recover for injuries he may sustain, even though those charged with the duty of maintaining the road or warning signs or lights have been negligent. * * * In the present case the road was open to traffic; the defendants were charged with the duty of maintaining warning lights upon the obstructions they had placed on the roadway. They provided lanterns which were not placed. The traffic officer was properly

upon the road. He was confronted with a sudden danger. If the lights had been there, he could not have forgotten, and he might have seen the crooked outline of the rock pile. Where one is confronted with sudden peril, the fact that he errs in judgment, miscalculates the space in which he may move, or momentarily forgets and encounters another danger, does not necessarily warrant the conclusion of contributory negligence, because afterwards it may appear he might have avoided both perils by choosing a different course."

In the instant case the jury may have inferred that plaintiff would not knowingly run into the barricade; that if a light or lights had been placed in the center of the northbound traffic lane, plaintiff would have had his attention directed to the uncovered trench; that if a sign or signs had been placed on or south of the trench indicating that the east side of the avenue was closed to north-bound traffic plaintiff would have been warned of the existence of the excavation in time to have avoided the accident; and that the accident might have happened if plaintiff had in fact been traveling at a speed of 25 miles per hour. We cannot say as a matter of law that such inferences are unreasonable. It is beyond the province of this court to set aside a finding based upon a reasonable inference. County of Alameda v. Tieslau, supra, 44 Cal.App. at page 339, 186 P. 398.

[6, 7] The defendant, having obstructed the north-bound traffic on Orange Avenue at the scene of the accident, was chargeable with ordinary care to see that such obstruction did not become a cause of injury to the plaintiff. In the exercise of due care to prevent injury by the obstruction, defendant was required to erect guards, place lights, or otherwise adequately warn the north-bound traffic. The sufficiency of the barrier and lights as constituting adequate warning was, under the circumstances, a question of fact for the jury. Stockton Automobile Co. v. Confer, 154 Cal. 402, 406, 97 P. 881; Rose v. County of Orange, 94 Cal.App.2d 688, 691, 211 P.2d 45. Under the circumstances shown, the trial court might well have granted defendant's motion for a new trial. However, we cannot say that plaintiff was guilty of contributory negligence as a matter of law.

[8] The attempted appeal from the order denying the motion for a new trial is dismissed. Such an order is not appealable. McNamara v. Emmons, 36 Cal.App.2d 199, 208, 97 P.2d 503.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

104 Cal.App.2d 94

VOLLMAN v. CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION.

Civ. 7883.

District Court of Appeal, Third District, California.

May 8, 1951.

Edward G. Vollman, doing business as Valley Catering Co., brought an action against California Employment Stabilization Commission to recover contributions toward unemployment insurance which had been paid under protest. The Superior Court, Sacramento County, B. F. Van Dyke, J., rendered a judgment for defendant and plaintiff appealed. The District Court of Appeal, Deirup, Justice pro tem., held that plaintiff, who employed Mexican nationals brought to the United States pursuant to executive agreement, was liable for contributions even though such employees might not be eligible for benefits under the Unemployment Insurance Act because earnings of such employees were insufficient.

Judgment affirmed.

I. Taxation ⇐111.11

Under Unemployment Insurance Act, employer subject to act who employed Mexican nationals brought to United States pursuant to executive agreement was liable

for contributions toward unemployment insurance even though such employees might not be eligible for benefits under act because earnings of such employees were insufficient. Gen.Laws, Act 8780d, § 53.

2. Taxation ⇐111.22

Where Mexican nationals were brought into United States pursuant to executive agreement, and each Mexican national executed agreement with federal government whereunder their employment would be in agricultural work exclusively, and no deductions were to be made from wages which would reduce wages below those therein provided for, except as required by law, employer who employed Mexican nationals for other than agricultural work was liable for contributions under Unemployment Insurance Act, and would be even though Mexican nationals were employed in agricultural work, since deductions for wages for unemployment insurance were required by law.

3. Taxation ⇐111.8

Employer subject to Unemployment Insurance Act who employed Mexican nationals brought to United States pursuant to executive agreement was liable for contributions under act as employer, as against contention that Mexican nationals who were brought to place of employment by a state agency were employed by state agency and were therefore exempt from provisions of act.

Blewett, Blewett & Macey, Stockton, for appellant.

Edmund G. Brown, Atty. Gen., Irving H. Perluss, William L. Shaw, Vincent P. Lafferty, Deputy Attys. Gen., for respondent.

DEIRUP, Justice pro tem.

Plaintiff appealed from a judgment for defendant in this action, which was brought to recover contributions toward unemployment insurance which had been paid under protest.

Appellant is the successor in interest of a partnership which carried on business under the name of Valley Catering Company. For convenience he will be regarded as being the owner of that business during the period of time that is involved in this action.

In a number of labor camps, from December, 1943, through March, 1946, appellant furnished meals to Mexican nationals who had been brought into the United States to do farm work pursuant to an executive agreement that had been entered into by representatives of the Governments of the United States and Mexico. For a short time he deducted from the wages of employees 3.70 per cent, assuming that he was required to do so by the Unemployment Insurance Act (Stats. 1935, Ch. 352, as amended, Act 8780d, Deering's Gen. Laws). On April 19, 1944, having been advised that he was not subject to the Act and that either he should repay the sums he had deducted or elect to come within its provisions, he filed with the respondent a written election, as provided in Section 15 of the Act. The effect of the election was to subject the plaintiff to the terms of the Act to the same extent as all other employers who were covered by the Act for two calendar years and thereafter unless he gave proper notice of withdrawal of his election. Such a notice was never given.

Appellant found it convenient to employ Mexican nationals to wash the dishes, clean the mess halls, prepare vegetables, keep the stock rooms in order and to do whatever other work was necessary in the maintenance and operation of the kitchens. He did not pay their wages directly to them, but to the camp manager. He did not make any deductions from their wages for unemployment benefits, but he paid to the defendant, under protest, all the sums he was required by the Act to pay, amounting to $3,731.21.

[1] Appellant contends that the Mexican nationals whom he employed did not come within the purview of the Act, for they were brought into the United States pursuant to an executive agreement which required that they be returned to Mexico within too short a period of time to permit them to qualify for unemployment benefits

under the Act. One answer to this contention is that under the provisions of Section 53 of the Act they would have had the same right as any other employee to apply for compensation after they had received $300 in wages. Another answer is that contributions by an employee are payable to the respondent even though the employee might not be eligible for benefits because of insufficient earnings. California Employment Comm. v. Los Angeles, etc., News Corp., 24 Cal.2d 421, 150 P.2d 186.

Before being brought into the United States each Mexican national executed an "Individual Work Agreement" with the Government of the United States acting by and through the Department of Agriculture by which the rights and obligations of the worker were set out at length. It was agreed that the worker would be employed exclusively in agricultural work; that he would be paid the prevailing rate of wages in the locality in which he worked; that in the event of unemployment he would receive a subsistance allowance; and that: "No deductions will be made from the wages of the Worker for commissions, fees or any other purpose (except as required by law) which will have the effect of reducing his wages below that provided for * *."

It is contended that by the executive agreement and the contract the worker was provided with unemployment insurance which would prevent him from receiving benefits under the Unemployment Insurance Act; and further, that deductions from his wages were forbidden.

[2] It will be noted, however, that the Mexican nationals who were employed by the appellant were not employed in agricultural work, and the provisions that we have cited are for the benefit of agricultural workers. Also, the provision for subsistence is not in the nature of unemployment insurance. The deductions that the appellant was permitted to make from the wages paid and was required to pay to the respondent were deductions that were required by law.

[3] The contention that the Mexican nationals were employed by a state agency and were therefore exempt from the provisions of the Act is without merit. It is true that they were brought to the place of employment by a state agency, but they were employed by the appellant.

Appellant refers to Assembly Bill No. 2206 which was passed by the Legislature in 1945. If it had not been pocket-vetoed by the Governor it would have exempted the nationals of other countries, working here under executive agreement, from the terms of the Act. In Irvine Co. v. California Employment Comm., 27 Cal.2d 570, 578, 165 P.2d 908, it is said that bills which were passed by the Legislature in 1943 and 1945 for the purpose of including certain special services within the definition of agricultural labor, but were pocket-vetoed, were of some significance as evidencing the continuity of legislative intent regarding the use of the broad term "agricultural labor." In that case the Supreme Court held that such special services were in fact incuded within the term and fortified its conclusion by the reference to the bills as indicating legislative intent. In the present case our conclusion is that there is no ambiguity or uncertainty in the Act; that the Mexican nationals were clearly employees within the meaning of the Act. For this reason the statement in the Irvine case is inapplicable.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur

HIRSCHMAN et al. v. LOS ANGELES COUNTY et al.

Civ. 18282.

District Court of Appeal, Second District, Division 2, California.

May 14, 1951.

Rehearing Denied May 29, 1951.

Hearing Granted July 12, 1951.*

June Hirschman and others, petitioners, brought mandamus proceedings against the County of Los Angeles and others, to compel the setting aside of decision upholding the discharge of the petitioners from county employment because of their refusal to comply with order requiring all county employees to execute a loyalty oath and an affidavit with respect to subversive activity. The Superior Court of Los Angeles County, W. Turney Fox, J., rendered a judgment adverse to the petitioners, and they appealed. The District Court of Appeal, Moore, P. J., held that order requiring county employees to execute loyalty oath and affidavit was not invalid.

Affirmed.

1. Counties ⇐64

Order of board of supervisors of county requiring all county employees to execute a loyalty oath and affidavit that employees did not advocate and were not members of any political party or organization advocating overthrow of the government by force or violence did not imperil any constitutional right of such employees.

2. Constitutional law ⇐82

Order of board of supervisors of county requiring all county employees to execute a loyalty oath and affidavit that employees did not advocate and were not members of any political party or organization advocating overthrow of the government by force or violence was not a "bill of attainder."

See publication Words and Phrases, for other judicial constructions and definitions of "Bill of Attainder".

3. Counties ⇐65

A county has the right and duty to exercise a reasonable supervision over its employees, to apply appropriate discipline, and to use such measures as are reasonably calculated to prevent disruption or impairment of public service.

4. Counties ⇐67

The power to prescribe tests and conditions for ascertaining extent or lack of loyalty on part of county employees implies right of Board of Supervisors to discharge those who decline to comply with the tests applied.

5. Officers ⇐26(1), 69.7

Provision of county charter that no person in classified service, or seeking admission thereto, shall be appointed, reduced, or removed or in any way favored or discriminated against because of his political or religious opinions or affiliations, refers to politics and religion in their narrow connotations and not to such a movement as champions the destruction of the government by violence.

6. Officers ⇐69.7

Order of Board of Supervisors of county requiring all county employees to execute a loyalty oath and affidavit that employees did not advocate and were not members of any political party or organization advocating overthrow of the government by force or violence did not violate provision of county charter that no person in classified service, or seeking admission thereto, shall be appointed, reduced, or removed, or in any way favored or discriminated against because of his political or religious opinions or affiliations.

Margolis & McTernan, John T. McTernan and William B. Murrish, Los Angeles, for appellants.

Harold W. Kennedy, County Counsel, and Gerald G. Kelly, Asst. County Counsel, and Robert L. Trapp, Deputy County Counsel, Los Angeles, for respondents.

MOORE, Presiding Justice.

Dissatisfied with the denial of their petitions for a writ of mandamus to compel the Los Angeles County Civil Service Commission to set aside its decision of November 24, 1948, upholding their discharge from county employment, petitioners appeal. Their discharges were based upon their "insubordination" in refusing to comply with a prior order of the Board of Su-

* Subsequent opinion 249 P.2d 287.

pervisors of Los Angeles County requiring all county employees to execute the oath and affidavits found on the margin hereof.[1]

[1] Because they refused to subscribe to those forms, they were discharged. They now seek restoration despite the fact that they have not even offered to subscribe to the oath or either affidavit. Nothing in the designated requirement or in either affidavit in the slightest degree affects petitioners' political or religious beliefs. No constitutional right is imperilled; no hallowed principle is to be forsworn; no hazardous or difficult task is assigned. The endless lines of men and women entrusted with public duties are in place, with life tenure, to enjoy economic independence, secure against all forces except the earth's diastrophisms and potential foreign foes. Respondents have simply undertaken to perform a plain duty by applying a procedure whereby to ascertain from each person in the public service whether he is a loyal American, loyal to the interests of the state, faithful as against insidious foes and resolute in his purpose not to give his allegiance to any party or movement designed to subvert the state or the national government. Their efforts deserve approval, not disapprobation; praise, not execration; eager applause, not muffled drums. Their purpose in exacting the new oath and affidavits is to place about the pulsing and reliant heart of society renewed confidence in the majesty and power of the American state and to reduce perils arising from internal foes. If appellants desire to advocate the overthrow of either form of our dual government or a terrorization of a municipal or county organization, they are free from employment restraints after having resigned from their positions. Neither argument nor authority is necessary to support the thesis that the State is not obliged to wait until after an employee has committed some overt act before making inquiry as to his fitness to occupy the position he holds.

The procedure espoused by respondents was wisely conceived. Within recent years the proceedings of courts and committees have in many metropolitan centers of the nation disclosed fallen idols who once enjoyed public esteem while entrusted with large responsibilities, now known chiefly by virtue of their convictions of subversive aims and disloyal hearts. Should those men who have confessed their adherence to alien programs be returned to nestle on the plush-seated divans of the national capital or behind the brocaded draperies of the Los Angeles Temple of Justice? We think not. The common sense of the average citizen resents the suggestion. Disloyalty is not merely a new or novel idea seeking expression. It is not a philosophy that the people of any political subdivision in all recorded history

1. "A. Oath of Office or Employment

"I, ————, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution and laws of the State of California, against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office or employment on which I am about to enter or am now engaged. So Help Me God.

"B. Affidavit Re Subversive Activity

"I do further swear (or affirm) that I do not advocate, nor am I now a member, nor have I been since December 7, 1941, a member of any political party or organization that advocates the overthrow of the Government of the United States, or State of California, or County of Los Angeles, by force or violence, except those specified as follows: ————

————————————————

and that during such time as I am an officer or employee of the County of Los Angeles, I will not advocate nor become a member of any political party or organization that advocates the overthrow of the Government of the United States, or State of California, or County of Los Angeles by force or violence.

"C. Affidavit Re Aliases

"I do further swear (or affirm) that I have never used or been known by any names other than those listed as follows:

————————————————

————————————————"

Paragraph "D" required the employee to indicate whether he has been a member of or supported any one of 142 named organizations.

have declared beneficial to their government, or that any philosopher or statesman has espoused. On the contrary, its sponsors have been the object of abhorrence in every enlightened land. Unrestrained, it gnaws, like the eternal termite, at the foundation of a government and if its devotees are employed to occupy the structure, soon will the rafter fall in ruins.

Is there any doubt that a private employer with reasonable fears of sabotage would not be justified in requiring his employees to submit to questioning and examination? He might thereby ascertain whether one had stolen or done malicious mischief or whether one intended to take or destroy his employer's property. How much higher standard must guide the servant of the state! It is not only the privilege but the duty of those who administer public affairs to make inquiry as to the individual fitness of the army of men and women employed to protect the property of the state, to maintain its government, to preserve law and order. It is only by public confidence in their intelligence, honesty and industry that social repose is protected and tranquility is assured. If the personal capabilities of workmen, gardeners, clerks, policemen, firemen and executives are indispensable to the public weal, how important is the personal loyalty of every public servant! How essential to keep all things of the State from the hands of those whose first aim is to destroy the support and shield of every American family!

The very questions presented have been before this court on two former occasions. In Steiner v. Darby, 88 Cal.App.2d 481, 199 P.2d 429, 434, we declined to enjoin the supervisors from proceeding with their fact-finding program through the use of such oath and affidavits. Although no discharge of any employee for refusal to subscribe was involved, that decision of necessity is controlling now on the question of the correctness of respondents' action herein. We there held in the language of Justice McComb that petitioners "as public servants, have the implied duty to support the form of government lawfully chosen * * * they impliedly agreed, when they accepted public employment, to act as representatives of the People and not to advocate destruction of the government by force or violence. By accepting public employment they forego any privilege they may have had as private citizens to advocate the overthrow of the government by force and violence. It is inconceivable that they should be permitted to represent the People * * * and at the same time have the privilege of advocating the overthrow of the very government by which they * * * obtain their livelihood." A hearing of that decision was refused by the Supreme Court and on certiorari the federal Supreme Court declined to annul it. Parker v. County of Los Angeles, 338 U.S. 327, 70 S.Ct. 161, 94 L.Ed. 144. Thereafter seventeen employees of the City of Los Angeles were discharged for refusal to subscribe to an oath and affidavit of substantially the same import as those here involved. They sought restoration by consolidated petitions for writ of mandate directing their reinstatement. Garner v. Board of Public Works, 98 Cal.App.2d 493, 220 P.2d 958, 960. Unable to convince the superior court, their appeal failed in this court (Division One). Justice Drapeau reviewed many decisions on the right of a state to prescribe qualifications of its employees. The conclusion derived was an affirmance with the observations that "It is treasonable to advocate the destruction by force of the government * * *. It is an ever-present threat to government itself to have treasonable persons charged with the conduct of public affairs. Having such people on the payroll results in impairment of governmental service. * * * It is, therefore, the duty of those charged with the management of the business of government to ascertain, require, and insure unconditional, unswerving loyalty of every servant of the people * * *. The man or woman who denies allegiance to his employment is, and should be, soon separated from it."

[2] The acts of the Board of Supervisors in requiring the subscription of county employees to such affidavits are in no respect akin to the bills of attainder, as argued by petitioners. The Act of Attainder was a cruel device employed in the

17th century by legislative assemblies as a means of enforcing compliance of designated persons with the wishes of the executive or of the majority of the legislators. Its application caused monstrous atrocities. It did not merely cause a slight unpleasantness or inconvenience but without a conviction by a jury or a court, without indictment or accusation, without any legal evidence the property of men and women was confiscated, they were driven from their homes, their furniture was burned and their food destroyed. Sometimes they were permitted to live, scorned by their fellows, driven to the forest or sent beyond the seas. It was a common occurrence that a man who had incurred the hatred of the king or his henchman would without trial be hanged or quartered and drawn.

No similarity exists between the harsh and imperious rule of the Act of Attainder and the rule of the supervisors prescribing a test for employees. The former imposed upon the innocent citizen violent retribution for merely having displeased the monarch or one of the latter's friends. The rule of the supervisors was designed solely to acquaint them with whether an employee of the county holds to a philosophy inimical to the maintenance of the state. The decisions cited by petitioners, Ex parte Garland, 4 Wall. 333, 18 L.Ed. 366; Cummings v. Missouri, 4 Wall. 277, 18 L.Ed. 356, etc., were answers by the Supreme Court to a dragnet method of excluding confederate soldiers and sympathizers from participating again in the national government by punishing them for past conduct with respect to a settled issue. At the present time in every large city in America there is a number of citizens who prefer the government of a potential enemy to that of the United States. To ascertain who they are in Los Angeles county is not to attaint them, not to take from them a single right to which they are entitled, not to coerce them to yield even an opinion.

[3, 4] The principle involved is not whether a constitutional guaranty has been violated but rather is it the right of the state or an arm of its government to prescribe moral and ethical as well as educational standards of those engaged in public service. Not only must an employee devote the prescribed hours to his work and apply thereto the necessary intelligence, but he is obliged to refrain from such deception as contracting an interest inconsistent with his duties and to this end he is subject to regulation. 2 Williston on Contracts, sec. 1022, p. 1923; 39 C.J. 82, 56 C.J.S., Master and Servant, § 42; Miller v. Jones, 178 Iowa 168, 159 N.W. 671; Osburn v. De Force, 122 Or. 360, 257 P. 685, 689, 258 P. 823. It would be not only monstrously oppressive to require a county to retain an employee who has adopted an attitude hostile to the state, Puritas Laundry Co. v. Green, 15 Cal.App. 654, 660, 115 P. 660, but it would undermine authority and induce the employee of treasonable persuasion to bite the hand that feeds him. The county has the right and the duty to exercise a reasonable supervision over its employees, to apply appropriate discipline and to use such measures as are reasonably calculated to prevent the disruption or impairment of public service. Hayman v. City of Los Angeles, 17 Cal.App.2d 674, 678, 62 P.2d 1047; Washington v. Clark, D.C., 84 F.Supp. 964. The power to prescribe tests and conditions for ascertaining the extent or lack of loyalty on the part of county employees implies the right of the Board of Supervisors to discharge those who decline to comply with the tests applied. See Communist Party v. Peek, 20 Cal.2d 536, 551, 127 P.2d 889.

A county employee's character is subject to inspection at all times and if his conduct or his sentiments are found to be inimical to the interest of the people he should be discharged. Kenneth v. Barber, 159 Fla. 81, 31 So.2d 44. Moreover, a municipality is possessed of the authority to supervise and regulate the conduct of its employees. Where a policeman had been discharged for violating a rule against his soliciting aid for any political purpose whatever, Justice Holmes said: "Petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. * * * The city may impose any reasonable condition upon holding offices within its control." McAuliffe v. Mayor,

etc., of City of New Bedford, 155 Mass. 216, 29 N.E. 517. In Gerende v. Board of Supervisors of Elections, 71 S.Ct. 565, it was held that there was no error in a Maryland decision Md., 78 A.2d 660, which denied plaintiff a place on the ballot for a municipal election on the ground that she had refused to file an affidavit that she was not a person engaged "in one way or another in the attempt to overthrow the government by force and violence" or that she was not knowingly a member of an organization engaged in such an attempt. 71 S.Ct. 565. If one may not seek election for declining to make such affidavit why should he not be excluded from a civil service position for the same offense?

[5, 6] In this connection, appellants contend that the orders of the Board of Supervisors with reference to advocacy of the forceful overthrow of the government violate section 41 of the county charter. That section provides: "No person in the classified service, or seeking admission thereto, shall be appointed, reduced or removed or in any way favored or discriminated against because of his political or religious opinions or affiliations." Nothing is to be found in section 41 intended to prevent an employer from discharging an employee who advocates the overthrow of our government. Such was the holding in Lockheed Aircraft Corporation v. Superior Court, 28 Cal.2d 481, 171 P.2d 21, 166 A.L.R. 701. While it is true that the corporation was engaged in the production of war materials and was for that reason considered especially deserving of protection against disloyal employees, still no good reason appears why section 41 should protect appellants by allowing them to return to the ranks of the county's 20,000 employees. The section contains no inhibition against the county's discharging an employee whose first loyalty is to his ideal of armed revolution against the state that he serves. The fact that his tenure is protected by civil service does not avail him if he is disloyal. The language of the section which prohibits discrimination against one in the classified service "because of his political or religious opinions or affiliations" refers to politics and religion in their narrow connotations and not to such a movement as champions the destruction of government by violence. Powell v. Unemployment Compensation Board of Review, 146 Pa.Super 147, 22 A.2d 43. The procedure for testing the fitness of county employees duly adopted by the Board of Supervisors and applied to appellants is reasonably fair and was correctly approved. It logically follows that where employees have been discharged for their refusal to submit to inquisitive processes instituted for the purpose of ascertaining their fitness, they are not entitled to be reinstated upon their mere demand.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

EBERHARDT et al. v. BASS et al.

Civ. 7916.

Sac. 6139.

District Court of Appeal, Third District, California.

May 17, 1951.

Rehearing Denied June 13, 1951.

Hearing Granted July 12, 1951.*

Action by R. L. Eberhardt and others against Arthur C. Bass and Stokely Foods, Inc., a corporation, to quiet plaintiffs' title to certain realty leased by first named defendant and to have plaintiffs' title to crops growing and to be grown thereon likewise quieted. The Superior Court, San Joaquin County, George F. Buck, J., rendered judgment for defendant Stokely Foods, Inc., and plaintiffs appealed. The District Court of Appeal, Van Dyke, J., held that plaintiffs were entitled to the relief sought by them.

Judgment reversed, with instructions.

1. Chattel mortgages ⇐135

When a tenant gives a crop mortgage on crops to be grown by him during existence of his estate in tenancy mortgage ends, as to crops not growing, when lease ends, whether by expiration of stipulated

* Subsequent opinion 243 P.2d 789.

time his estate is to last or sooner termination for breach of condition.

2. Crops ⇐1

Growing crops are personal property and this is true whether they are produced by annual planting or from perennial root stock or from trees and vines.

3. Chattel mortgages ⇐117

A tenant's crop mortgages create no right or interest in respect of any crops to be grown after his estate has terminated. Civ.Code, § 2955.

4. Chattel mortgages ⇐124

When a mortgagor purports to mortgage crops to be grown in future, mortgage will take effect only when growing crops become such in course of nature and up to that point mortgage has no more than a potential existence and is not a mortgage for want of existence of personal property to which it may attach. Civ.Code, § 2955.

5. Chattel mortgages ⇐135

Defendant's chattel mortgage on lessee's crops, terminated when tenancy ended with respect to crops not growing at the time, and subordination agreement signed by lessor which authorized defendant to exercise all rights it had under any crop mortgage, same as though breach of lease had not occurred did not create rights in defendant as to future crops but only authorized defendant to go on land, complete production and harvesting growing crop, to sell crop and to apply the net proceeds to lessee's indebtedness to defendant. Civ. Code, § 2955.

6. Sales ⇐84, 214

Contracts signed by lessors and lessee purporting to presently sell all asparagus on leased realty to defendant to be grown during seasons of 1947 to 1955 inclusive and containing expressed declaration that it was intended by parties that on their execution title to asparagus sold passed immediately to defendant, were contracts to sell future goods and notwithstanding expressed declaration to contrary defendant did not acquire title to asparagus to be grown on execution of crop contracts and lessee's contract to sell crops ceased to give any rights to defendant after lessee's tenancy estate ended. Civ.Code, §§ 1725(3), 1796.

7. Landlord and tenant ⇐326(1)

Under lease providing that lessor is to receive as rental one-fourth of crops produced by lessee, as crops are produced tenant has whole title thereto unless title to part or all of crop is reserved by lease.

8. Chattel mortgages ⇐141
Sales ⇐68

Where lessors were entitled to receive from lessee one-fourth of all crops grown during tenancy, and lessors and lessee agreed to sell to defendant all asparagus crops to be grown on realty during seasons of 1947 to 1955 inclusive, and lessors also signed subordination agreement authorizing defendant, in event of breach by lessee, to exercise all rights which it had in any crop mortgage, lessors were contracting solely with respect to their rental portion of asparagus to be grown on leased premises. Civ.Code, §§ 1725(3), 1796, 2955.

9. Sales ⇐66

Where lessors and lessee entered into crop contracts with defendant whereby they agreed to sell to defendant all asparagus crops to be grown on realty during seasons of 1947 to 1955 inclusive, provisions of crop contracts which obligated seller to work crops and deliver them to defendant were obligations of lessee alone since he alone had right of possession and he alone, while lease endured, could perform.

10. Contracts ⇐175(1)

Statute providing that where all parties who unite in a promise receive some benefit from consideration, whether past or present, their promise is presumed to be joint and several, is a rule of construction and cannot prevail where contracts executed show several undertakings only. Civ. Code, § 1659.

Rutherford, Jacobs, Cavalero & Dietrich, Stockton, for appellant.

Mazzera, Snyder & DeMartini, Stockton, Price, Macdonald & Knox, Oakland, for respondent.

VAN DYKE, Justice.

During the year 1945 plaintiffs and appellants acquired as co-owners 557 acres of land in San Joaquin County. Substantially all of it had been planted to asparagus. This was done by one MacLean in 1943 and 1944. MacLean had a 10-year lease on the property running from 1943 to 1953, with an option for an additional year, and if that were exercised, an option for still another year. In 1944 he assigned this lease to defendant Bass who was in possession as tenant when appellants acquired the property. Bass was indebted to Richmond-Chase Company, cannery operators. The debt was secured by a crop mortgage on three-fourths of the crops. Bass was obligated to deliver the remaining one-fourth to appellants as rental. Bass was also indebted to a bank and this debt was secured by chattel mortgage on his farming equipment. In March of 1947, Bass, being still indebted to Richmond-Chase Company and the bank, began negotiations for refinancing with Stokely Foods, Inc., respondent herein, which also operated a cannery. Respondent was interested and on March 20th its counsel wrote to appellants relative to a proposed refinancing plan. The letter stated that respondent would refinance Bass only if it could purchase from him and from appellants all of the canning asparagus, and if it obtained proper documents for its security. Enclosed with this letter were a subordination agreement, to be executed by appellants, and contracts, to be executed by appellants and Bass, for the sale of all the asparagus growing or to be grown on the property during the years 1947 to 1955, inclusive. Thereafter appellants and Bass executed the contracts for sale of the crops and appellants executed the subordination agreement. Respondent then took over Bass' indebtedness to Richmond-Chase Company, receiving assignments of the note and crop mortgage securing the same and also took over Bass' indebtedness to the bank, receiving by assignment his note to the bank and the chattel mortgage securing its payment. Respondent also took a new note and chattel mortgage from Bass covering his total indebtedness to it. The mortgage was in form both a crop mortgage upon his share of the crops and a chattel mortgage covering his equipment. As further security respondent also received an assignment of Bass' lease, to which assignment appellants consented.

Bass continued to farm the property through 1947, 1948 and 1949. However, his operations were not profitable and his lessors, the appellants, claimed that he had breached his lease by failing to live up to his obligations as to the way in which his farming operations should be conducted. On June 1, 1949, they served him with notice of these defaults, serving a similar notice on respondent, pursuant to a provision in the subordination agreement requiring such notice to be given if the lessee, Bass, should default in any lease obligation. Neither Bass nor respondent took any steps to cure the claimed defaults. Bass left the premises during June and on June 30th appellants gave to Bass and also to respondent notice of termination of Bass' lease. They thereupon took possession of the property and filed the present action to quiet their title to the land and to the asparagus crops as against any claim of interest therein or lien thereon by Bass or respondent.

The complaint is in the usual form consisting of two counts, the first praying that their title to the land be quieted, and the second that their title to the crops growing and to be grown thereon be likewise quieted. Defendant Bass did not appear in the action and his default was entered. Respondent answered, setting up its claims, which may be summarized as follows: It claimed to be the owner, by virtue of the crop contracts, of all crops of asparagus growing and to be grown upon the property during the seasons 1947 to 1955, inclusive, and that appellants' ownership of the land was subject to a lien in its favor until the indebtedness of Bass still owing to it should have been paid and until the crop contracts had been performed by the sellers thereunder, including the appellants. By the trial court's decree the following matters were adjudged: That respondent is the owner and entitled to the possession of all the crops of asparagus growing and to be grown through the 1955 season on the real

property described in the complaint; that the crop contracts were in full force and effect; that appellants were the owners of the real property, but that their title was subject to an equitable lien in favor of respondent until the Bass debt be paid and subject to respondent's ownership of the crops; that Bass was indebted at the time of the decree to respondent in the sum of approximately $48,000 for loans and advances made for the production of, and moneys spent in connection with, said asparagus growing on said real property; that respondent has a lien, imposed by the decree, on three-fourths of the proceeds of all asparagus growing and to be grown on the real property to and including the 1955 asparagus season as security for the payment of Bass' debt with the proviso that all payments made on that debt by Bass, and the net amount that might be realized by respondent on foreclosure sale of his equipment mortgaged to respondent, should be applied in reduction of his debt and in reduction of the decreed lien; that until the rights of respondent under the crop contracts and under the subordination agreement have terminated any new lease and any conveyance or mortgage or deed of trust of the real property must contain a provision expressly recognizing the agreements provided for in the crop contracts and the subordination agreement and subordinating thereto the rights of such new lessee or transferee, and that to that extent a further equitable lien be imposed upon the real property in favor of respondent; that appellants' title to the real property be quieted against Bass and against respondent and any persons claiming through them, subject, however, to the said rights and equitable liens of respondent. The practical effect of the judgment is that under the crop contracts appellants must now proceed—all Bass' interest in the crops and his estate under the lease having been terminated—to farm the land to asparagus, produce the annual crops thereof at their expense, and deliver the crops to respondent. They will receive from respondent payment for one-fourth of such crops. Respondent may then apply the purchase price of the remaining three-fourths of crops delivered, to the payment of Bass' indebtedness to it until the same shall have been discharged. After that point has been reached, appellants will be paid the full purchase price of all the crops to the appellants. From this judgment appellants have appealed.

A statement of the contents of the subordination agreement and of the crop contracts is necessary to a discussion of appellants' contentions. The subordination agreement contains eight paragraphs. By the first, appellants represent that they own the land; that they own the lessor's interest in the rental to become due under the lease and that the lease is in effect and not in default. By the second paragraph respondent recites it is willing to loan money to Bass in connection with financing asparagus growing on the land in consideration of the agreement. By the third paragraph it is recited that in consideration of respondent making loans to Bass (further loans to be at respondent's option) appellants agree that all their claims against Bass, except for rental as provided in the lease, and all their interest in or claims against the crops except for such rental shall be subordinate to the claims of respondent against Bass and against the crops under the crop contracts and under any crop mortgage which Bass may execute and deliver to respondent covering the asparagus, and subordinate to the claims of respondent as assignee of the assigned mortgage from Bass to Richmond-Chase Company. Paragraph 4 provides that if "Bass should breach or abandon said lease or do or cause anything to be done whereby he might or would lose possession of said land" then respondent might exercise all rights which it had under any crop contract and/or any crop mortgage as if Bass had not breached the lease or had remained in possession, and further that respondent could then take possession of the crops and dispose of them as provided in the crop contracts or any crop mortgage, provided that while in possession of the land respondent should perform the lessee's agreements as set forth in the lease. Paragraph 5 provided that if the real property should be relet, sublet, sold or encumbered before

respondent's rights under the crop contracts or the crop mortgages should terminate, then any new lease or any conveyance or mortgaging of the real property should contain a provision recognizing respondent's rights and should subordinate the rights of the lessee or transferee to them. Paragraph 6 refers to a lease provision whereunder appellants as lessors were entitled to receive one-fourth of the asparagus crops produced during the term of the lease as rental, and to the crop contracts whereby the appellants "had this day sold their share of canning asparagus" to respondent, and appellants agreed that, although the lease provided that they might dispose of their share of the crops through the lessee they would not, after execution of the subordination agreement, permit him to so dispose of it. By paragraph 7 appellants consented to the security assignment to respondent of the Bass lease and to the sale to respondent by Bass of his interest in the asparagus crops. Paragraph 8 obligated appellants in the event of lessee's defaults to notify respondent of such defaults before exercising any rights under their lease and to give respondent ten days in which to cure such defaults before terminating the lease. The crop contracts described Bass and each of the appellants as "sellers" and thereby Bass and the appellants "sold" all asparagus growing or to be grown upon the land for the seasons of 1947 to 1955, both inclusive. It was expressly agreed that title thereby passed. There were two of these contracts, one covering all green asparagus produced and the other all white asparagus produced. Otherwise they are the same. They were on printed forms and contained a series of identical provisions on the reverse side of each form. It is not necessary to state the provisions of these contracts in detail, except as regards paragraph 7 of the printed stipulations. The substance of that paragraph provided that during the life of the contract the sellers should till, fertilize and cultivate the asparagus beds in the manner best adapted to asparagus production and should harvest and pack the crops produced and deliver them to respondent. Further, with respect to the documents summarized, all of which were executed at the same time, this may be said: Nowhere therein do appellants expressly agree to the hypothecation of any property owned by them or to be acquired by them to the payment of the Bass debt to respondent. The result arrived at by the court as reflected in its decree rests upon the court's interpretation of these instruments.

Appellants first contend that the operation of the subordination agreement depended entirely upon the existence of the Bass lease and that when that lease was terminated on June 30, 1949, the rights and obligations under the subordination agreement were likewise ended. They contend that, with respect to crops to be grown, neither the mortgages nor the crop contracts were intended to be or were in any way operative as to appellants beyond the time when the Bass lease should terminate. We will first examine this contention with respect to the crop mortgages.

[1] When a tenant gives a crop mortgage upon crops to be grown by him during the existence of his estate in tenancy the mortgage ends, as to crops not growing, when the lease ends, whether by expiration of the stipulated time his estate is to last or sooner termination for breach of condition. First National Bank of Oakdale v. Brashear, 200 Cal. 389, 253 P. 143, 144. In the cited case the Supreme Court declared: "* * * while it is true that a crop mortgage may be made to cover the crops thereafter to be sown and grown upon leased land, as was held by this court in the case of Arques v. Wasson, 51 Cal. 620, 21 Am.Rep. 718, and while it is true, as stated in that case, that such a mortgage has a potential existence during the period prior to the actual planting of the seed in said land upon which the crops to be subjected to said mortgage are to be grown, our attention has been called to no case, either in this or in any other jurisdiction, which goes so far as to hold that such a crop mortgage shall pass the point of such potential existence at any time prior to the actual planting with seed of said land. The rule applicable to this class of securities may seem to be an arbitrary one, but it has nevertheless been given universal applica-

tion and has never, so far as we have been advised by the appellant or have investigated the authorities upon our own account, been extended to a case wherein the land, although plowed or summer fallowed by the tenant, has passed, through his surrender of his lease, back to his landlord or into the possession and control of others who have thereafter undertaken to plant and grow the crops thereon."

[2] Growing crops are personal property and this is true whether they are produced by annual planting or from perennial root stock or from trees and vines. Said the Supreme Court in Congdon v. G. M. H. Wagner & Sons, 207 Cal. 373, 377, 278 P. 863, 865: "* * * It has, however, been held consistently by this court that growing crops are personal property * * *, and that crop mortgages made, executed, and recorded under the provisions of section 2955 et seq. of the Civil Code do not affect in any degree the title to the land upon which the crops covered by said crop mortgage are being grown and that the same do not constitute a lien or charge upon the land. * * * It was also early decided by this court that a growing crop of fruit occupied the same relation to the land as a growing crop of grain, and as fructus industriales was personal property which might properly be subjected to a chattel mortgage." See, also, Twin Falls Bank & Trust Co. v. Weinberg, 44 Idaho 332, 257 P. 31, 54 A.L.R. 1527; Campbell v. Sutton, 62 Cal.App.2d 621, 624–625, 145 P.2d 91.

[3] We are not at this moment concerned with the right of the crop mortgagee after his mortgage in respect of a growing crop has passed "the point of potential existence" to subject the same to his security demands. We are now concerned with the status of the crop mortgages here with respect to crops to be grown after the admitted termination of Bass' estate as a tenant and we conclude, in view of the authorities referred to, that his crop mortgages would create no right or interest in his mortgagees in respect of any crops to be grown after his estate had terminated.

Relying upon the rule that the Bass crop mortgages could not go beyond the end of his tenant's estate, appellants say that there was nothing in the subordination agreement which would change the effect of the rule. Respondent, however, says there was and points to paragraph 4 of that agreement dealing with the situation that would arise if Bass breached his lease. The agreement provides that if Bass should breach or abandon the lease or do anything whereby he might lose possession of the land, then appellants undertake "to permit [respondent] to exercise all rights which it has under any crop mortgage as if lessee had not breached said lease or had remained in possession"; further that respondent would be permitted to take possession of said crops and dispose of them as provided in any crop mortgage. Respondent says that these provisions would, in effect, extend the crop mortgages through the years after Bass, the mortgagor, had suffered termination of his estate, from the time of such occurrence to the end of the 1955 crop season. In effect, respondent says that by this language in the subordination agreement appellants themselves mortgaged their tenant's share of the crops to secure the payment of his debt to respondent if Bass' mortgages should become a nullity through the ending of his estate in tenancy. This contention of respondent claims a great deal. Appellants did not owe any debt to respondent. And they had no control over, nor was any limitation placed upon, the amount of indebtedness from Bass to respondent that might come to be secured by crop mortgages executed by him, for the subordination agreement expressly provided that further loans than those then being made might at respondent's option be made to Bass.

[4, 5] Concerning mortgages of personal property, the Civil Code, by Section 2955, declares that mortgages may be made upon all growing crops and all kinds of personal property. With respect to growing crops, we have seen that they are personal property, but it is only crops which have attained the status of growing crops that may be the subject of a chattel mortgage. Consequently, when a mortgagor purports to mortgage crops to be grown in the future, the mortgage will take effect only when the

growing crops become such in the course of nature. Up to that point the mortgage has no more than a potential existence and is not, in fact, a mortgage for want of existence of personal property to which it may attach. When Bass' estate in tenancy with respect to the real property here involved ended, then with respect to crops that were not growing crops at that time, that is, with respect to crops to be grown, there was no mortgage. Appellants by the subordination agreement undertook, in the event of breach by Bass, that respondent could exercise all rights which it had under any crop mortgage, the same as if the breach had not occurred, but that language does not create rights. It preserves them only and it preserves the rights which respondent had by reason of the Bass mortgages. As to future crops not at the time of breach having attained the status of growing crops, the respondent had no rights. The obligation of appellants in the event of breach by Bass was only that, notwithstanding such breach, respondent could exercise its rights as mortgagee of any growing crop then existing, so that it might, as its mortgage provided, protect its interest by way of lien in such growing crop. By the mortgage and as to such growing crop it had been agreed between Bass and respondent that if Bass should fail to keep his engagements concerning his mortgage obligations, including care, production and handling of the mortgaged crop, respondent might take possession of the property and "do such acts as mortgagee may deem necessary to protect its security interest in said property." These acts would include the right to go upon the land, complete the production and harvesting of the growing crop, the right to sell the crop and to apply the net proceeds to Bass' indebtedness to respondent. These were the rights which were preserved to respondent by the subordination agreement and to which the language herein under discussion applied.

What we have said is not affected by those provisions of the agreement giving respondent the right, on breach of the lease by Bass, to go upon the land and cure the breach. Respondent, when tendered the opportunity, elected not to do so.

We will next discuss the contention of appellants that the contracts to sell the crops to respondent likewise terminated when the Bass lease was ended. These two contracts—one covering the green asparagus to be produced and the other the white asparagus—were entered into by appellants along with Bass as sellers and purported to presently sell all of the asparagus to be grown during the seasons of 1947 to 1955, inclusive. They contained provisions whereby the sellers should till, cultivate, fertilize and irrigate the asparagus beds, harvest and pack the crops and deliver the total thereof to respondent as buyer. They contained an express declaration that it was intended and understood by the parties that upon their execution title to the asparagus sold passed immediately to respondent.

Notwithstanding the fact that the contracts purported to effect a present sale of the asparagus to be grown and therefore to pass present title to all future asparagus throughout the years 1947 to 1955, nevertheless as to crops to be grown the law does not permit that result to be reached. Such crops constitute goods to be acquired by the seller after the making of the contract of sale. Civil Code, Sec. 1796. They are by the code called future goods, and Section 1725, subd. (3), of the Civil Code provides that where parties purport to effect a present sale of future goods the agreement operates only as a contract to sell the goods. Title does not pass until (and, of course, unless) the seller acquires the goods.

[6] Therefore, notwithstanding the expressed declaration to the contrary contained in the documents, the respondent did not acquire title to asparagus to be grown upon the execution of the crop contracts. In so far, then, as the contract of Bass to sell the crops be concerned, his contract would cease to give any rights to respondent as to crops grown after his tenancy estate ended. Since he himself would have no interest in such crops after that time his contract to sell them could give no rights to respondent with respect to the crops grown by others. This is, of course,

not to say that he would not be responsible in damages for breach of his contract to sell, but we are not here concerned with such matter. We are concerned only with title to the property involved.

[7, 8] Appellants, however, by the contracts purported themselves to undertake, along with Bass, to sell the crops to be grown, and a further consideration of the agreements executed, including the subordination agreement and the documents referred to in those agreements, is necessary to a determination of the rights respondent may have against them by virtue of these crop contracts. When these contracts were executed, the Bass lease was in effect and by its terms appellants were to receive as rental one-fourth of the crops produced. Under such a lease and as crops are produced the tenant has the whole title thereto unless title to part or all is reserved by the lease. No such reservation was expressed in the lease between Bass and the appellants. Silveira v. Ohm, 33 Cal.2d 272, at page 275, 201 P.2d 387. But appellants were, under the lease, entitled to receive *from Bass* one-fourth of the crops produced during the tenancy and they agreed to sell such portion. With these matters the parties were all conversant and the lease was a factor in all their negotiations. Indeed, respondents sought and with consent of appellants received a security assignment of the Bass lease. The subordination agreement itself refers to these same crop contracts and in addition to other references contains the following: "In said lease it is provided that lessors shall be entitled to receive 25% of all of the crops of asparagus produced on said land during the term of said lease as rental and that lessor may elect to dispose of its said percentage through lessee. The undersigned hereby agree that they have this day sold their share of said crops of canning asparagus to Stokely Foods, Inc., and that they will not elect to permit lessee to dispose of said canning asparagus." When the executed documents, the lease therein referred to and the situation of the parties are all considered, we think it clear that appellants were contracting solely with respect to their rental portion of asparagus to be grown on the leased premises which they would receive if the terms of the Bass lease were kept and while the tenancy estate thereby created should endure. By the quoted portion of the subordination agreement the subject of the crop contracts, in so far as appellants were concerned, is clearly defined. Their expected portion of crops to be grown is stated and the source therof, to-wit, rental to be paid under the Bass lease, is identified. Following this, a description of what they have sold by virtue of the crop contracts is expressly and clearly stated. It must be concluded, therefore, that they sold to respondent that portion of the crops to be grown on the rented land which would be deliverable to them as rental under the lease. It follows that no more can be demanded of them and that when the Bass lease ended there could be nothing thereafter that would become the subject of their crop contract.

[9] As to the provisions of the crop contracts which obligated the "seller" to work the crops and deliver them to respondent, it is obvious that these were the obligations of Bass alone. He alone had the right of possession, and he alone, while his lease endured, could perform. If he failed the parties had agreed that respondent could enter, care for, and take any growing crop. When we look at the situation and interest of appellants in this respect they were, as was clearly declared, agreeing to sell what they received from Bass. We think it plain that, though they signed with Bass, it was never intended they should be bound beyond their obligation to sell.

[10] The trial court in construing these same crop contracts relied upon the provisions of Section 1659 of the Civil Code that "Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several", and therefore considered that by joining with Bass in the execution of the crop contracts appellants became bound equally with their tenant and that they thereby with Bass jointly and severally promised to sell to respondent all crops that would be grown upon the premises

from 1947 to 1955, inclusive. The code section is a rule of construction and cannot prevail where, as here, the contracts executed clearly show several undertakings only.

What we have heretofore said as to the provisions of paragraph four of the subordination agreement with respect to the crop mortgages is applicable to the crop contracts as we have construed them. That paragraph permitted respondent to exercise its rights under the crop contracts. The crop that might be growing when the lease ended would go under the crop contracts just as under the mortgages. But crops to be grown could not.

Respondent, in support of the judgment, relies upon the rule that where a trial court has construed a contract and such construction appears to be consistent with the true intent of the parties, a reviewing court will not substitute another interpretation which seems equally tenable. But we think this rule has no application here, for we think that the trial court's construction is not tenable and does violence to the clear intent of the parties when their situation and all of the documents simultaneously executed by them, and the documents therein referred to, are considered. Respondent proposed to lend money to Bass. There was never any suggestion anywhere in the contractual record that appellants should guarantee the payment of that loan or should mortgage their land or any other property they owned or might acquire as security for the repayment thereof. This is a fact of great significance. Surely, if the parties had contemplated such a thing, they would have found it easy to give clear expression to such intent. Yet by the construction placed upon the contractual instruments by the trial court appellants did guarantee the repayment to respondent of the loan to Bass and did hypothecate as security therefor all crops that might be grown upon their land for a period of nine years to the extent of three-fourths thereof, agreeing that they would during that period of time at their own expense use their land for the production of asparagus crops, and each season pack and deliver the same to respondent in order that it might by the sale thereof, so far as necessary, obtain repayment to itself, not only of the $48,000 being loaned to Bass at the time these contracts were made, but also for the repayment to itself of any additional or other loan for whatsoever purpose made that it might at its option make to Bass. We think the construction of the trial court is not tenable and that on the contrary the construction herein given to the contractual documents involved is what the parties intended to agree to.

The judgment is reversed, with instructions to the trial court to enter judgment for appellants as prayed for in their complaint.

DEIRUP, Justice pro tem., and ADAMS, P. J., concur.

104 Cal.App.2d 375

Petition of CHRISTENSEN.

HALL v. CHRISTENSEN.

Civ. 14650.

District Court of Appeal, First District, Division 2, California.

May 22, 1951.

Proceeding in the matter of the petition of J. E. Christensen for judgment establishing the standing of the "San Pablo Reporter" as a newspaper of general circulation, which could be used for legal notices, wherein Donald R. Hall filed a contest. The Superior Court in and for the County of Contra Costa, Harold Jacoby, J., entered a judgment for the petitioner, and the contestant appealed. The District Court of Appeal, Nourse, P. J., held that, the newspaper was a newspaper of general circulation in the county, which could be used for legal notices in the county.

Judgment modified and, as modified, affirmed.

1. Newspapers ⇐3(3)

The word "place" as used in statutory provision that for a newspaper to be published, so that it may be used for legal no-

tices, it shall have been issued from the "place" where it is printed and sold to or circulated among the people and its subscribers during the whole of one year period, does not necessarily mean location, situs or business premises, and it is sufficient that both publishing and printing take place in the political subdivision where publication must be made. Government Code, § 6004.

See publication Words and Phrases, for other judicial constructions and definitions of "Place".

2. Newspapers ⇐3(3)

If a newspaper of general circulation has been published and printed in one city of a county, and both publishing and printing are moved to another city of the same county, the newspaper will have maintained its status for county publication, but will lack the status for city publication until it has been at least a year in its new location. Government Code, §§ 6000–6005.

3. Newspapers ⇐3(5)

Where newspaper was published and circulated in the City of San Pablo, but was printed in Richmond, Rodeo, Concord and Rodeo respectively, all of which were cities or townships within the county of Contra Costa, the newspaper was a newspaper of general circulation published in the county of Contra Costa and could be used for legal notices. Government Code, §§ 6000–6005.

4. Newspapers ⇐3(4)

Fact that newspaper which was published every week, was not always published on the same day of the week, did not impair finding that newspaper was published at regular intervals, so that it might be used for legal notices. Government Code, §§ 6000–6005.

5. Newspapers ⇐3(4)

Intervals between publications of a newspaper need not be exactly equal, in order to entitle the newspaper to be used for legal notices, but it is sufficient that the publication is not spasmodic or occasional. Government Code, §§ 6000–6005.

6. Appeal and error ⇐204(1)

Where objection to admission of testimony was waived in the trial court, admission thereof could not be reviewed on appeal.

Carlson, Collins, Gordon and Bold and Frederick Bold, Jr., all of Richmond, for appellant.

S. C. Masterson, Charles H. Baldwin and Norman A. Gregg, all of Richmond, for respondent.

NOURSE, Presiding Justice.

This is an appeal by contestant from a judgment declaring the "San Pablo Reporter" to be a newspaper of general circulation. The evidence is undisputed that during the year preceding the petition to have its standing as a newspaper of general circulation ascertained and established the "San Pablo Reporter" was published and circulated in the City of San Pablo but printed in Richmond, Rodeo, Concord and Rodeo respectively, and that all the mentioned cities and/or townships are within the county of Contra Costa. The court found among other facts "That the 'San Pablo Reporter' has been established, printed and published at regular intervals in the County of Contra Costa, State of California, said county and state being the county and state where publication, notice by publication, and official advertising is to be given or made, for more than one year prior to the filing of the within petition;" and concluded "That the 'San Pablo Reporter' is a newspaper of general circulation in and for the County of Contra Costa, State of California." The judgment does not contain any restriction of the status of newspaper of general circulation to the county and state.

Appellant's main contention is that sections 6000, 6003 and 6004 of the Government Code require for the standing of a newspaper of general circulation that it is printed in the place where it is published during the whole of the one year period contemplated and that if both printing and publishing have not during said period taken place at one and the same location or situs the newspaper is not one of general circulation for any purpose. Respondent contends that the cited sections of the Gov-

ernment Code require the newspaper to be both printed and published in the city, town or county in which the publication is to be made. Respondent concedes that, as the "San Pablo Reporter" was published but not printed in San Pablo, the paper does not fulfill the requirements of a newspaper of general circulation *published in that city,* but maintains that nevertheless it fulfills the requirements of such a newspaper *published in Contra Costa County* and may be used for publication, notice of publication or official advertising required to be given or made in that county. Respondent declared at the oral argument he would not object to any modification of the judgment which would express that distinction.

[1] The question involved seems never to have been decided. Respondent stresses section 6000, Government Code, which reads in part: "A 'newspaper of general circulation' is a newspaper * * * which * * * has been established, printed and published at regular intervals *in the State, county, or city where publication, notice by publication, or official advertising is to be given or made* for at least one year preceding the date of the publication, notice or advertisement." (Emphasis added.) Whereas appellant stresses section 6004 reading: "For a newspaper to be 'published,' it shall have been issued *from the place where it is printed and sold to or circulated among the people and its subscribers* during the whole of the one year period." (Emphasis added.) However, the word "place" in the latter section does not necessarily mean location, situs (or business premises) as contended by appellant. In Standley v. Knapp, 113 Cal.App. 91, 98, 298 P. 109, 112, it is said, citing from American and English Encyclopedia: " 'The term place, in popular usage, is very indefinite. In legal parlance it is equally indefinite. The extent of the locality designated by it must generally be determined by the connection in which it is used.' " Citing expressions in legal dictionaries to that same effect, it was shown in State ex rel. Sackett v. Thomas, 25 Mont. 226, 64 P. 503 that "place" is sometimes even used in the meaning of state or country and it was held that in the case then before the court the word "place" should be considered to include "county."

Also to the word "place" in section 6004, Government Code, such wide significance seems applicable. The provision of that section was first introduced in our codes in the year 1923 when it became part of section 4463, Political Code. Prior to the enactment the Supreme Court had held that although section 4460, Political Code, required a newspaper of general circulation to be printed and published in the community where legal notice was to be given, it was not necessary for the object to be served—an effective medium of publicity—and therefore not intended, to require that the physical act of printing was to be done in the place of publication. In re McDonald, 187 Cal. 158, 161, 201 P. 110. In Application of Monrovia Evening Post, 1926, 199 Cal. 263, 268, 248 P. 1017, the Supreme Court recognized that the new provisions of section 4463, Political Code, were deliberately adopted for the express purpose of overcoming the effect of the decision in Re McDonald. In describing the meaning of the new provision the Supreme Court used the following language, 199 Cal. at page 266, 248 P. at page 1018: "It was the clear intent of the Legislature, expressed in these two sections [4460 and 4463, Pol.Code], to require a newspaper of general circulation to be both printed and published *in the city, town or county wherein it seeks the patronage of such legal notices.* The word 'publish' ordinarily means to disclose, reveal, proclaim, circulate, or make public. But, as that term is used in section 4460 of the Political Code, it is limited by the provisions of section 4463 to mean that the newspaper shall have been actually issued *from the identical city or political subdivision* where it is printed." (Emphasis added.)

Clearly the Supreme Court considered the expression "place where it [the newspaper] is printed" in section 4463 in connection with the language of section 4460, which it limits, and concluded that "place" meant city, town, county or in general political subdivision where publication is to be made. Again, 199 Cal. on page 268, 248 P.

on page 1019, the court stated: "Since the adoption of this amendment, it is now very clearly the legislative intention to require that a newspaper of general circulation be printed, published, and issued from one and the same *city, town, county, or place* where the notice of publication or official advertising is to be given or made". (Emphasis added.) Although the exact question now before us was not involved in the Monrovia Evening Post case the interpretation of the legislative intent given by the Supreme Court seems sufficiently to support respondent's position that the paper need not be printed at its business situs but that it is sufficient that both publishing and printing take place in the political subdivision where publication must be made.

[2, 3] Appellant contends that the code does not recognize a newspaper which is one of general circulation in some instances and not one of general circulation in others. However section 6000, Government Code requiring that the newspaper has been established, printed and published in the State, county or city where publication is to be made expressly makes the newspaper of general circulation for some publications and not for others. Appellant further contends that it was the legislative intent and a practical necessity that the question whether a newspaper of general circulation may be used for publication within a certain political subdivision should depend solely on the "location" of the newspaper within said subdivision. The "location" as sole standard for the capacity to make official publications is an invention of appellant not borne out by the code. Prior to the legislation of 1923 the officer who had to make an official publication had to ascertain over and above the general character of the news published by the newspaper and the bona fide subscription list, whether the newspaper had been published for at least one year preceding the date of publication in the subdivision where publication was to be made. Since the 1923 amendments the officer must moreover ascertain whether it has been *printed* in that subdivision during the same period. Even when publishing and printing take place in the same office, complications can arise and could arise under the old provisions. If a newspaper of general circulation has been published and printed in one city of a county and both publishing and printing are moved to another city of the same county the newspaper both under the old and under the new law will have maintained its status for county publication but will lack the status for city publication until it has been at least a year in its new location. We conclude that the above objection of appellant is not well taken but think it proper to modify the judgment so as to clarify it and make it conform to the findings of fact.

[4–6] Appellant's further objections are without merit. The undisputed fact that the "San Pablo Reporter" was published every week but not always on the same day of each week did not impair the correctness of the court's finding that it was published at regular intervals. It is not necessary that the intervals between the publications are exactly equal but it is sufficient that the publication is not spasmodic or occasional. In re Tribune Publishing Company, 12 Cal. App. 754, 756, 108 P. 667. Appellant's final contention that petitioner's testimony as to the existence of a bona fide subscription list was not admissible because not the best evidence, § 1937, Code Civil Procedure, cannot be reviewed because the objection was waived below on condition that the objector would be given informal inspection of the original subscription list and respondent maintains and appellant does not deny that said condition was fulfilled.

The adjudication in the judgment appealed from is modified so as to read: "Now therefore, it is hereby ordered, adjudged and decreed that the 'San Pablo Reporter' is a newspaper of general circulation published in the County of Contra Costa, State of California, in accordance with the provisions of sections 6000–6005 of the Government Code and is hereby determined and declared to be such a newspaper of general circulation."

As modified the judgment is affirmed, the appellant to bear all costs of the appeal.

GOODELL and DOOLING, JJ., concur.

104 Cal.App.2d 298

PEOPLE v. KING et al.

Cr. 2691.

District Court of Appeal, First District, Division 2, California.

May 18, 1951.

Ross King and Kenneth Pierce were convicted in the Superior Court in and for the City and County of San Francisco, William T. Sweigert, J., on a charge of abortion and a charge of conspiracy to commit abortion and they appealed. The District Court of Appeal, Schottky, J., pro tem. held that permitting physician to answer certain hypothetical questions based on evidence previously admitted to effect that on occasion in question an abortion was being completed, was not error.

Judgment affirmed.

1. Criminal law ⇐485(1)

In prosecution on charge of abortion and conspiracy to commit abortion, permitting physician to answer certain hypothetical questions based on evidence previously introduced as to what was being done by person who was treating woman on certain evening and whether on that occasion an abortion was being completed, was not error particularly as questions were objected to as incompetent, irrelevant and immaterial, indefinite and certain, calling for an indefinite and uncertain answer and an opinion, rather than as questions invading province of jury and calling for an opinion on an ultimate fact.

2. Criminal law ⇐470

There is no hard and fast rule that experts may not be asked questions that coincide with ultimate issues in case, and true rule is that admissibility depends on nature of issue and circumstances of case, there being a large measure of discretion involved.

3. Criminal law ⇐1036(2)

Where no objections were made by defendants to questions complained of in trial court, defendants were not entitled to urge such objections on appeal.

4. Criminal law ⇐650

In prosecution for abortion and conspiracy to commit abortion, refusal to allow defendants to conduct experiment in court to prove that instrument alleged to have been used by them on complaining witness would burn flesh, on ground that experiment could not be performed under substantially same conditions as those referred to in witness' testimony was not an abuse of discretion.

5. Criminal law ⇐400(4)

In prosecution for abortion and conspiracy to commit abortion, admission of hospital records showing treatment of complaining witness, over defendant's objection that records were secondary evidence, was not error. Code Civ. Proc. §§ 1953e–1953h.

6. Criminal law ⇐939(1)

The claim of newly discovered evidence warranting a new trial is universally looked on by courts with distrust and disfavor and public policy demands that a litigant should be compelled to exhaust every reasonable effort to produce at his trial all existing evidence in his behalf, and circumstance that testimony has just been discovered when it is too late to introduce it is so suspicious that courts require very strictest showing of diligence.

7. Criminal law ⇐958(1)

A wise discretion is vested in trial court in determining weight to be given to statements contained in affidavits on motion for new trial and that discretion is to be exercised in determining diligence shown, truth of matters stated, and the materiality and probability of effect of them, if believed to be true and trial court is justified in regarding with distrust affidavits with newly discovered evidence in motions for new trial.

8. Criminal law ⇐958(6)

In prosecution for abortion and conspiracy to commit abortions, refusal to grant defendants new trial on basis of alleged newly discovered evidence as shown by affidavits on ground that defendants failed to show they had not a reasonable opportunity to produce same evidence at trial, was not an abuse of discretion.

Magee, Shortridge & Werlhof and Bruce A. Werlhof, all of Redwood City, for appellants.

Edmund G. Brown, Atty. Gen., David K. Lener, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice pro tem.

Defendants Ross King and Kenneth Pierce were found guilty upon two counts of an indictment charging them with abortion and conspiracy to commit abortion. Their motion for a new trial was denied and this appeal is from the judgment of conviction and from the order denying the motion for a new trial.

Defendants and appellants do not attack the sufficiency of the evidence to support the judgments of conviction, nor do they contend that the jury was not fully, fairly and correctly instructed. They base their argument for reversal upon a number of asserted prejudicial errors occurring at the trial.

In view of the fact that no attack is made on the ground of insufficiency, it is not necessary to state the evidence in any detail.

It is sufficient to say that a woman who was pregnant visited the place of business of defendants in San Francisco and, after an examination, she was told that it would be safe to perform an abortion. She described to the jury what was done, and the instruments used on two different visits to defendants' place. Shortly after the second operation certain alarming symptoms developed which sent her to a reputable doctor (in no way involved in the illegal operation) who hospitalized her and thereafter operated and she seems to have recovered from what was apparently a serious condition.

Appellants' first contention is that the court erred in permitting Dr. Carr to answer the following hypothetical questions:

"Mr. Phelps: Q. I will ask another question, Doctor: Assuming the facts of the previous question—I am more used to being asked questions by doctors than asking of them—assuming the occurrences on Monday, the 24th, as I have asked you to assume and all the prior occurrences and facts as asked you to assume, what in your opinion, as a medical man, was being done by the person who was treating the woman on Monday—treating or working upon the woman on Monday evening, October 24, 1949?

"Mr. Hennessy: I object to that question as incompetent, irrelevant and immaterial, indefinite and uncertain, calling for an indefinite and uncertain answer, and an opinion.

"The Court: Overruled.

"The Witness: A. At that time material had been evacuated spontaneously far enough that the uterine contents were visible and part of them were undoubtedly in the vaginal canal. Those were seized by the hemostat, which is No. 12 in evidence, and by traction that material was being pulled out of the uterus. It is evident that was the case because the woman felt pain.

"Mr. Phelps: Q. In your opinion, on that occasion was an abortion being completed? A. That's right.

"Mr. Hennessy: That is a leading and suggestive question, your Honor. I move to strike it out.

"The Court: Overruled."

Appellants argue that "it is obvious that by these two questions the expert witness was directed by the prosecution questions to give an opinion on the ultimate, basic issue, and the law is clear that conclusions of this type are for the jury to make, and such testimony invades the province of the jury."

[1] The questions complained of were based on prior hypothetical questions which assumed the introduction of the vaginal electrode through the cervix of a pregnant woman and that it was allowed to remain for two hours, which Dr. Carr testified could cause an abortion. It appears from the record that the only objection made to the previous questions was that some of them did not correctly state the evidence but no objection was made that they invaded the province of the jury. The questions complained of, and the answers thereto, added little if anything to the previous answers of Dr. Carr, so it is difficult to understand how appellants could have been harmed by them. Furthermore, we do not

believe that appellants made proper objections to the questions specifically complained of, as the objections should have been that the questions invaded the province of the jury and called for an opinion on an ultimate fact. It is only fair to state that appellants were not represented at the trial by the same counsel who represent them on this appeal.

Appellants cite sec. 74, p. 1778 of Witkins Summary of California Law where it is said: "Opinions on Ultimate Issue. (a) The expert may give his opinion on any particular questions involved in a case, but that opinion cannot be accepted on the *ultimate, basic issue*, e. g., in a personal injury case, whether the defendant was negligent. It is said that conclusions of this type are for the *jury* to make, and the testimony invades the province of the jury. Thus, it is proper to ask a doctor whether a certain kind of operation or method is the *customary practice* of skilled physicians, but it is improper to ask whether such practice constitutes *due care* or *negligence*. Thomason v. Hethcock, 1935, 7 Cal.App. 2d 634, 46 P.2d 832. It is likewise improper to ask whether the *particular doctor defendant* exercised ordinary skill in treating the particular patient. Criss v. Angelus Hospital Ass'n, 1936, 13 Cal.App.2d 412, 56 P.2d 1274." Appellants also quote from People v. Crossan, 87 Cal.App. 5, at page 16, 261 P. 531, at page 536: "Witnesses were also permitted, over appellant's objection, to testify as experts that flying with a loose magneto, or with only one gallon of gasoline in the tank, was not safe. There was other evidence tending to prove the existence of both of these conditions on appellant's aeroplane at the time in question. This testimony invaded the province of the jury and should not have been admitted. No doubt expert witnesses should be allowed to testify as to the probable consequences of flying with a loose magneto or a small supply of gasoline, but testimony that such flying was not safe went beyond the scope of expert testimony and covered the ultimate fact which the jury were required to determine. 10 Cal.Jur. 1013, 1014."

Counsel for respondent concedes that there are authorities in California and elsewhere holding that questions to experts hearing on the ultimate facts for the jury have been held inadmissible as a general rule, but they argue that there are exceptions to this rule. They cite People v. Wilson, 25 Cal.2d 341, 153 P.2d 720, which was an abortion case, and in which a doctor was permitted to testify that the abortion in question was not performed in order to save the woman's life. The Supreme Court in affirming the judgment of conviction said in 25 Cal.2d at page 348, 153 P.2d at page 724:

"The method of obtaining opinion evidence from an expert by hypothetical questions is unsatisfactory (citations), but it is at present the least objectionable known to the law. (Citation.) The trial court, however, should prevent the use of misleading or unfair hypothetical questions, permitting only questions that sufficiently specify the assumptions on which they are based and contain only such assumptions as do not contradict the weight of the evidence in the case. (Citations.) While each hypothesis contained in the question should have some evidence to support it, it is not necessary that the question include a statement of all the evidence in the case. The statement may assume facts within the limits of the evidence, not unfairly assembled, upon which the opinion of the expert is required, and considerable latitude must be allowed in the choice of facts as to the basis upon which to frame a hypothetical question. (Citations.) All facts assumed in prosecuting counsel's questions in the present case were sustained by the evidence except the assumed fact that the abortion was performed for the preservation of Mrs. Anderson's life. This fact, however, if true, would have been favorable to defendant.

"There is no hard and fast rule that the expert cannot be asked a question that coincides wtih the ultimate issue in the case. 'We think the true rule is that admissibility depends on the nature of the issue and the circumstances of the case, there being a large element of judicial discretion in-

volved. * * * Oftentimes an opinion may be received on a simple ultimate issue, even when it is the sole one, as for example where the issue is the value of an article, or the sanity of a person; because it cannot be further simplified and cannot be fully tried without hearing opinions from those in better position to form them than the jury can be placed in.' (Citations.) In the present case there was no other practicable way of framing the questions if they were to serve the purpose of obtaining the benefit of the witness's expert knowledge as to matters on which enlightenment of the jury by the expert was proper. (Citations.)"

There is a very enlightening discussion of this question in Wharton's Criminal Evidence, 11th ed., Vol. 2, sec. 957, p. 1682, where it is stated:

"Two correlated questions arise in connection with the testimony of an expert witness as to the 'ultimate fact':

"(1) Whether an expert witness may testify as to his opinion as to 'the ultimate fact in issue.'

"(2) If he can testify as to the ultimate fact, whether his testimony must be in the form of an opinion, or whether it may be in the form of a fact.

"On the first question the courts, and in some instances the same court, have widely differed. In some cases it is held that such testimony is not admissible, on the ground that it invades the province of, and substitutes the witness for, the jury, the rule commonly announced being that an expert witness cannot give his opinion upon the very question or fact which is in issue and is to be determined by the jury. On the other hand, many other courts, and in some instances the same courts, in allowing an expert witness to state his opinion as to the ultimate fact in issue, if not in terms, at least in effect, repudiate the contrary position. When the conditions are such that they can be made plain, distinct, and obvious, and the conclusions to be drawn therefrom are matters of common knowledge, then it is the province of the jury to form their own opinions, and expert testimony is inadmissible.

"In some cases the courts do not seem to have hesitated to allow the expert witness to state his opinion as to whether certain hypothetical facts assumed to be true, or the facts proven to exist in the case at bar, or what facts, could or would give rise to the result complained of but, as pointed out above, they seem to disagree on the question whether he may state his opinion as to whether the facts proven or admitted to exist in the case at bar did or did not in fact give rise to that result, considering the first question as one within the province of an expert witness, but the second as one purely within the province of the jury which the witness must not invade.

"It seems that the distinction is supertechnical, and as pointed out in the quotation from 11 R.C.L. p. 583, it is absurd to admit opinion evidence as to whether a certain state of facts would produce a certain result which would be of little pertinency to the issue in the case, and exclude opinion evidence of the highest pertinency on the very point in issue. The rule excluding such evidence is predicated on the fallacious theory that it invades the province of the jury. It may be noted, however, that such evidence, which the jury may believe or disbelieve, is no more binding on them than opinion evidence on the evidentiary facts from which they would find the ultimate fact. Furthermore, some ultimate facts in their inherent nature are such that the evidentiary facts to prove the same are unintelligible to any mind except that of the expert, and unexplainable to a person of ordinary experience and skill. It would, therefore, seem to be little less than useless, if not absurd, to require the expert to testify or state his opinion as to the evidentiary facts, from which the jury would (because of the inherent nature of such facts) be unable to find the ultimate fact, and refrain from stating his opinion, the soundness of which the jury are at liberty to accept or reject, on the very fact in issue. An adherence to the rule excluding the opinion of an expert witness as to the ultimate fact confines the province of such witness largely to a statement or explanation of the scientific and technical processes by which he in his mind reaches a certain

conclusion as to the ultimate fact, without stating that conclusion, and leaves to the jury the impossible task of determining that fact from premises of which they are ignorant, perhaps, even after the statements and explanations of the witness."

[2] We believe, therefore, that there is no hard and fast rule that experts may not be asked questions that coincide with the ultimate issue in the case, and that the true rule is that admissibility depends on the nature of the issue and the circumstances of the case, there being a large measure of discretion involved. We believe further that the modern tendency is against making a distinction between evidentiary and ultimate facts as subjects of expert opinion.

Appellants' next contention is that there was prejudicial error in allowing expert testimony to be based upon hospital records introduced into evidence. The specific questions and answers complained of by appellants are as follows:

"Doctor, would you say that the condition of the woman in the hospital upon the facts I have given you was, in your opinion, a result of the treatment on Monday and on Friday? A. Yes, I believe so.

"Q. Can you state if there was anything in the hospital records which I have shown you to indicate whether or not the woman prior to her operation had been pregnant? A. Yes, there is that evidence."

There were a number of questions leading up to these questions and a number of questions on the same subject immediately following them, but none of the questions were objected to in the trial court and we deem it unnecessary to prolong this opinion by discussing the propriety of the questions. A defendant may not permit testimony to be given without objection in the trial court and then urge its inadmissibility for the first time on appeal.

Appellants next contend that it was error for the trial court to allow an expert opinion as to the cause and the time of the commission of an abortion. The questions and answers objected to are as follows:

"Mr. Phelps: Q. Doctor, assuming the facts that I have given you here in my hypothetical question I now ask you to assume an additional set of facts:

"Assuming,—in other words, the woman is the same woman, she is pregnant, she missed the same indicated period and the instrument, according to her description, was used, same treatment I described was given to her on Friday, October 21st—

"I now ask you to assume the following facts: Assume further that after the event of Friday that the woman felt fairly well on Saturday, the 22nd of October, that she also felt fairly well on Sunday, the 23rd of October, but that on Sunday afternoon, the 23rd of October, there commenced some slight vaginal discharge, apparently blood and dark in color, and that on Monday, October 24th, the vaginal discharge continued and she felt cramps and pain which increased in intensity during the day until by nightfall it assumed the severity of what she described as labor pains; I ask you if, in your opinion, the additional facts and conditions which I have asked you to assume could be or would be the result or effect of the occurrence of Friday, the 21st? A. Yes, that is the time sequence that is reasonable and that is essentially the natural history of an abortion as you have outlined it."

[3] However, it appears from the record that no objections were made to the questions now complained of, and the appellants therefore are not entitled to urge such objection on this appeal. What we have hereinbefore said as to the first contention of appellants applies to the arguments advanced by appellants as to this contention.

Appellants contend further that "it was an abuse of the trial court's discretion to disallow an experiment to be conducted in court to prove that an instrument alleged to have been used upon the complaining witness would burn flesh." The complaining witness testified that Pierce inserted a vaginal speculum in her private parts, and with it a rod which caused an ache in her private parts, and that the rod remained inserted in her for two hours, and during said time Pierce removed it; he withdrew it and let it rest for a minute, and inserted it

again; the vaginal speculum remained inserted all the time; he told her he thought he was getting somewhere, and that he was almost through. Dr. Carr referred to the rod as an electrode or heating tip of a high frequency heating mechanism which could be used to secure an abortion; it is in the shape of a uterine sound, which has at the ends of it a curvature, or the curved tip approximately that size and with that radius and it is used to be passed into the cervical canal and into the cavity of the uterus; it is the proper shape and size; it was referred to by the prosecution as a vaginal electrode and by appellant Ross King as a nasal electrode.

Appellant Pierce testified the electrode could not be connected with a short wave diathermy machine unless special arrangements were made, a special cord would be required; that if the electrode was connected with a diathermy machine and the electrode was placed in the vagina of a woman and turned on it would burn a hole in her. Appellants then sought permission of the court to perform an experiment demonstrating the instrument. The prosecution then objected as follows:

"Mr. Phelps: Objected to as incompetent, irrelevant and immaterial. The man has testified as to what it will do.

"Mr. Hennessy: We want to demonstrate it.

"Mr. Phelps: Accumulative.

"Mr. Hennessy: I want to demonstrate that machine. A fair proposition, your Honor.

"Mr. Phelps: No showing that is a type of machine that was in the room at the time or whether it has been doctored up at any time since.

"Mr. Hennessy: Q. Is that the machine that was in the room at that time?

"Mr. Phelps: If you please, Mr. Hennessy, I haven't completed my objection yet.

"There is no showing that that is the machine that was there and used or whether it has been changed since or doctored up in any way. I have no objection to a demonstration as such but it is conducted merely as a demonstration, but conducted by interested witnesses—I think that the matter of demonstration is cumulative evidence which goes to your Honor's discretion to permit it or not. The witness has already testified as to what would happen and I think that further demonstration is matter of cumulation and goes to your Honor's—

"The Court: I am not going to have any demonstration here on any machine unless I am satisfied that every condition is identical with the conditions referred to by the witnesses in their testimony. I am doubtful if that can be done."

In People v. Ely, 203 Cal. 628, at pages 632–633, 265 P. 818, at page 820, the court said: "The testimony comes within the class of testimony designated as experiments, which, when shown to have been made under the same conditions as those existing in the case itself, are admitted. The reception or rejection of such testimony lies largely within the discretion of the trial court, with this limitation—that it must be shown that substantially the same conditions existed, and, further, that the evidence shall be of such a character as to aid rather than to confuse the minds of the jurors with collateral matters."

[4] We believe that it was for the trial court to determine whether or not the experiment could be performed under substantially the same conditions and whether it would be of such a character as to aid rather than confuse the jurors. We are unable to agree with appellants' contention that the trial court abused its discretion in not permitting the experiment proposed by appellants.

Appellants next contend that it was error for the trial court to allow the introduction of the hospital records. When these records were offered in evidence appellants' counsel made the following objection: "Object on the grounds they are secondary evidence. The doctor (who attended the complaining witness) has testified here, his evidence is in the record and it is nothing now but secondary evidence."

The question of the admissibility of hospital records is discussed by Chief Justice Gibson in Loper v. Morrison, 23 Cal.2d 600, at page 607, 145 P.2d 1, at page 4, as follows:

"Defendant also contends that the trial court erred in excluding from evidence a portion of a hospital chart called a 'nurses' record.' The chart contained entries by nurses relative to the condition of the plaintiff during the time she spent in the hospital after the accident, and was offered to refute testimony as to the nature and extent of plaintiff's injuries. Defendant contends that the record should have been admitted under sections 1953e–1953h of the Code of Civil Procedure, known as the 'Uniform Business Records as Evidence Act.' Section 1953f provides: 'A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.' Section 1953e provides: 'The term "business" as used in this article shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.' Section 1953g requires that 'This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it.' The purpose of this act is to enlarge the operation of the business records exception to the hearsay evidence rule. The common law exception is based on the assumption that records kept in the general course of business usually are accurate, and may be used, in case of necessity, as evidence of the matter recorded. (Citation.) But the exception has been hedged about with so many burdensome restrictions that legislation has been necessary to secure widespread use of such records. Speaking of the desirability of similar legislation, the United States Supreme Court, in the recent case of Palmer v. Hoffman, 318 U. S. 109, 63 S.Ct. 477, 481, 87 L.Ed. 645, 144 A.L.R. 719, stated: 'The several hundred years of history behind the Act (Wigmore, supra, §§ 1517–1520) indicate the nature of the reforms which it was designed to effect. It should of course be liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed.'

"The business entry statutes are not limited to entires in commercial enterprises, and hospital records are properly included within their operation. (Citations.) There is no reason to believe that a hospital record is not as truthful as a record kept by a commercial firm. It is a record upon which treatment of the patient is based, and experience has shown it to be reliable and trustworthy. See discussion in Globe Indemnity Co. v. Reinhart, 152 Md. 439, 447, 137 A. 43. It is the object of the business records statutes to eliminate the necessity of calling each witness, and to substitute the record of the transaction or event. It is not necessary that the person making the entry have personal knowledge of the transaction. (Citations.) Plaintiff cites several California cases in support of its contention that hospital records are not admissible in evidence. In re Estate of Flint, 100 Cal. 391, 34 P. 863; Pierce v. Paterson, 50 Cal. App.2d 486, 123 P.2d 544; Lusardi v. Prukop, 116 Cal.App. 506, 2 P.2d 870. All of these cases were tried before the Uniform Act became effective in this state, and are not controlling."

[5] It clearly appears from the record that all of the records were made in the regular course of the business of the hospital and that they were made at or near the times of the various acts recorded. While it may be that there frequently are some things recorded on a hospital chart that in a strict sense may not be admissible, such items can be excluded therefrom upon the making of a proper objection, or appropriate instructions may be offered covering such items. Here the only objection was that the records were secondary evidence, which was not a good objection in view of the "Uniform Business Record as Evidence Act". We conclude, therefore, that the trial court did not err in admitting the hospital records.

Appellants' final objection is that the trial court erred in denying appellant's motion

for a new trial upon the ground of newly discovered evidence.

[6] In 8 Cal.Jur. sec. 452 at p. 427 it is stated: "The claim of newly discovered evidence warranting a new trial is universally looked upon by the courts with distrust and disfavor. Public policy demands that a litigant should be compelled to exhaust every reasonable effort to produce at his trial all existing evidence in his behalf. It has been said that the circumstance that the testimony has just been discovered when it is too late to introduce it is so suspicious tht courts require the very strictest showing of diligence."

In support of their motion appellants filed several affidavits. One was the affidavit of a druggist who stated that appellant King had told him he was opening a physio-therapy and chiropractic office in San Francisco and that King gave him a number of his cards and that he gave one of the cards to a Mr. W who inquired about a good physiotherapist; that W made no inquiry about drugs or treatment for an abortion. Another was an affidavit of Mr. W denying that he ever discussed the matter of an abortion with the complaining witness or anyone else and never sent her to any doctor or surgeon and denying that she had told him after she left the hospital that she had told her doctors that Ross King had attempted to abort her, and had then stated to him, "My God, what could I do, I thought I was going to die." Appellants also filed a joint affidavit by themselves stating that they did not learn of such evidence in time to produce it at the trial.

[7] As stated in People v. Weber, 149 Cal. 325, at page 350, 86 P. 671 at page 681: "It is to be remembered that a wise discretion is vested in the trial court in determining the weight to be given to the statements contained in affidavits upon motion for new trial. This discretion is to be exercised in determining the diligence shown, the truth of the matters stated, and the materiality and probability of the effect of them, if believed to be true. Moreover, it is to be remembered that a trial court is justified in regarding with distrust affidavits of newly discovered evidence in motions for new trial. (Citations.) Potent as this affidavit might have been, if believed, it may not be said that the trial court did not exercise a sound discretion in discrediting it, and so in denying the motion in support of which it was brought forward."

[8] We are unable to say that the trial court was not fully justified in concluding that appellants failed to show that they had not had a reasonable opportunity to produce this same evidence at the trial. Furthermore it was for the trial court to determine what weight should be given to the statements contained in the affidavits.

We are convinced that the trial court did not abuse its discretion in denying appellants' motion for a new trial.

We have read the record in this case carefully. In our opinion the evidence pointing to the guilt of appellants was overwhelming and it is difficult to understand how a jury could have failed to find the defendants guilty. We believe that no substantial error was committed, and that even if some of the claims of error made by appellants were meritorious we would be unable to hold that such error was reversible error, in view of provisions of sec. 4½ of Art. VI of our State Constitution that "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

The judgment and order are affirmed.

GOODELL, Acting P. J., and DOOLING, J., concur.

104 Cal.App.2d 233

SCHOHR et al. v. POLK et al.

Civ. 7937.

District Court of Appeal, Third District, California.

May 16, 1951.

Hearing Denied July 12, 1951.

Elna B. Schohr and others brought a proceeding for a writ of mandate to compel M. C. Polk and another, as assessor and auditor of Butte County, to include in the Biggs Union High School District, for the purpose of assessing taxes, the portion of the Nelson Elementary School District incorporated in the Durham Unified School District. From a judgment of the Superior Court, Butte County, J. O. Moncur, J., denying the petition, petitioners appealed. The District Court of Appeal, Peek, J., held that statutory proceedings for unification and reorganization of school districts in the Durham Union High School District by formation of the Durham Unified School District, containing all the elementary school districts in such high school district and the major portion of the Nelson Elementary School District, formerly entirely within the Biggs Union High School District, were effective to sever from the Biggs district the portion of the Nelson district included in the unified district, though the statutory procedure for withdrawal of territory from school districts was not complied with.

Judgment affirmed.

1. Schools and school districts ⇐34

The statute providing for optional reorganization of school districts by formation, unification, division or change of boundaries of school districts within any area provides means for severance of territory from district in addition to other statutory procedures for exclusion and withdrawal of territory therefrom, especially in view of amendment prescribing method of voting on county committee's plans and recommendations providing for exclusion of territory from school district. Education Code, §§ 2921, 2922, 3691–3694, 4871 et seq., 4873, 4901–4904, 4911–4912, 4912.2, 4919.

2. Statutes ⇐179

An expression of legislature bearing on intent of prior statute is not binding on courts, but may be resorted to in determining effect of prior act.

3. Schools and school districts ⇐22

The statute providing for optional reorganization of school districts by formation, unification, division or change of boundaries of such districts did not impliedly repeal statute governing severance of territory from existing high school districts, but established new and additional procedure for accomplishing same results without entirely replacing older procedures. Education Code, §§ 2921, 2922, 3691–3694, 4871 et seq., 4873, 4901–4904, 4911–4912, 4919.

4. Schools and school districts ⇐40

Statutory proceedings for formation of Durham Unified School District, containing all elementary school districts formerly within Durham Union High School District and major portion of Nelson Elementary School District, formerly entirely within Biggs Union High School District, were effective to sever such portion of Nelson district from Biggs district, though statutory procedure for withdrawal of territory from school districts was not complied with. Education Code, §§ 2921, 2922, 3691–3694, 4871 et seq., 4873, 4901–4904, 4911–4912, 4912.2, 4919.

Minasian & Steadman, Oroville, for appellant.

Raymond A. Leonard, Dist. Atty., Butte County, Oroville, Charles H. Andrews, Deputy Dist. Atty., Chico, for respondent.

PEEK, Justice.

This is an appeal from a judgment denying a petition for a writ of mandate to compel the assessor and auditor of Butte County to include within the Biggs Union High School District, for the purpose of assessing and computing taxes, that portion of Nelson Elementary School District which was incorporated into the Durham Unified School District.

The pertinent facts concerning which there is no dispute are that prior to 1950 the Durham Union High School District

and the Biggs Union High School District were adjoining districts located in Butte County. The southerly boundary of the Durham District was the northern boundary of the Biggs District. At that time the Nelson Elementary School District was entirely within the Biggs District. Some time prior thereto high school officials of said county met for the purpose of determining the line from which pupils could be reasonably transported to the north to the Durham and adjacent areas, and to the south to Biggs and its contiguous areas. This line ran through the Nelson District, placing the larger portion to the north thereof and the smaller portion to the south. Thereafter proceedings were instituted to form the Durham Unified School District, which district was to contain within its boundaries all of the elementary school districts formerly within the Durham Union High School District and the major portion of the Nelson Elementary School District. Said proceedings were instituted pursuant to Chapter 16, Division 2 of the Education Code, Statutes 1945, Chapter 1273, as amended in 1947, Statutes 1947, Chapter 501, and followed the plans and recommendations formulated by the Butte County local survey committee and approved by the State Commission on School Districts as provided in said chapter. No attempt was made in said proceedings to comply with the procedure set up in said code for the withdrawal of territory from a school district. Sections 2921 and 2922. On December 6, 1949, a special election was called at which more than a majority of the voters cast their ballots in favor of such unification. On January 9, 1950, the Board of Supervisors of Butte County, being notified of the outcome of the election, adopted a "Resolution for Unification and Reorganization of School Districts in the Durham Union High School District to be known as Durham Unified School District."

It is the legality of that action by said board which is attacked by petitioners. They concede that respondents complied with the procedure for reorganization of school districts as outlined in Chapter 16, Division 2 of the Education Code but they contend that such proceedings were ineffective to sever the disputed three fourths of the Nelson Elementary School District from the Biggs Union High School District because no attempt was made to comply with the procedure set up by the Education Code for the withdrawal of territory from a school district.

The title to said Chapter 16, Division 2 of said code, "Optional Reorganization of School Districts by Electors", leaves small room for doubt regarding the purpose and intent behind its adoption. It provides for an over all state wide plan for the reorganization of school districts. Provision is first made for the creation of local survey committees to study their respective areas and formulate plans and recommendations for the unification or other reorganization of school districts within such areas. Sections 4901–4904. Next the resulting plans and recommendations, if any, of these local committees are to be reviewed by the State Board of Education, and, if approved by that Board, notice shall be given to the local supervisors, and after public hearings are had, the proposal shall be voted upon at a special election held in the district or districts affected. sections 4911–4912. Furthermore, if the majority of the electors vote in favor of the plans and recommendations, the Board of Supervisors of the county in which the area is located are to cause an entry of that fact to be entered in the Minutes and the reorganization shall be deemed accomplished. Section 4919.

Although counsel for appellants agree that the method set forth in said chapter provides for an "optional procedure for reorganization", they contend, nevertheless, that the withdrawal of the whole or portion of an elementary school district from a union high school district can be accomplished only by strict compliance with sections 2921, 2922, and 3691 of the Education Code. In support thereof they rely exclusively upon two cases, Slater v. Kesey, 102 Cal.App. 266, 282 P. 1021, and Burger v. Hirni, 50 Cal.App.2d 709, 123 P.2d 891, neither of which is in point since both were decided prior to the adoption of said Chapter 16 in 1945.

Both of those cases involved proceedings—the Slater case dealt with the formation of a new elementary school district under what are now Sections 2451 to 2461 of the Education Code, and the Burger case, annexation proceedings under what are now Sections 4663 through 4665 of the Education Code—which proceedings in each case were held to be ineffective to accomplish the withdrawal of territory from a union district. The trial court in each case noted that under the statutory law as it then existed the sole means of withdrawal of territory from a union district was by strict adherence to that procedure set forth in what are now sections 2921 and 2922 of the Education Code; that the sections involving formation and annexation of districts did not relate to the same subject as those involving withdrawal from districts. Neither the sections relating to formation nor those relating to annexation purported to deal with the comprehensive subject of over all reorganization as presently embraced by Chapter 16 of Division 2. Both the Slater and Burger cases were in their scope necessarily limited to the particular statutes involved, and because of the peculiarly distinct character of the legislation presented in this case, we conclude that those decisions are not here controlling.

[1] In the present case it first should be noted that the title to Chapter 16 states that it provides for the "Optional Reorganization of School Districts by Electors". The commonly understood meaning of the word "optional" relates to the exercise of choice. See Webster's New International Dictionary. Thus, as used in said title it indicates that there are existing procedures for dealing with the general subject of reorganization, to which was added an alternative method. Secondly, "reorganization" is defined in the chapter, section 4873, to mean the "formation, annexation, uniting [unification], unionization, merger, division or change of boundaries of school districts authorized by this code." By defining "reorganization" so as to indicate division or change of boundaries of school districts, it is apparent that the legislature has provided a means of severance of territory from a district additional to the procedures for exclusion and withdrawal of districts outlined in sections 3691 to 3694 and 2921 and 2922 of the Education Code.

Further indication of what the legislature meant to include within the term "reorganization" is found in certain language of Chapter 16 as revised in 1949. As amended, section 4912.2 now reads in part that: "In the event the plans and recommendations of a county committee for an area provide for the exclusion of territory from a school district * * *." Thereafter the section concludes with provisions as to the method of voting upon such plans and recommendations.

[2] While a subsequent expression of the leglislature bearing upon the intent of a prior statute is not binding on the courts, such expression may be resorted to in determining the effect of a prior act. California Employment Stabilization Comm. v. Payne, 31 Cal.2d 210, 187 P.2d 702; Board of Social Welfare v. County of Los Angeles, 27 Cal.2d 90, 162 P.2d 635. Thus, when the subsequent legislation as set forth in said section 4912.2 is read together with the section 4873 definition of "reorganization", the conclusion is inescapable that the legislation did in fact contemplate that reorganization proceedings under Chapter 16 were to include the exclusion of territory from an already established district.

[3] Appellants have lastly contended that the effect given Chapter 16 of division 2 by the trial court amounts to a holding that Chapter 16 is by implication a repeal of the other provisions of the Education Code governing severance of property from an existing high school district. Since we have concluded that Chapter 16 established a new and *additional* procedure for accomplishing the same results that may be accomplished under procedures set forth in the older sections of the Education Code, and that later procedure is not intended to replace entirely the older procedures, but may be used in lieu thereof, it is clear that the several procedures are

not irreconcilable, and no question of repeal by implication is involved. See 23 Cal.Jur. 694.

[4] We conclude, therefore, that the proceedings herein attacked were effective to sever and did sever from the Biggs Union High School District that three-fourths of the Nelson Elementary School District which appellants seek to have included within said high school district; and that the petition for a writ of mandate was properly denied by the trial court.

The judgment is affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.

104 Cal.App.2d 212

JONES v. CITY OF LOS ANGELES et al.

Civ. 17963.

District Court of Appeal, Second District, Division 3, California.

May 15, 1951.

Rehearing Denied June 1, 1951.

Hearing Denied July 12, 1951.

Action by Annabelle Jones against the City of Los Angeles, and Ray Carter and others, for injuries when plaintiff was struck by portions of an electrolier struck by a truck. The Superior Court, Los Angeles County, Arthur Crum, J., entered an order granting the city's motion for a new trial, and the plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that there was substantial evidence which would have justified a verdict in favor of the city and accordingly city's motion had properly been granted.

Order affirmed.

1. Municipal corporations ⇐723

A "dangerous or defective condition" as a basis of liability of a local agency for injuries sustained thereby, is one from which it would reasonably be anticipated that injury would occur to those coming in contact with the condition. Government Code, § 53051.

See publication Words and Phrases, for other judicial constructions and definitions of "Dangerous or Defective Condition".

2. Municipal corporations ⇐847

City is not an insurer of safety of its property.

3. Municipal corporations ⇐847

Degree of hazard created by a given condition of city property is determinative as to whether it is dangerous or defective condition within Public Liability Act. Government Code, § 53051.

4. Automobiles ⇐308(4)
Municipal corporations ⇐821(8)

Whether location of electrolier on city street involves an unreasonable risk of injury to motorists or pedestrians or property and is for that reason a dangerous or defective condition is generally a question of fact. Government Code, § 53051.

5. Municipal corporations ⇐775, 777

In maintaining poles upon sidewalks and park areas city has right to anticipate that vehicle drivers will exercise care in their driving and conduct themselves with relation to conditions which are obvious to them with view to their own safety. Government Code, § 53051.

6. New trial ⇐72

In action by pedestrian against trucking firm and city for injuries when truck struck an electrolier located near curb of city street causing it to break up and fall and injure pedestrian standing near it, order granting new trial to city on ground that verdict against city was against weight of evidence was not abuse of discretion. Government Code, § 53051.

7. Negligence ⇐136(25)

Where it is claimed that an intervening cause has broken chain of causation, question of proximate cause is one of fact for jury.

8. Municipal corporations ⇐779

Where truck struck electrolier causing it to fall and injure a pedestrian standing near it, to determine city's liability for pedestrian's injuries, the test would be whether city could reasonably have foreseen that maintenance of electrolier in-

volved likelihood of injury to motorists or pedestrians. Government Code, § 53051.

9. Municipal corporations ⇐800(2)

In pedestrian's action against city and trucking firm for injuries when truck struck electrolier causing a portion of it to fall and injure pedestrian, if truck driver was negligent city would not be excused if condition of electrolier was a concurring cause of accident. Government Code, § 53051.

10. Municipal corporations ⇐821(19)

In pedestrian's action against city and trucking firm for injuries when truck struck electrolier causing a portion of it to fall and injure pedestrian, whether city's maintenance of electrolier was proximate cause of accident was question of fact.

11. New trial ⇐72

Trial court has duty to grant new trial if verdict is determined to be against weight of evidence.

12. Appeal and error ⇐1003

Whether verdict was against weight of evidence is a factual question not reviewable on appeal.

13. Appeal and error ⇐979(2)

Appellate court has duty to sustain order granting movant a new trial if there is substantial evidence which would have justified a verdict for movant.

Jones & Wiener, Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., Joseph N. Owen, Deputy City Atty., all of Los Angeles, for respondent City of Los Angeles.

SHINN, Presiding Justice.

Annabelle Jones, plaintiff and appellant, was standing on the sidewalk at the southwest corner of Spring and Eighth Streets, in Los Angeles. She was close to an electrolier consisting of a cast iron base about three feet high and a lamp post with cross arms supporting five large light globes. The total height of the standard to the top of the center globe was 13½ or 14 feet. A truck and van-type trailer operated by Ray Carter Trucking Company approached from the west. The right front corner of the van struck the top of the standard and broke off the pole where it joined the base. Mrs. Jones was struck by the falling sections of the pole and severely injured; she sued the City and the individual partners who composed the trucking company. In a jury trial the verdict and judgment were against the City, but in favor of the trucking company. Plaintiff moved for a new trial as to the trucking company and the City also moved for a new trial. The court granted both motions. The trucking company did not appeal; plaintiff appealed from the order granting the motion of the City.

In granting the motions the court specified insufficiency of the evidence to support the verdict as to each defendant. It is not claimed by the City that the order is supportable for error in the trial. The sole question to be considered is whether it was an abuse of discretion to grant the motion of the City upon the ground of insufficiency of the evidence.

It is contended by plaintiff that the electrolier was placed so close to the curb as to create an obviously dangerous and defective condition of public property of which the city had knowledge, that such condition was a proximate cause of the accident, and that liability of the City results under section 53051 of the Government Code, commonly referred to as the Public Liability Act, a codification of Act 5619, Deering's General Laws, page 2630, which was in force at the time of the accident.

The physical facts which contributed to the happening of the accident are the following: The base of the standard was imbedded 12 inches from the face of the adjacent curb; the width of the crossarms which were at right angles to each other was 39½ inches; the thickness of the metal at the break was 9/16ths of an inch; the width of the body of the trailer was 7 feet 9 inches; the width between the outsides of the wheels was 8 feet; the top of the trailer was 12 feet 5½ inches above ground level; there was an inlet through the curb and a culvert under the

sidewalk, immediately west of the lamp post, for the diversion of surface waters from the gutter; opposite the inlet the center of Eighth Street, at a point 20 feet from the curb, was approximately 10 inches above the level of the gutter; easterly from that point, the gutter rose gradually to within one inch of the sidewalk level at the corner; the lamp post was 4.8 feet west of the westerly edge of the sidewalk of Spring Street. Naturally, the slope of Eighth Street caused the body of the trailer to incline toward the south. Plaintiff claims that it was shown by uncontradicted testimony that the light standard inclined toward the north. There was testimony that after the accident the three-foot base inclined toward the north and was almost an inch from the perpendicular. From this it is argued that at the top the inclination of the standard toward the street would be approximately four inches. A truck driver testified that he had observed on other occasions that the pole leaned toward the north. There was also evidence from which it could have been inferred that the inclination of the base might have been somewhat affected by the blow it received. Plaintiff argues earnestly against the reasonableness of such an inference. It is an arguable question of fact, but is not a determinative factor in the case, for reasons which will be developed.

Plaintiff contends that the described condition was incontestably dangerous and defective, and further, that it was conclusively shown to have been a proximate cause of the accident. These conclusions are claimed to follow from the fact that the truck, while it was entirely upon the roadway, came in contact with the top of the light standard. It is claimed there was concurrent negligence upon the part of the truck driver and the city, as otherwise the accident would not have happened. We can readily agree that there is liability for plaintiff's injuries, but to say that as a matter of law the fault lay with one defendant or the other, or with both, would be quite another matter. Of necessity plaintiff argues that there was no basis in the evidence for a finding that a known dangerous and defective condition did not exist or that it was not a proximate cause of the accident. Therefore, it is said that it was an abuse of discretion to grant the City a new trial. We cannot agree that a verdict in favor of the City would have been without substantial support in the evidence.

[1–4] A dangerous or defective condition, as a basis of liability, is one from which it would reasonably be anticipated injury would occur to those coming in contact with the condition. Stated otherwise, the question is whether the condition created an unreasonable hazard. Since the City is not an insurer of the safety of its property, Nicholson v. City of Los Angeles, 5 Cal.2d 361, 54 P.2d 725, the degree of hazard created by a given condition of property is determinative as to whether it is a dangerous or defective condition within the purview of the Statute. If, therefore, the condition here described was one that did not involve an unreasonable risk of injury to motorists or pedestrians or property it was not a dangerous or defective condition, even though vehicles of unusual height would have to be handled with unusual care in passing. This is generally a question of fact. Adams v. Southern Pacific Co., etc., 4 Cal.2d 731, 740, 53 P.2d 121; Warren v. City of Los Angeles, 91 Cal.App.2d 678, 205 P.2d 719; Rose v. Orange County, 94 Cal.App.2d 688, 211 P.2d 45.

[5] We are satisfied that in the view of the evidence which tends most strongly to justify the order granting a new trial the primary question was one of fact and not of law. There was latitude within which reasonable minds might differ as to whether accidents should have been anticipated through contact of vehicles with the light standard. The southerly, or eastbound lane, for traffic on Eighth Street, was 10 feet 3 inches wide. Only vehicles of extreme height could have come into contact with the light standard. All the surrounding conditions were obvious to the users of the street. Drivers of trucks such as the one in question would be expected to know that the slope of the street would

cause their vehicles to incline toward the south. There was ample room for passage of such vehicles in safety. Unquestionably the condition was hazardous to a degree. There are many conditions on and adjacent to streets which of themselves increase the degree of care that is required of drivers of vehicles, but it does not necessarily follow that they create unreasonable hazards. In maintaining poles upon sidewalks and parked areas a City has a right to anticipate that vehicle drivers will exercise care in their driving and conduct themselves with relation to conditions which are obvious to them with a view to their own safety. These were considerations for the trial court in the present case. We think there was room for reasonable difference of opinion as to whether it should have been anticipated by the city that vehicles using Eighth Street would come in contact with the light standard. On the one hand, as we have pointed out, there was the fact that certain types of vehicles would have to be driven at some distance from the curb to pass in safety, and with considerably more care than would be necessary with the usual run of motor vehicles. On the other hand, the slope of the pavement and the position of the pole would readily be observed by attentive drivers, and there was ample room for all vehicles to pass the point in safety. There was also evidence, which no doubt was considered by the trial court, that for a period of 2½ years large numbers of such high van-type trailers had traversed the same route, under the same conditions, and without coming in contact with the light standard.

[6] We are therefore of the opinion that the conclusion of the trial court to the effect that the verdict as to the City was against the weight of the evidence was not unreasonable. In determining the factual questions involved, the trial judge may have concluded either that the condition was not dangerous or defective, or that the negligence of the truck driver was the sole cause of the accident. These questions are closely related, if upon the facts presented they are not identical.

[7–10] In Stockwell v. Board of Trustees of Leland Stanford Junior University, 64 Cal.App.2d 197, 204, 148 P.2d 405, 409, it was said: "Then again, as to the question of proximate cause, where it is claimed that an intervening cause has broken the chain of causation, it has been repeatedly held that such a question is one of fact for the jury [citing authorities]." In Gibson v. Garcia, 96 Cal.App.2d 681, 216 P.2d 119, the rule of proximate cause was discussed at some length and numerous authorities were cited. We adopt, by reference, as a part of the present opinion, our discussion of the rule in that case. The true test to be applied here is whether the City could reasonably have forseen that the maintenance of the pole under the described conditions involved likelihood of injury to motorists or pedestrians. There was an additional item of evidence that had a bearing upon the immediate cause of the accident. Witnesses testified that as the truck approached the point of the accident the driver's head was turned and he was looking at vehicles to his left. The negligence of the driver, of course, would not excuse the City if the condition of the light pole also was a concurring cause of the accident. We mention it only as a circumstance which the trial court could properly have considered in determining what the City should reasonably have anticipated and provided against in the performance of its statutory duty. The question of proximate cause was clearly one of fact.

[11–13] It was the duty of the trial court to grant a new trial as to the City if the verdict was determined to be against the weight of the evidence. This was a factual question which is not reviewable on appeal. It is our duty to sustain the order if there was substantial evidence which would have justified a verdict in favor of the City. Perry v. Fowler, 86 Cal.App.2d 635, 195 P.2d 78. For the reasons stated, we are unable to say that the ruling was an improper exercise of the court's discretion.

The order is affirmed.

WOOD and VALLÉE, JJ., concur.

Hearing denied; CARTER, J., dissenting.

BROOME v. BROOME.

Civ. 17654.

District Court of Appeal, Second District, Division 2, California.

May 14, 1951.

As Corrected on Denial of Rehearing May 29, 1951.

Hearing Denied July 12, 1951.

Action by Teresita G. Broome against Montague W. Broome to recover one-half of the after-discovered property distributed to defendant from his mother's estate together with one-half share of dividends paid after distribution, which property was discovered after plaintiff was granted a divorce from defendant and the parties had entered into a property settlement agreement which had been confirmed by the court. The Superior Court, Santa Barbara County, Atwell Westwick, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that the incorporation of the property settlement agreement in judgment for divorce merged it in decree and thereupon agreement was superseded by decree and obligations imposed by agreement were imposed by decree and as interlocutory decree stood unimpeached it was res judicata of claims of plaintiff.

Judgment affirmed.

1. Divorce ⇐255

Incorporation of divorced parties' property settlement agreement in judgment for divorce merged it in decree and agreement was superseded by decree and obligations imposed by agreement were imposed by decree and value attaching to separation agreement was only historical and as decree stood impeached it was res judicata of claims of divorced wife's rights in after discovered property of former husband.

2. Divorce ⇐254

A divorce decree which establishes property rights of parties is not subject to modification without consent of both parties.

3. Divorce ⇐254

If it appears to have been intention of parties to a property settlement agreement definitely and permanently to adjust their property rights, court cannot thereafter modify decree.

4. Divorce ⇐156

Where an interlocutory judgment for divorce, valid on its face and regularly entered is not vacated, it becomes a final judicial determination of property rights of parties and of all other matters not suspended until entry of final decree.

5. Judgment ⇐731

No second action can be tried as to anything within scope of first action whether in fact it was alleged and considered in first or not, so long as same matter was actually in issue.

6. Husband and wife ⇐279(1)

Where property settlement agreement provided for division and transfer of listed property to plaintiff wife, that defendant husband agreed to execute requisite instruments to effect such division immediately, that from and including October 1, 1934 dividends, interest and income thereon should belong to wife, and provided that husband had represented that property mentioned constituted all of his property substantially and as far as husband could now ascertain, wife made definite and definitive contract with husband and under terms of agreement subsequently incorporated in divorce decree was not entitled to any share in after discovered property of husband. Civ. Code, §§ 1635–1661.

7. Contracts ⇐143

For purpose of deriving truth, an entire contract and all its parts should be read together. Civ. Code, §§ 1641, 1647, 1648, 1650; Code Civ.Proc. § 1860.

8. Contracts ⇐147(3)

The purpose of a writing must be ascertained solely from a common sense meaning of it as a whole with a view to effectuate the mutual intention of parties. Civ.Code, §§ 1641, 1647, 1648, 1650; Code Civ.Proc. § 1860.

9. Contracts ⇐154

A contract must, if possible, be given a reasonable rather than an unreasonable construction.

10. Contracts ⇐143, 169

For a correct interpretation, a contract must be regarded as a whole, each clause

must be given the limitation or qualification evidently intended by authors and that is done by a consideration of writing in its entirety and, if necessary, of circumstances of parties at time of contract.

Heaney, Price, Postel & Parma, Santa Barbara, for appellant.

Clarence C. Ward, J. Vincent Wood, Santa Barbara, for respondent.

MOORE, Presiding Justice.

Demurrer having been sustained to the fourth amended complaint, judgment that plaintiff take nothing was duly entered. On this appeal plaintiff demands a reversal on eight specified grounds which will appear as the story unfolds.

The Fourth Amended Complaint.

The substance of the voluminous pleading is as follows: October 2, 1934, the parties executed an agreement settling their property rights and on the same day plaintiff instituted her action for divorce. The cause having come on regularly for trial on the following December 19th, an interlocutory decree was granted and the court confirmed the property settlement agreement by whose terms defendant conveyed and transferred to plaintiff five ($1,000 par value) Cities Service Bonds and one half of all other securities[1] then owned by him, and agreed to execute the documents necessary for a valid transfer. About the same time defendant transferred the Cities Service Bonds and made an equal division of his securities "enumerated in a list attached as 'Exhibit A' to said agreement, and did make physical transfer and delivery to plaintiff of her one-half share thereof." In addition to the five bonds and securities, defendant at the time of agreement was the owner of 480 shares of Chesapeake and Ohio Railway Company common stock, par value $25, which ownership arose under and by reason of the following unusual circumstances: Frances Broome, mother of defendant, died testate November 8, 1921, leaving her net estate in equal shares to her three surviving children, Amy Haswell, Thornhill Broome and defendant. Her will was admitted to probate June 27, 1922, and letters of administration were issued to defendant as sole administrator. A decree of settlement of the first and final account and of final distribution was made by the court on October 18, 1923. By such decree all the assets of the estate then known and any other property not known or discovered but owned by decedent at her death were distributed in equal undivided interests to the three surviving children.

Seventeen years after defendant had been discharged as such administrator with will annexed, to wit, in the month of August, 1940, Thornhill Broome, then residing in Chicago, Illinois, desirous of ascertaining certain genealogical data relating to his family requested his sister, Amy, at San Francisco to re-examine any family records, diaries and albums left by his mother. Pursuant to her brother's request and while searching through such records, she discovered between the pages of an album a trust receipt dated February 15, 1899, and drawn to the order of Frances Broome upon J. P. Morgan & Company. The receipt evidenced ownership of the 400 shares of common stock of the Columbus, Hocking Valley and Toledo Railroad Company. Upon inquiry of Morgan & Company as to the possible current value, it was learned that by reason of certain reorganizations during the preceding 41 years in such railroad company and its immediate successor, Hocking Valley Railway Company, and its ultimate successor, the Chesapeake and Ohio Railway Company, the trust receipt was on the date of its discovery in August, 1940, redeemable in 1,440 shares of Chesapeake & Ohio Railway Company par $25 common stock whose market value at that time was approximately $40 per share. In addition, dividends had been declared upon the 1,440 shares, upon its various predecessor shares of the Chesapeake and Ohio Railway Company and upon the shares of other predecessor companies from which the 1,440 shares had ultimately derived; that such dividends so successively declared and paid

1. The word "securities" as used includes bonds, stocks and choses in action.

between 1901 and August, 1940, had been regularly collected and accumulated by Morgan & Company and credited to the account of Frances Broome. The dividends so collected and held for Mrs. Broome as of August 3, 1940, amounted to $75,299.40. In addition there were 28.80 shares of Series A, 4 per cent stock of the Chesapeake and Ohio Railway Company received as a dividend in 1937 whose market value in 1940 was $95 per share.

Prior to the discovery of the trust receipt, its existence and the additional assets of the estate of Frances Broome had not been suspected by any one of the three children—although one-third interest therein had passed to each of them upon the death of their mother under her will and had been confirmed to them under the decree of final distribution. Thereafter, defendant's attorney in the administration of the estate of Frances Broome, pursuant to the terms of the final decree of distribution, in December, 1940, caused one third of said "after-discovered" property to be delivered to defendant. It consisted of 480 shares of Chesapeake and Ohio Railway stock, 9.60 shares of Chesapeake and Ohio Railway Company Series "A" 4% preferred stock and cash in the sum of $25,728.13.

After her divorce from defendant, plaintiff had little communication with him. In 1936 he married a person other than plaintiff, after which defendant has never met with or in any way communicated with plaintiff except through their attorneys in the present action after January 16, 1947.

Defendant did not inform plaintiff of the discovery of additional assets or of the distribution of one-third thereof to him, but concealed such fact from plaintiff until his deposition was taken June 10, 1948. Although she occasionally saw and communicated with defendant's brother and sister after her divorce from defendant, neither of them ever informed her of the discovery of the additional assets except the occasion on which plaintiff met with Mrs. Haswell in San Francisco about November, 1946. In the course of conversation, information concerning the division of jewelry of defendant's mother among her three children was volunteered by Mrs. Haswell. Also, she informed plaintiff that in the box where the jewelry had been stored for many years were a number of certificates representing the securities determined to be worthless. She told also of the discovery made by her in 1940 of the certificate evidencing the rights of the Broome heirs to certain railway stock and the subsequent distribution thereof to the three children. Prior thereto, no one had disclosed to plaintiff any knowledge concerning the discovery or distribution of the additional assets, and until the conversation with Mrs. Haswell, plaintiff had been ignorant of the discovery.

Upon reporting such facts to her counsel, the latter searched the records of the probate proceedings of the city and county of San Francisco and found proof in the amended inheritance tax returns of the distribution of the additional assets.

On January 16, 1947, plaintiff made demand upon defendant to divide and transfer to her one half of the "after-discovered" property distributed to him together with one-half share of the dividends paid after distribution, which demand was refused. Plaintiff has fully performed all her obligations under the property settlement agreement while defendant has failed to perform his.

Except as herein above alleged, nothing ever came to plaintiff's attention to provoke her inquiry as to the discovery and distribution and nothing occurred which might have occasioned her inquiry. She could not have discovered the facts of the discovery and distribution sooner.

With intent to deprive plaintiff of her share of the after-discovered property, defendant fraudulently concealed from her all information concerning its discovery and distribution. As a result plaintiff was unaware of such facts and of her right to demand her share until the time of her conversation with Mrs. Haswell about November, 1946, and the investigation made by her attorneys. Defendant still detains the one-half share of the after-discovered property distributed to him in 1940 with all its profits and gains in violation of plaintiff's rights.

No Substantial Change from Third Amended Complaint.

Substantially the same facts are alleged for a second cause of action. While the allegations of the fourth amended complaint disclose practically no new fact that was not included in the third amended complaint and for that reason it might appropriately be stricken, yet a consideration of the merits of the demurrer is deemed a more satisfactory disposition of the controversy.

The Demurrer.

The grounds of demurrer are (1) the complaint does not state facts sufficient; (2) the action was not commenced within the period prescribed by the Code of Civil Procedure, section 337, subdivision 1; section 338, subdivision 4, and section 343. A consideration of the sufficiency of the facts alleged and of the proposed plea of res judicata will show the soundness of the judgment. Plaintiff's theory is summarized in the marginal note [2].

The Interlocutory Judgment is Res Judicata.

[1–5] The incorporation of the agreement of property settlement in the judgment for divorce merged it in the decree. Thereupon, the agreement was superseded by the decree and the obligations imposed by the agreement are imposed by the decree and the "value attaching to the separation agreement is only historical." Hough v. Hough, 26 Cal.2d 605, 609, 160 P.2d 15, 17. A divorce decree which establishes the property rights of the parties is not subject to modification without the consent of both parties. Puckett v. Puckett, 21 Cal.2d 833, 840, 136 P.2d 1. If it appears to have been the intention of the parties to a property settlement agreement definitely and permanently to adjust their property rights, the court cannot thereafter modify the decree. Hamilton v. Hamilton, 94 Cal.App. 2d 293, 299, 210 P.2d 750. When an interlocutory judgment for divorce, valid on its face and regularly entered is not vacated, it becomes a final judicial determination of the property rights of the parties and of all other matters not suspended until the entry of the final decree. Deyl v. Deyl, 88 Cal.App.2d 536, 539, 199 P.2d 424. Inasmuch as the interlocutory decree stands unimpeached it must of necessity be *res judicata* of the instant claims of appellant. She is attempting now to relitigate an ad-

2. In her thoughtfully considered brief appellant presents her theory of her right to recover, to wit: By the property settlement respondent effected a present transfer to her of one half of "all bonds, stocks, choses in action and securities then owned by him, a list of which is set forth in Exhibit 'A' attached to the agreement"; he paid her $2,015 and delivered her five $1,000 bonds of Cities Service. Besides the above mentioned property respondent owned on the date of the agreement, to wit, October 2, 1934, an undivided one-third interest in and to all other undistributed property of the estate of his mother who had deceased 13 years before and by virtue of the agreement appellant became owner of one half of such portion as belonged to respondent under the decree of distribution of such estate even though such undistributed share was not discovered until 1940. Because he retained the entire share of the newly discovered assets, respondent became an involuntary trustee of one-half thereof for appellant; because he concealed from appellant all knowledge of the discovery of such assets with the intention of preventing her from enforcing her right to one-half thereof, such concealment tolled the statutes of limitation until appellant learned of the distribution thereof. Immediately upon learning of the discovery and distribution, about November, 1946, appellant made an investigation and on April 14, 1947, filed her complaint. Appellant asserts that her right of recovery is not impaired by the merger of the agreement in the interlocutory decree of divorce if a merger occurred; that if it was not, her claim of ownership to one half of the "after-discovered securities" rests in the division and assignments effected by the agreement and if it was merged for all purposes, her claim of ownership in such securities rests in the terms of the interlocutory decree. She maintains that under the agreement she became the owner of the newly discovered property and respondent holds it as her trustee. In either event, appellant maintains that the task of the reviewing court is to interpret either the agreement or the decree and that a sound interpretation of either will lead to no conclusion contrary to her contention.

justment of her property rights which were fixed by the interlocutory judgment. She attempts to escape the effect of that decree by contending that she is entitled under the terms of "the agreement" to one half of the "after-discovered property" and its income. She thus makes a collateral attack on the decree without alleging any facts that might have defeated a full and fair trial of the divorce action. This cannot be done. No second action can be tried as to anything within the scope of the first whether in fact it was alleged and considered in the first or not, so long as the same matter was actually in issue. Titensor v. Titensor, 75 Cal.App.2d 206, 209, 170 P.2d 479.

After-Discovered Securities not Included in Agreement.

[6] Whether or not appellant's right to a half of the after-discovered securities was adjudicated by the divorce decree, she cannot recover by this action. From a reading of the agreement in its entirety which is essential to a fair and reasonable interpretation of an instrument, Lazar v. Superior Court, 16 Cal.2d 617, 622, 107 P.2d 249, the conclusion is inescapable that respondent made a definite and definitive contract with appellant. The parties had no community property. Appellant had to be satisfied with a share of respondent's possessions. He gave her one half of the securities which were described in an exhibit attached to the agreement. The deletion from the exhibit of a certain stock[3] prior to the execution of the agreement emphasizes that the parties attempted to designate with exactness the securities to be divided.

Appellant makes capital of the fact that while paragraph First (c) provides for the immediate division of the property it does not require prompt delivery, and therefore the parties had in mind that the division might operate on assets not then known to either of them. The language referred to by appellant is as follows: "the division of one-half (½) to be made by dividing equally each of the bonds, stocks and securities and said first party agrees to take the necessary steps and execute the requisite instruments to effect such division thereof immediately, and to effect the delivery to said second party, of second party's portion thereof, and from and including October 1, 1934, the dividends, interest and income thereon shall belong to second party." From such excerpt it is clearly apparent that respondent cautiously provided for delivery at once to appellant of her portion of the securities, leaving no room for argument as to her right to the profits and dividends earned after the date of the agreement.

Appellant appears to contend by the last quoted passage from the agreement that the parties intended it as an omnibus clause such as is oftentimes used in decrees and in contracts to dispose of subsequently-discovered property. Such is not a reasonable deduction. Where two lawyers officiate in the preparation of a contract finally to adjust property rights, if they entertain a thought that other property exists or will be discovered, they will beyond a peradventure make a definite provision for its disposition upon its coming into the possession of either. If the court is to be guided by a writing upon which an action is founded it must be construed rationally and not for the purpose of helping a disappointed or deserving person. So construing the agreement here involved, it is clear that the quoted passage conveys no thought other than that appellant was to get one half of respondent's securities and money listed in the exhibit. He knew of no other property that might be his own. He listed what he agreed to divide. If by chance his sister had found a deed conveying to his mother the East Texas oil field, could it be maintained that by the language of the quoted portion of paragraph First appellant is entitled to one-sixth thereof? Such a contention would be stultiloquent not because of the immense value of the suppositious devise but because the definitive list of securities to be shared with appellant conclusively demonstrates the mutual in-

3. Russ Building Co. $10,000, 6% first mortgage, gold bonds, series A, due January 1, 1938, was stricken from the list on the face thereof.

tention of both parties when they effected a property settlement agreement. That instrument does not make a division of all respondent's property. Neither does it expressly transfer to appellant one half of all securities of respondent. As observed by the trial judge, "to limit the scope of this language does violence to every rule of interpretation of contracts. Civ. Code, secs. 1635–1661. The after-discovered property was not excluded by reference to Exhibit 'A' but was included in the term 'all'; the obvious and clear intent being to make equal division of all securities (except said City Service bonds) and to make specific division of all other property." That they made such division is shown by the quoted subparagraph (c) which provided for respondent to make the division of the securities "by dividing equally each of the * * * securities * * * immediately, and to effect the delivery" to appellant of her portion thereof.

That the agreement was intended to be definitive is further illustrated by the language of the fourth and fifth preambles, to wit:

"Whereas, the said first party has represented to said second party that the property hereinafter mentioned and referred to constitutes all of his property, real, personal and mixed, of whatsoever kind or character, wheresoever situated, which he owns and in which he has any interest, and that said property represents substantially and as far as first party can now ascertain, all of his assets; and

"Whereas, first party has agreed, and does hereby agree, to divide all of such property in accordance with the provisions hereinafter stated * * *"

[7–9] A reading of the quoted preambles along with the contract in its entirety is impressive of the contractual intent that the exhibit attached to the agreement should be considered as the total of all securities to be divided and that no others were in contemplation. That the entire document and all its parts should be read together is the orthodox method of interpretation for deriving the truth. Civ. Code, sec. 1641; Universal Sales Corp. v. California, etc., Mfg. Co., 20 Cal.2d 751, 760, 128 P.2d 665; Ghirardelli v. Peninsula Properties Co., 16 Cal.2d 494, 496, 107 P.2d 41; Hunt v. United Bank & Trust Co, 210 Cal. 108, 114, 291 P. 194. Place the judge in the position of the authors of a contract and he should then with knowledge of the circumstance of its execution of the subject of the writing, be able to divine their intentions. Civ. Code, secs. 1647, 1648, 1650; Code Civ.Proc. § 1860. The purpose of a writing must be ascertained solely from a common sense meaning of it as a whole with a view to effectuate the mutual intention of the parties. Miranda v. Miranda, 81 Cal.App.2d 61, 66, 183 P.2d 61. A contract must, if possible, be given a reasonable rather than an unreasonable construction. Oberwise v. Poulos, 124 Cal.App. 247, 251, 12 P.2d 156.

In effecting a property settlement with her husband by taking one half of all his known listed possessions could any reasonably disposed woman be so bold as to assert: "I am taking this in settlement with my husband, but if manna should in the future fall from heaven upon him by virtue of his being the son of his mother, I shall demand one half of it as one of the securities divided by this agreement"? Would any man of normal instincts endued with common honesty and intelligence in settling upon his wife one half of all his known and described property entertain the thought: "although I now assign and pay to my wife one half of my known wealth consisting of many thousands of dollars, if perchance it should turn out that my mother who deceased 15 years ago owned other forgotten securities, I shall share it with my wife who is about to divorce me"? A fair construction of the agreement leads to no conclusion other than that it was intended to be definitive. That both parties and their lawyers must have so regarded it is further evidenced by the included covenant that the agreement shall operate as a "conclusive stipulation." It follows, therefore, that appellant at no time acquired an interest in the "after-discovered property."

In aid of her contention that the agreement included the railroad stocks and their

dividends that came to light 17 years after mother Broome deceased appellant cites a number of respected authorities that do not support her. In Johnson v. Grand Fraternity, 8 Cir., 255 F. 929, 932, the defendant had agreed to pay the plaintiff specified commissions upon "all business" written under the designated types of policies, referring to attached exhibits. The court said that the only function of the exhibits was "to prevent any future dispute as to any particular policy" and held that where reference is made to another writing for a particular specified purpose such writing becomes a part of the contract, citing Moreing v. Weber, 3 Cal.App. 14, 20, 84 P. 220. In Chicago Union Traction Company v. O'Connell, 224 Ill. 428, 79 N.E. 622, 623, 8 L.R.A.,N.S., 1034, a release was given the company of "all claims, demands, actions, causes of actions * * * from the beginning of the world to * * * date hereof, and especially on account of a certain accident which occurred on or about the 18th day of July, A.D. 1903". The court held that such release dated about a month after the specified accident barred an action for an accident which occurred in March, 1902, because the more general intent is first stated. Also, it held that where there is a particular recital and general words follow, the latter are qualified by the particular recital. Similarly, all the cases cited by appellant support respondent's interpretation of the agreement involved, or are distinguished on their facts.

[10] The courts of this state have uniformly adhered to the doctrine that for a correct interpretation a contract must be regarded as a whole; each clause must be given the limitation or qualification evidently intended by the authors. This is done by a consideration of the writing in its entirety and, if necessary, of the circumstances of the parties at the time of the contract. Lemm v. Stillwater Land & Cattle Company, 217 Cal. 474, 480, 19 P.2d 785; Ogburn v. Travelers Ins. Co., 207 Cal. 50, 53, 276 P. 1004.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

Hearing denied; SHENK, J., dissenting.

SCHNIDER et ux. v. STATE.

Civ. 18133.

District Court of Appeal, Second District, Division 2, California.

May 10, 1951.

Rehearing Denied May 28, 1951.

Hearing Granted July 5, 1951.

Louis Schnider and wife brought an inverse condemnation proceeding against the State. From a portion of a judgment of the Superior Court of Los Angeles County, Jesse E. Frampton, J., plaintiffs appealed. The District Court of Appeal, McComb, J., held that exclusion of plaintiffs' evidence was prejudicial error.

Judgment reversed.

Prior opinion, 229 P.2d 847.*

1. Eminent domain ⇐106

An owner of a lot adjacent to a public highway to which he has ingress and egress has a property right in the right to enter and leave his lot for which he is entitled to damages in the event such right is taken in an eminent domain proceeding. Const. art. 1, § 14.

2. Appeal and error ⇐1056(1)
Eminent domain ⇐298

In inverse condemnation proceeding against the state, exclusion of plaintiffs' evidence that boulevard abutted their lots with complete and free access to and from said lots for in excess of 30 days, following which the state installed a permanent fence along the entire length of the lots and on and along boundary line between the lots and boulevard, with intent and purpose of permanently taking and barring all access rights of such lots, and each of them, to and from boulevard, was prejudicial error. Const. art. 1, § 14.

3. Eminent domain ⇐68, 293(4)

The State Highway Commission's resolution, declaring that public interest and necessity require acquisition of certain real property for public improvements, becomes conclusive of the facts recited therein, and the same may not be disputed in absence of pleading in trial court specifically charg-

* Subsequent opinion 241 P.2d 1.

ing fraud, bad faith or an abuse of discretion by Commission.

4. Appeal and error ⇐173(2)

In inverse condemnation proceeding against state by one claiming easements of access to and from boulevard, along boundary line between which and plaintiffs' lots defendant erected permanent fence, plaintiffs waived objection, not presented to trial court, that procedure followed in establishing and constructing boulevard as freeway, pursuant to State Highway Commission's resolution declaring that public interest and necessity required acquisition of realty involved for public improvement, was defective.

Reuben Rosensweig, Los Angeles, for appellants.

George C. Hadley, Los Angeles, Robert E. Reed, Sacramento, John N. McLaurin, Herbert J. Williams, Los Angeles, and Harry S. Fenton, Sacramento, for respondent.

McCOMB, Justice.

From a portion of a judgment rendered in an inverse condemnation proceeding after trial before a jury, plaintiffs appeal, predicating error upon the trial court's instruction to the jury that plaintiffs had no easements of access to and from Olympic Boulevard at the time defendant erected a permanent wire fence along the line forming the south boundary of Olympic Boulevard and the north boundary of plaintiffs' lots.

Plaintiffs' contention is correct. Objection was made and sustained to their offer to prove that "Olympic Boulevard abutted plaintiffs' lots 127 and 130 with complete and free access to and from said lots for in excess of 30 days, following which the State of California installed a permanent fence along the entire length of plaintiffs' lots 127 and 130 and on and along the boundary line between said two lots and Olympic Boulevard, with the intent and purpose of permanently taking and barring all access rights of such lots, and each of them, to and from Olympic Boulevard." [1]

[1] An owner of a lot adjacent to a public highway to which he has ingress and egress has a property right in the right to enter and leave his lot for which he is entitled to damages in the event such right is taken in an eminent domain proceeding. (People v. Ricciardi, 23 Cal.2d 390, 398 et seq., 144 P.2d 799; art. I, Sec. 14, Constitution of California.) [2]

[2] In view of the established law the trial court committed prejudicial error in not permitting plaintiffs to present evidence in support of the facts set forth in the offer of proof, supra.

There is no merit in plaintiffs' contention that the procedure followed in establishing and constructing Olympic Boulevard as a freeway was defective. There was received in evidence without objection a resolution of the California Highway Commission declaring that the public interest and necessity required the acquisition of the real property here involved for a public improvement.

[3] When the State Highway Commission adopts a resolution declaring that public interest and necessity require the acquisition of certain real property for public improvements, such resolution becomes conclusive of the facts recited therein, and the same may not be disputed in the absence of a pleading in the trial court specifically charging fraud, bad faith or an

1. The omissions in the record before this court, pointed out in our opinion in Schnider v. State of California, 229 P. 2d 847, filed April 17, 1951, in which a rehearing has been granted, have been corrected by a stipulation of the parties which has been made a part of the record in this court.

2. Article I, Section 14, of the Constitution of California reads in part as follows: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, * * *."

abuse of discretion of such commission. Such question may not be raised for the first time on appeal. (People v. Milton, 35 Cal.App.2d 549, 552, 96 P.2d 159.)

[4] In the instant case the objection now made was not presented to the trial court and was therefore waived by plaintiffs.

The judgment is reversed.

MOORE, P. J., and WILSON, J., concur.

37 Cal.2d 239

Guardianship of WALTERS.

BOBST et al. v. SACKS.

L. A. 21052.

Supreme Court of California.

May 16, 1951.

Rehearing Denied June 14, 1951.

Proceeding in the matter of the guardianship of the estate and person of Allie Walters, sometimes known as Allie Walters Sacks, an alleged incompetent person. The Superior Court of Los Angeles County, Newcomb Condee, J., entered orders declaring Allie Walters Sacks incompetent and appointing John C. Packard and L. C. Rauch guardians, and Allie Walters Sacks appealed. The Supreme Court, Gibson, C. J., held that evidence sustained finding that Allie Walters Sacks was incompetent.

Orders affirmed.

Prior opinion, 220 P.2d 22.

1. Constitutional law ⇐255

Where alleged incompetent was regularly served with citation directing her to appear in proceedings to have her declared incompetent and for appointment of guardians but she wrote to a newspaper stating that she would not appear in court and was leaving the State, and she later advised her attorneys that she was out of the state and would not be present at hearing, and there was no showing that she was unable to be present when matter was called for hearing, and no excuse was given for her absence, there was no denial of due process because alleged incompetent was absent when matter was first called for hearing. Probate Code, § 1460.

2. Insane persons ⇐14

Appearance of alleged incompetent at hearing in proceedings to have her declared incompetent and for appointment of guardians, did not constitute a waiver of personal notice required by statutes. Probate Code, § 1460

3. Insane persons ⇐13

Though court cannot properly proceed in proceedings to have a person declared an incompetent and for appointment of a guardian, when the matter had been dropped from the calendar, unless, upon restoration to the calendar, notice is given of time and place of hearing, there is no necessity of service of another citation, since an off-calendar order is not equivalent to a dismissal and does not divest court of jurisdiction which it has acquired. Probate Code, § 1460.

4. Insane persons ⇐13

Off-calendar order entered by court in proceedings to have alleged incompetent declared an incompetent and for appointment of guardians, did not amount to a dismissal, and hence another service of citation on alleged incompetent was not necessary when court later proceeded with the case. Probate Code, § 1460.

5. Insane persons ⇐13

Fact that alternative writ of prohibition directed trial court to refrain from taking any further proceedings in proceedings to have alleged incompetent declared an incompetent and for appointment of guardians, did not require another service of citation on alleged incompetent when trial court was later permitted to proceed with the proceedings. Probate Code, § 1461.

6. Insane persons ⇐27

Where alternative writ of prohibition directed trial court in proceedings to have alleged incompetent declared an incompetent and for appointment of guardians, to refrain from taking any further proceedings in the matter until an indefinite date, orders of trial court continuing the proceedings from time to time and then removing it from the calendar, could be regarded as surplusage, for purposes of appeal from order of trial court declaring alleged incompetent an incompetent and appointing guardians. Probate Code, § 1460.

7. Insane persons ⇐27

In considering contention of alleged incompetent on appeal that evidence did not support the finding of incompetence, Supreme Court was required to test evidence in light of section of Probate Code providing that an incompetent shall be construed to mean or refer to any person, whether insane or not, who by reason of old age, disease, weakness of mind, or other

cause, is unable, unassisted, properly to manage and take care of himself or his property, and is likely to be deceived or imposed on. Probate Code, § 1460.

8. Insane persons ⇐27

All conflicts and reasonable doubt as to sufficiency of evidence to support finding of mental incompetence, was required to be resolved on appeal in favor of the order.

9. Insane persons ⇐27, 33(2)

On appeal from orders declaring alleged incompetent an incompetent and appointing guardians, Supreme Court was required to uphold the findings of the trial court, if there was any substantial evidence which, together with the aid of all inferences, reasonably to be drawn from it, tended to support the judgment. Probate Code, § 1460.

10. Insane persons ⇐2

In proceedings to have alleged incompetent declared incompetent and for appointment of guardians, evidence of facts occurring between 1944 and 1946 was not too remote to be considered on question of competency at time of hearing in February, 1949. Probate Code, § 1460.

11. Insane persons ⇐2

Evidence of conduct of alleged incompetent tending to show mental condition a reasonable time before hearing to have alleged incompetent declared incompetent, is admissible on question of competence. Probate Code, § 1460.

12. Insane persons ⇐2

In proceedings to have an alleged incompetent declared an incompetent, broad discretion is left to the trial court as to the character of testimony on question of competence, and period of time over which it may extend. Probate Code, § 1460.

13. Insane persons ⇐2

In proceedings to have alleged incompetent declared incompetent and for appointment of guardians, evidence as to conduct of alleged incompetent from 1946 up to and including time she appeared and testified at hearing in February, 1949, was some evidence of her mental condition, which court could consider in making its determination. Probate Code, § 1460.

14. Insane persons ⇐19

In proceedings to have alleged incompetent declared incompetent and for appointment of guardians, trial judge was entitled to consider alleged incompetent's behavior on the stand in determining her competency. Probate Code, § 1460.

15. Insane persons ⇐2

In proceedings to have alleged incompetent declared incompetent, and for appointment of guardians, evidence supported finding of incompetency. Probate Code, § 1460.

16. Insane persons ⇐2

In proceedings to have alleged incompetent declared incompetent and for appointment of guardians, court might properly have attached some significance to conduct of alleged incompetent in leaving her home and traveling around in order to evade service, repeatedly ignoring advice of counsel to appear in court, and defying citation to appear when it was eventually served on her. Probate Code, § 1460.

17. Insane persons ⇐93

One who had been appointed guardian of estate of alleged incompetent, could not properly represent alleged incompetent in alleged incompetent's action against guardian as an individual.

18. Insane persons ⇐38

The mere existence of pending action by alleged incompetent against the guardian of her estate personally, did not disqualify guardian from acting as guardian of alleged incompetent's estate, since her interests in the action could be adequately protected by appointment of a guardian ad litem. Probate Code, § 1607; Code Civ.Proc. §§ 372, 373.

19. Insane persons ⇐33(1)

In proceedings to have alleged incompetent declared incompetent and for appointment of guardians, evidence sustained trial court's finding that certain person was a suitable, fit, and proper person to be appointed as guardian of estate of alleged incompetent.

20. Insane persons ⇐33(2)

Where appeal by alleged incompetent from order directing guardian to take pos-

session of alleged incompetent's property pending appeal from order declaring her incompetent, was taken on clerk's transcript alone, and alleged incompetent did not produce a certified reporter's transcript or make any application to be relieved from default for failure to request a reporter's transcript within time required by the Rules on Appeal, Supreme Court was required to presume that there was sufficient evidence to support the order directing guardian to take possession. Probate Code, § 1631; Rules on Appeal, rules 4, 53.

21. Courts ⇐91(2)

Supersedeas case in which District Court of Appeal granted an order staying action by guardian of alleged incompetent pending determination of appeal by alleged incompetent from incompetency order, was not determinative of appeal by alleged incompetent to Supreme Court from orders declaring her incompetent and appointing guardians, where it did not appear that District Court of Appeal had before it all evidence which was before the trial court. Probate Code, § 1460.

Bodkin, Breslin & Luddy, S. V. O. Prichard and Morris Lavine, all of Los Angeles, for appellant.

Ralph R. Sleeper and Harold A. Slane, Los Angeles, for respondents.

GIBSON, Chief Justice.

Mrs. Allie Walters Sacks has appealed from an order declaring her incompetent and appointing respondent Rauch guardian of her estate and respondent Packard guardian of her person. She contends that the court lacked jurisdiction to make the order, that the evidence is insufficient to support it, and that the court erred in appointing Rauch as guardian of her estate because his interests were adverse to hers.

These proceedings were commenced in July, 1946, and various precedural and jurisdictional aspects of the case have been in the appellate courts on five separate occasions. See Sacks v. Superior Court, 79 Cal.App.2d 806, 180 P.2d 922; Guardianship of Walters, 81 Cal.App.2d 684, 184 P.2d 684; Sacks v. Superior Court, 31 Cal.2d 537, 190 P.2d 602; Sacks v. Superior Court, 88 Cal.App.2d 808, 199 P.2d 396; Guardianship of Walters, 93 Cal.App.2d 208, 208 P.2d 713. Appellant successfully evaded personal service until June 2, 1948, at which time she was regularly served with a citation requiring her to appear on June 11, 1948. When the matter was called on that date appellant was not present in court, and her attorneys objected to any proceedings being held in her absence. One witness was asked two preliminary questions, and the hearing was recessed until June 14. A bench warrant was issued for appellant, and her attorneys were requested by the court to urge her to appear.

When the matter was called on June 14 the trial court was served with an alternative writ of prohibition issued by the District Court of Appeal restraining all proceedings until further order. The hearing on the petition for appointment of guardian was continued in open court from time to time until November 10, on which date the matter was ordered "off calendar." Thereafter the District Court of Appeal vacated the alternative writ of prohibition and denied a peremptory writ on the ground that the appellant could not defeat the jurisdiction of the superior court by refusing to respond to a citation which had been regularly served upon her. Sacks v. Superior Court, 88 Cal.App.2d 808, 811, 199 P.2d 396. A petition for hearing from that decision was denied by this court on January 20, 1949, and on January 24 the trial court directed that the hearing in the matter be resumed on February 7, 1949. No new citation was served on appellant, but the order fixing the date of hearing was served on her attorneys and she was present at the hearing and gave testimony.

[1] Appellant contends that she has been denied due process of law because evidence was taken in her absence when the matter was first called on June 11, 1948. This contention is entirely without merit. After having been regularly served with a citation directing her to appear she wrote to a newspaper stating, "I will not appear in court and I am leaving California, I hope for good." She later advised her attorneys

that she was out of the state and would not be present at the hearing. There was no showing that she was unable to be present when the matter was called for hearing, and no excuse was given for her absence. The essentials of due process were fully met, and the court had jurisdiction to proceed. See Chaloner v. Sherman, 242 U.S. 455, 461, 37 S.Ct. 136, 61 L.Ed. 427; Sacks v. Superior Court, 88 Cal.App.2d 808–812, 199 P.2d 396. Not only was there compliance with the requirements of due process, but the record shows that appellant's interests were scrupulously protected by the trial court. Notwithstanding appellant's disobedience of the order to appear, the court was unwilling to proceed in her absence and recessed the matter after only two preliminary questions had been asked of one witness. These questions and the answers thereto were repeated in substance in appellant's presence when the hearing was resumed in February, 1949.

[2] The next contention is that the court below lost jurisdiction over the person of appellant on November 10, 1948, when it ordered the guardianship matter off calendar pending determination of the prohibition proceeding. It should be noted as a preliminary matter that appellant's presence and participation when the hearing was resumed in February, 1949, do not perclude her from raising the jurisdictional question, since a person who is alleged to be incompetent is incapable of waiving statutory requirements of notice. Snyder v. Superior Court, 206 Cal. 346, 349–350, 274 P. 337; McGee v. Hayes, 127 Cal. 336, 338, 59 P. 767.

[3, 4] Appellant argues, in effect, that the off-calendar order amounted to a dismissal and that, since no new citation was served on her, the trial court was without power to proceed with the hearing or to declare her incompetent.[1] While it is true that a court cannot properly proceed in such a case when the matter has been dropped from the calendar, unless, upon restoration to the calendar, notice is given of the time and place of hearing, we cannot agree that another service of citation was essential. An off-calendar order is not equivalent to a dismissal and does not divest the court of the jurisdiction which it has acquired. Guardianship of Lyle, 77 Cal.App.2d 153, 155–156, 174 P.2d 906; Bankers Trust Co. v. District Court of Hamilton County, 209 Iowa 879, 227 N.W. 536; Hart v. Challerton, 216 Mass. 90, 102 N.E. 929; Jasperson v. Jacobsen, 224 Minn. 76, 27 N.W.2d 788, 793; see California Canning Mach. Co. v. Superior Court, 3 Cal.2d 606, 609, 44 P.2d 1046; Gury v. Gury, 219 Cal. 506, 509, 27 P.2d 758.

[5, 6] Nor does a different result follow by reason of the issuance of the alternative writ of prohibition which directed the trial court to refrain from taking any further proceedings in the matter. It has been held that such a writ amounts to a stay of proceedings by operation of law pending determination of the application for a peremptory writ. In re Sutter-Butte-By-Pass Assess. No. 6, 191 Cal. 650, 671-672, 218 P. 27. After service of the alternative writ it would, of course, have been improper for the trial court to act contrary to its terms. However, the orders which continued the matter from time to time and then removed it from the calendar were not contrary to the writ but were entirely consistent therewith and did not have the effect of a dismissal. See George L. Cousins Contracting Co. v. Acer Realty Co., Mo.App., 110 S.W.2d 885, 889. Moreover, for purposes of this appeal the orders may be regarded as surplusage since, as we have seen, the alternative writ by operation of law postponed proceedings to an indefinite date. See In re Sutter-Butte By-Pass Assess. No. 6, supra, 191 Cal. at page 672, 218 P. 27; George L. Cousins Contracting Co. v. Acer Realty Co., Mo.App., supra, 110 S.W.2d at page 889.

1. Section 1461 of the Probate Code provides that, upon the filing of a petition for appointment of a guardian for an alleged incompetent, the clerk shall issue a citation directed to the alleged insane or incompetent person setting forth the time and place of hearing and that the citation must be "personally served" on said person "at least five days before the time of hearing".

Inasmuch as the proceedings were not dismissed, there was no need for another service of citation on appellant. Her attorneys were given adequate notice of the date set for resumption of the hearing, no further notice was required by law, and she appeared at the appointed time with her counsel and gave testimony.

[7–9] In considering appellant's contention that the evidence does not support the finding of incompetence, we must test the evidence in the light of Probate Code section 1460, which provides: "* * the phrase 'incompetent person,' 'incompetent,' or 'mentally incompetent,' shall be construed to mean or refer to any person, whether insane or not, who by reason of old age, disease, weakness of mind, or other cause, is unable, unassisted, properly to manage and take care of himself or his property, and by reason thereof is likely to be deceived or imposed upon by artful or designing persons." All conflicts and any reasonable doubt as to the sufficiency of the evidence must be resolved in favor of the order. See Estate of Reed, 198 Cal. 148, 151, 243 P. 674; Estate of Bristol, 23 Cal.2d 221, 223–224, 143 P.2d 689. In cases of this type, as in any other, we must uphold the findings of the trial court if there is any substantial evidence which, together with the aid of all inferences reasonably to be drawn from it, tends to support the judgment. Matter of Coburn, 165 Cal. 202, 212–213, 131 P. 352; Estate of Reed, supra, 198 Cal. at pages 150–151, 243 P. 674; Estate of Watson, 176 Cal. 342, 346, 168 P. 341; Estate of Schulmeyer, 171 Cal. 340, 342, 153 P. 233; Guardianship of McConnell, 26 Cal.App.2d 102, 106–107, 78 P.2d 1043.

Appellant was widowed in 1940 at the age of seventy-two. Her husband left her property worth between $300,000 and $400,000, which included 18 or 19 pieces of improved realty and produced a net income of approximately $2,000 per month. She owned her own home, where she lived with a brother, and managed her various properties with the assistance of her brother-in-law. In April, 1944, when she was seventy-six, she met Earl Sacks, an oil promoter, who was then fifty-three. He began paying marked attention to her, introduced her to his friends and the following month induced her to buy some property from third persons by means of an escrow transaction out of which he made a sizeable profit at her expense and unknown to her. He told her that he was worth "millions" in oil lands and that he had a valuable gold mine. The record does not disclose what property he owned or what its value may have been. It appears, however, that the oil properties he claimed to own had not been developed and that he had little, if any, money. Between May and August Sacks obtained several thousand dollars from appellant, part of the sum representing money she had borrowed on her property.

In September, 1944, they went to Las Vegas and were married. Between that time and February, 1945, appellant borrowed large sums of money on her properties on several occasions, and Sacks appropriated the proceeds of the loans to himself. At his suggestion she put all here property into joint tenancy with him, and they kept a joint bank account. Sacks spent some $20,000 of appellant's money buying a home and luxuries for a former wife and son. In all, he cost appellant approximately $60,000 in the five or six months they lived together immediately after their marriage.

When appellant discovered evidence of Sacks' mishandling of her money, in February, 1945, she left him and told her story to the district attorney. Subsequently she testified before the grand jury, and in May, 1946, Sacks was indicted on seven counts of grand theft and one count of corporate securities violation arising out of his dealings with her property. Appellant, meanwhile, filed suits for annulment, for divorce, and to have a resulting trust imposed on the home Sacks had bought for his ex-wife. Thereafter appellant had a change of heart, forgave Sacks and put up bail to have him released. They went to Mexico together, she failed to appear at his trial, and the criminal case against him was dismissed for lack of prosecution on July 26, 1946. None of the civil actions commenced by her was brought to trial.

It was at this time that the present guardianship proceeding was commenced by appellant's brother, Charles Bobst. Appellant, having returned from Mexico with Sacks, again left the state in order to avoid service of citation. In August, 1946, she was adjudged incompetent, and a guardian was appointed to manage her estate, but the order was subsequently annulled as void for lack of service. Sacks v. Superior Court, 79 Cal.App.2d 806, 180 P.2d 922; see, also, Guardianship of Walters, 81 Cal. App.2d 684, 184 P.2d 684. An attorney who had been appointed appellant's guardian ad litem in the proceedings went to Missouri, where appellant and Sacks were living together, and tried unsuccessfully to influence her to return to California and appear in court. The attorney requested Sacks to leave the room while he conferred with appellant, but Sacks remained present throughout the interview.

On another occasion appellant's sister and brother-in-law went to Missouri to see her and urged her to return to California with them, but she refused. For some two years she and Sacks lived in hotels and motels in various states. It was not until June, 1948, that service could be had on her in California, at which time she was found living under an assumed name in a small resort town. Upon being served, as we have already seen, she wrote to a newspaper stating that she would not appear in court and then refused to be present on the day set for commencement of the hearing in June, 1948. She did appear, however, when the hearing was resumed in February, 1949.

A psychiatrist testified that, in his opinion, appellant suffers from cerebral arteriosclerosis and "has been, at least since 1944, and is at this time incompetent." Appellant took the stand, and on direct examination her testimony was clear and her memory for financial detail excellent. On cross-examination, however, she was evasive and forgetful as to transactions in which Sacks had mishandled her money and as to her testimony before the grand jury which led to his indictment. She testified that she had not recovered any of the property Sacks had given to his former wife and had not pressed the suit she had filed in June, 1946, to impose a trust thereon, but that she would take care of the matter "when the proper time comes." Appellant stated that from time to time her attorneys advised her to appear in the guardianship proceedings but that she used her "own judgment in all cases" and avoided service of citation because she was afraid of being placed "in some institution." She said, however, that she did not remember ever having asked any of her attorneys about the possibility of being committed to an institution.

Appellant complains that the foregoing evidence is insufficient to support the finding of incompetency, claiming that the psychiatrist's testimony should be disregarded and that respondents' evidence relating to facts occurring between 1944 and 1946 was too remote. It is asserted that the psychiatrist did not understand the legal meaning of the term "incompetence" and that the facts upon which he based his opinion did not justify his conclusion. During a series of preliminary questions the psychiatrist testified that he was familiar with section 1460 of the Probate Code relating to incompetency. When asked by respondents to define incompetence he replied that it is "a state of the human being in which this human being can be taken advantage of by artful and designing persons and is unable to manage her or his own estate for that reason." Appellant did not challenge the witness' definition or cross-examine as to it, but she now complains that it is at variance with the code section and indicates that he must have based his conclusion as to her incompetence upon the fact that she had already been imposed upon by an "artful or designing" person. While the psychiatrist's definition is incomplete, his testimony as a whole clearly shows that he took the proper elements into account in forming his opinion as to appellant's incompetency, namely, her age, her state of health and her mental condition. Further, it should be noted that the witness' attention was at no time directed to the language he had used in his definition, and he was given no opportunity to amend or clarify it.

The psychiatrist's opinion as to appellant's competency was based on his observation of her, his study of two transcripts of testimony given by her in other proceedings in 1945, and a lengthy hypothetical question. The witness had not examined appellant but had observed her in the courtroom on three different occasions at which times he noted that she had a marked tremor of the head. He stated that this was a "positive indication" of hardening of the arteries, that the condition had an effect on reasoning powers, and that the prognosis for a woman of her advanced age was not good. He further stated that, in his opinion, her testimony as it appeared in the two transcripts indicated that she was "uncertain," "confused," and that "her memory is not too good." Although it is apparent that the witness' opinion would carry more weight if it had been based on an examination of appellant, we cannot say as a matter of law that the facts and circumstances he took into consideration do not justify his conclusion. It should be noted that, while appellant produced two other psychiatrists and her family physician who testified that she was able to manage her own affairs, two of these experts stated that she had a tremor, and one of them testified that a tremor might be an indication of arteriosclerosis.

[10–14] We cannot agree with appellant's contention that evidence of facts occurring between 1944 and 1946 was too remote to be considered on the question of her competency at the time of the hearing in February, 1949. Evidence of conduct tending to show mental condition a reasonable time before the hearing is admissible on the question of competence, Matter of Coburn, 165 Cal. 202, 213, 131 P. 352; Estate of Reed, 198 Cal. 148, 150, 243 P. 674, and broad discretion is left to the trial court as to the character of such testimony and the period of time over which it may extend. Estate of McKenna, 143 Cal. 580, 586, 77 P. 461; Estate of Baker, 176 Cal. 430, 437–438, 168 P. 881; Estate of Martin, 170 Cal. 657, 663, 151 P. 138. In any event, the trial court's finding of incompetency was not based solely on evidence of facts occurring before July, 1946. Appellant's conduct from the date of her reunion with Sacks in 1946 up to and including the time she appeared and testified at the hearing is some evidence of her mental condition which the court could and apparently did take into consideration in making its determination. In addition the trial judge was entitled to consider appellant's behavior on the stand. He observed her and the manner in which she testified at the hearing and was in a better position than we are to pass upon her mental condition. See Estate of Cowper, 179 Cal. 347, 348–349, 176 P. 676; Estate of Schulmeyer, 171 Cal. 340, 343–344, 153 P. 233; Estate of Coburn, 165 Cal. 202, 214–217, 131 P. 352; Guardianship of McConnell, 26 Cal.App.2d 102, 106, 78 P.2d 1043.

[15] Appellant argues that she has conclusively demonstrated her competence to manage her own property by the facts that she has employed a reputable real estate company to assist in caring for her realty, that she had the joint tenancy agreement with Sacks set aside and that she has not kept a joint bank account with him or borrowed on any of her property since their reunion in 1946. Such matters, however, merely serve to create a conflict in the evidence, and considering the record as a whole, we are satisfied that there is sufficient support for the finding of incompetency.

[16] The cases of Guardianship of Waite, 14 Cal.2d 727, 731, 97 P.2d 238, and Estate of Watson, 176 Cal. 342, 168 P. 341, relied on by appellant, are not controlling. There the evidence which was held insufficient to show incompetency related to poor business judgment and marriage to a much younger man which resulted in considerable financial loss. Here we not only have evidence to that effect, but we also have medical testimony that appellant, who was approximately 82 years old at the time of the trial, is suffering from arteriosclerosis, shows signs of physical and mental deterioration, and is incompetent. Further, unlike the situation in the Waite case, the trial court had an opportunity to observe the alleged incompetent's demeanor on the stand. Moreover, in passing upon appellant's ability to manage her affairs, the

court might properly have attached some significance to her conduct in leaving her home and traveling around in order to evade service, repeatedly ignoring the advice of counsel to appear in court, and defying the citation to appear when it was eventually served on her.

We must next determine whether the trial court abused its discretion in appointing respondent Rauch as guardian of appellant's estate. Rauch had previously been appointed guardian of her estate under the void order of August, 1946, and he managed her properties until the order was set aside. Shortly thereafter appellant filed suit against Rauch and other persons charging them with mismanagement of her property and with oppression and malice. She claims that Rauch's interests are adverse to hers because of this suit, which is still pending and has not yet been brought to trial on the merits, and that for this reason it was error to appoint him as guardian.

[17–19] It is true that the positions of guardian of a ward and defendant in a suit brought by the ward are antagonistic, and that Rauch cannot properly represent appellant in the action brought by her against him as an individual. See Townsend v. Tallant, 33 Cal. 45, 52; Loock v. Pioneer Title Ins. & Trust Co., 4 Cal.App.2d 245, 249, 40 P.2d 526; Rupe v. Robinson, 139 Wash. 592, 247 P. 954, 47 A.L.R. 565, 567. However, the mere existence of the pending action did not disqualify Rauch from acting as guardian of appellant's estate, since her interests in that action could be adequately protected by the appointment of a guardian ad litem. Prob. Code, § 1607; Code Civ.Proc., §§ 372, 373; Townsend v. Tallant, supra, 33 Cal. at page 52; Loock v. Pioneer Title Ins. & Trust Co., supra, 4 Cal.App.2d 245, 249, 40 P.2d 526; Boyd v. Lancaster, 56 Cal. App.2d 103, 109, 132 P.2d 214; Rupe v. Robinson, 139 Wash. 592, supra, 247 P. 954, 47 A.L.R. 565. There was abundant evidence that Rauch was well qualified to handle the property, there was no proof of mismanagement, oppression or malice, and we cannot say that the trial court abused its discretion in finding that he was a suitable, fit and proper person to be appointed as guardian.

[20] Appellant also appeals from an order made on April 22, 1949, pursuant to Probate Code section 1631,[2] directing Rauch to take possession of her property pending appeal from the order declaring her incompetent. Thereafter, on July 30, 1949, she obtained a writ of supersedeas from the District Court of Appeal staying action by the guardian pending determination of the appeal from the incompentency order. Guardianship of Walters, 93 Cal.App.2d 208, 208 P.2d 713. As grounds for reversal of the order directing the guardian to take possession, appellant asserts that there is no evidence that the order was necessary "for the purpose of preventing injury or loss to person or property," as required by section 1631. The appeal was taken on a clerk's transcript alone, and appellant did not produce a certified reporter's transcript or make any application to be relieved from default for failure to request a reporter's transcript within the time required by the Rules on Appeal. Rules 4, 53. In this state of the record we must presume that there was sufficient evidence to support the order. Guardianship of Waite, 33 Cal.App.2d 315, 316, 91 P.2d 620.

[21] There is no merit in appellant's contention that the decision in the supersedeas case, Guardianship of Walters, 93 Cal.App.2d 208, 208 P.2d 713, is determinative of the present appeal. That decision was made on demurrer to an application for supersedeas which incorporated various petitions and affidavits submitted to the trial court, and it was necessarily limited to a holding as to the sufficiency of the evidence set forth in that application. Appellant

2. Section 1631 of the Probate Code provides that "An appeal from an order appointing a guardian for an insane or incompetent person shall stay the power of the guardian, except that, for the purpose of preventing injury or loss to person or property, the court making the appointment may direct the exercise of the powers of the guardian, from time to time, as though no appeal were pending, and all acts of the guardian pursuant to such directions shall be valid, irrespective of the result of the appeal."

claims that it was there held that the evidence before the trial court did not show reasonable necessity for the order, but it does not appear that the District Court of Appeal had before it all the evidence which was before the trial court. Respondents claim that there was additional evidence, the opinion does not negative the possibility of such evidence, and the order of the trial court recites that it was made "after receiving evidence, considering affidavits submitted, and reviewing the record of this matter." Under the circumstances, the supersedeas decision is not controlling.

The orders are affirmed.

We concur:

SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

37 Cal.2d 190

HENDERSHOTT et al. v. SHIPMAN et al.

L. A. 21227.

Supreme Court of California

May 15, 1951.

Rehearing Denied June 14, 1951.

Action by Loyal L. Hendershott and Elsie Mae Hendershott against Benjamin W. Shipman and Lettie B. Shipman to quiet title to lot on basis of certificate of sale under foreclosure of street improvement bonds and treasurer's deed pursuant thereto. The Superior Court of Los Angeles County, Allen W. Ashburn, J., entered judgment that plaintiffs were not owners of lot but that plaintiffs had valid lien by virtue of certificate of sale on property, and defendants appealed. The Supreme Court, Shenk, J., held that defendants' answer which denied validity of plaintiffs' title but asked for no affirmative relief placed validity of certificate of sale and tax deed in issue and that judgment declaring tax deed void for lack of affidavit of notice to owners and declaring certificate of sale to be valid lien but which did not require defendant to reimburse amount due on bonds was proper.

Judgment affirmed.

Prior opinion 221 P.2d 982.

231 P.2d—31

1. Quieting title ⇐49

A provision for reimbursement of lienholder by prevailing party in action to quiet title is proper only when latter party has sought judgment quieting title in himself.

2. Quieting title ⇐50

Where plaintiffs sued to quiet title to lot on basis of sale under foreclosure of street improvement bonds and certificate of sale and treasurer's deed issued pursuant thereto, and defendants answered and denied validity of plaintiffs' title but sought no affirmative relief, judgment which declared treasurer's deed to be void and certificate of sale to be valid lien, but which did not require that defendants reimburse plaintiffs for amount due on bonds was proper. Streets and Highways Code, § 6570.

3. Appeal and error ⇐907(3)
Quieting title ⇐43

Where plaintiffs sued to quiet title to lot on basis of sale under foreclosure of street improvement bonds and certificate of sale and treasurer's deed pursuant thereto and defendants attacked validity of sale and deed but asked no affirmative relief, denials placed validity of certificate of sale and treasurer's deed in issue and in absence of transcript of proceedings in trial court it would be assumed on judgment roll appeal that all such issues had been tried without objection. Streets and Highways Code, §§ 6570, 6572.

4. Appeal and error ⇐907(3)

On appeal on judgment roll from judgment which declared treasurer's deed to be void but which held certificate of sale to be valid lien on property, it would be assumed that there was no evidentiary or time factor upon or within which defendants could question validity of certificate of sale, and finding thereon would be deemed supported. Streets and Highways Code, §§ 6570, 6572.

5. Quieting title ⇐46, 50

A court may finally determine as between the parties in quiet title action all of conflicting claims regarding any interest or estate in property and fact that plaintiff was not entitled to prevail on claim of title

in fee does not preclude the court from declaring lesser interest.

6. Quieting title ⇐52

Where plaintiffs sued to quiet title to lot on basis of sale under foreclosure of street improvement bonds and certificate of sale and treasurer's deed pursuant thereto and defendants answered and denied validity of plaintiffs' title but sought no affirmative relief, judgment which declared treasurer's deed to be void for lack of affidavit showing notice on owner and which held that certificate of sale was valid lien on property did not affect right of parties to pursue whatever remedies might be open to them regarding existing lien rights. Streets and Highways Code, §§ 6570, 6572.

7. Appeal and error ⇐671(3)

Where plaintiffs sued to quiet title to lot on basis of sale under foreclosure of street improvement bonds and certificate of sale and treasurer's deed pursuant thereto and judgment was entered which declared treasurer's deed to be void but which declared that certificate of sale was valid lien on property on judgment roll appeal, in absence of transcript of evidence, contentions concerning correctness of amount of declared lien would not be considered. Streets and Highways Code, §§ 6570, 6572.

Charles Murstein, Los Angeles, for appellants.

John F. Bender and Gizella M. Allen, Los Angeles, for respondents.

SHENK, Justice.

The plaintiffs sued to quiet title to a lot in the City of Los Angeles. The defendants Shipman answered and denied the validity of the plaintiff's alleged title. They admitted a claim of ownership in themselves. The judgment was that the plaintiffs were not the owners of the lot. The defendants appealed because the judgment also declared that the plaintiffs had a valid and subsisting lien on the property.

The appeal is on the judgment roll which discloses the following:

The plaintiffs commenced proceedings to foreclose a street improvement bond issued August 31, 1928, pursuant to the Improvement Act of 1911. On the termination of the proceedings the City Treasurer of Los Angeles issued to the plaintiffs a certificate of sale dated May 31, 1946. On July 7, 1947, the plaintiffs received a treasurer's deed to the property which was issued, however, without the filing of the affidavit showing service of notice on the owners as required by sections 6550 et seq. of the Streets and Highways Code.

The plaintiffs' claim of title was based on the validity of the sale proceedings and the Treasurer's deed. The defendants did not seek to have the title quieted in themselves but rested on their denial of the validity of the plaintiffs' title and their allegations of ownership. The trial court concluded that the treasurer's deed of July 7, 1947, was void; that the plaintiffs were the owners of the certificate of sale issued May 31, 1946, which was a valid and subsisting lien upon the real property in the amount due on the bond; that the plaintiffs were not entitled to a judgment quieting title and that the defendants recover their costs. Judgment was entered accordingly. The defendants question that portion thereof which declares that the plaintiffs are the owners of the certificate of sale and that the certificate and the amount due thereon constitute a lien against the property.

It is contended by the defendants that the findings of fact and conclusions of law respecting the certificate of sale were not within the issues; that the findings and conclusions as to the treasurer's deed disposed of all the triable issues; that the defendants did not seek affirmative relief and hence should not be obligated to reimburse the plaintiffs in the amount due on the bond.

[1, 2] The defendants apparently misapprehend the effect of the judgment. It is true that in an action to quiet title a provision for reimbursement of a lienholder by the prevailing party is proper only when the latter has sought a judgment quieting title in himself. Warden v. Ratterree, 215 Cal. 215, 9 P.2d 215, 86 A.L.R. 1204; Newcomb v. City of Newport Beach, 12 Cal.2d 235, 237–239, 83 P.2d 21; Jones v. Walker, 47 Cal.App.2d 566, 571, 118 P.2d 299; Roma

v. Elbert, Ltd., 73 Cal.App.2d 338, 166 P.2d 294. This result flows from the rule that one seeking such equitable relief must satisfy the equitable claims of the opposing party. District Bond Co. v. Pollack, 19 Cal.2d 304, 307, 121 P.2d 7 and cases cited; Roma v. Elbert, Ltd., supra, 73 Cal.App.2d at page 341–342, 166 P.2d 294. The defendants sought no affirmative relief. They elected to stand on their legal defenses and to resist the plaintiffs' claim of title without asking for a declaration quieting their own title as against any claims of the plaintiffs which might necessitate a tender of the amount due on the bond. The judgment contained no provision for reimbursement as a condition thereof. The omission was a recognition by the trial court that the condition would not have been proper. Cf. Holland v. Hotchkiss, 162 Cal. 366, 123 P. 258, L.R.A.1915C, 492; Moyer v. Wilson, 166 Cal. 261, 135 P. 1125.

[3, 4] The principal effect of the judgment is to leave the parties where they were before the treasurer's deed was issued. Section 6570 of the Streets and Highways Code provides that if a copy of the certificate of sale is transmitted as required, a suit or proceeding to question the validity of the certificate of sale shall be barred unless commenced within one year after the date of sale. The certificate of sale was issued on May 31, 1946. The action was commenced on July 16, 1947. Thereafter the defendants by the denials and allegations of their answer attacked the validity of the sale and the deed. Therefore the validity of the certificate of sale as well as of the treasurer's deed was within the issues, and it must be assumed in the absence of a transcript of the trial proceedings that all issues respecting the validity of the certificate of sale and the deed were tried without objection. Baar v. Smith, 201 Cal. 87, 98, 255 P. 827. Likewise in the absence of a transcript of the evidence it must be assumed that there is no evidentiary or time factor upon or within which the defendants could successfully question the validity of the certificate of sale, and consequently the finding thereon must be deemed supported. The trial court declared the validity of the certificate of sale and invalidity only as to the treasurer's deed. In such case section 6572 of the Streets and Highways Code indicates that the lien continues until a valid deed is issued but not for longer than two years after the deed was held void. It is assumed that the applicable law will govern in subsequent proceedings.

[5, 6] It is now well settled that the court may finally determine as between the parties in a quiet title action all of the conflicting claims regarding any estate or interest in the property. The fact that the plaintiffs were not entitled to prevail on their claim of title in fee did not preclude the court from declaring a lesser interest. Peterson v. Gibbs, 147 Cal. 1, 5, 81 P. 121; Yuba Investment Co. v. Yuba Consolidated Gold Fields, 199 Cal. 203, 209, 248 P. 672; Hurt v. Pico Investment Co., 127 Cal.App. 106, 15 P.2d 203; Bashore v. Mooney, 4 Cal.App. 276, 280, 87 P. 553; see also Sears v. Rule, 27 Cal.2d 131, 149, 163 P.2d 443. In the Hurt case, as also in Bailey v. Cox, 102 Cal. 333, 36 P. 650 and Burns v. Hiatt, 149 Cal. 617, 87 P. 196, a mortgage lien was dealt with as a lesser interest in a quiet title action. The lien created pursuant to the Improvement Act of 1911 would similarly be a subject for equitable adjustment in a proper case.

The decisions in Warden v. Harker, 212 Cal. 775, 300 P. 965, and Warden v. Ratteree, 215 Cal. 215, 9 P.2d 215, 86 A.L.R. 1204, do not afford support for the defendants' case. In each the plaintiff sought to quiet title after the issuance of a treasurer's deed, in one pursuant to the 1913 Street Improvement Act, and in the other pursuant to the Street Improvement Bond Act of 1893. In each the defendant contested the plaintiff's title without asking for affirmative relief. And in each the judgment was adverse to the plaintiff who was the appellant. In the first case the issue of the existence of a lien notwithstanding the invalidity of the sale proceedings and deed was neither tendered nor tried. The matter of the plaintiff's right of recovery in that respect was expressly left open. In the second case the contention that the plaintiff was entitled to a declaration of

his lien interest was disposed of merely by reference to and citation of the first case.

[7] The disposition of the contentions on the appeals in those cases where a possible lien of the losing plaintiff was not decreed can have no controlling influence here. In the absence of a decree granting affirmative relief, the parties are left to pursue whatever remedies may be open to them with respect to existing lien rights. The same result ensues from the determination and the lack of affirmative relief in the present case, since neither the judgment nor the declarations of this court may be deemed to foreclose the parties from pursuing whatever remedies are still open to them. What equities may then appear is not a matter for investigation at this time. Nor would it now be appropriate to resolve, in the absence of a transcript of the evidence, the contentions concerning the correctness of the amount of the declared lien because of possible varying rates of interest or penalties which are said to create advantages or disadvantages. The trial court in a proper case will be in a position to decide and adjust the equities.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

37 Cal.2d 159

POPEJOY v. HANNON et al.

L. A. 21532.

Supreme Court of California, in Bank.

May 11, 1951.

Rehearing Denied June 7, 1951.

Action by Mac Wade Popejoy against H. H. Hannon and others, individually, and doing business as Mutual Molding and Lumber Company, and others, for personal injuries. The Superior Court, Los Angeles County, William S. Baird, J., rendered judgment for plaintiff, and from such judgment and from order denying motion for judgment notwithstanding verdict, defendants appealed. The Supreme Court, Edmonds, J., held that certain instructions even if error, were not so prejudicial as to require reversal of judgment.

Judgment and order affirmed.

Prior opinion, 216 P.2d 521.

1. Negligence ⇐121(1, 5)

In an action founded upon negligence, burden is upon plaintiff to prove wrongful conduct of defendant which was proximate cause of injury.

2. Appeal and error ⇐1170(9)
Trial ⇐296(7)

In an action founded upon defendants' alleged negligence, where defendants submitted an instruction to be given only in event that jury was instructed upon doctrine of res ipsa loquitur as requested by plaintiff, and jury was not so instructed, defendants' requested instruction should not have been given and instructions correctly stating requirements laid upon plaintiff did not cure such error, but giving of such instruction was not so prejudicial as to require reversal in view of instruction that burden of proof was upon party who asserted affirmative of an issue. Const. art. 6, § 4½.

3. Negligence ⇐136(15)

Question whether invitation, express or implied, to a person to enter premises included that part of premises where injury occurred is generally not one of law but is of fact for determination of court or jury.

4. Trial ⇐252(1)

Only instructions which are supported by evidence should be given.

5. Negligence ⇐32(2.4)

An invitation or permission to enter upon land need not be expressed but may be implied from such circumstances as conduct of possessor, arrangement of premsies, or local custom.

6. Negligence ⇐32(1)

Gist of liability of a possessor toward another on his land consists in fact that person injured did not act merely for his own convenience or pleasure, but that an

owner or occupant held out an invitation or allurement which led him to believe that use made by him of premises was in accordance with intention and design.

7. Trial ⇐252(8)

In action by employee of trucker against lumber company owners for injuries sustained in fall from vehicle while attempting to avoid falling lumber negligently stacked, refusal to instruct upon effect of an invitee's exceeding scope of his invitation and in regard to duty owed to others than invitees, was not error in absence of evidence to justify giving such instruction.

8. Appeal and error ⇐1064(1)

Prejudicial error does not necessarily result from giving of an instruction which, subjected to meticulous analysis, might be given a possible construction making it subject to criticism.

9. Trial ⇐228(3)

Generally, expressions "safe" and "reasonably safe" are used in instruction synonymously and interchangeably.

10. Appeal and error ⇐1170(9)
Negligence ⇐139(1)

In action by employee of trucker against lumber company owners for injuries sustained in fall from vehicle when attempting to avoid falling lumber negligently stacked, instruction defining duty owed an invitee wherein jury was told that their verdict should be for employee if owners failed to use ordinary care to have premises in safe condition and to supply safe place in which to work was not error requiring reversal, even though it would have been more appropriate for court to follow language as given in another instruction that toward an invitee he who extends the invitation is obliged to refrain from active negligence and to exercise ordinary care to keep premises in a condition reasonably safe for invitee. Const. art. 6, § 4½.

11. Negligence ⇐32(2.3)

It is purpose for which a person is upon premises of another which renders him an invitee rather than a licensee.

12. Trial ⇐296(3)

In action by employee of trucker against lumber company owners for injuries sustained in fall from vehicle while attempting to avoid falling lumber negligently stacked, instruction at request of employee to effect that if employee at time of accident was in employ of trucker and while acting in scope of such employment was working upon premises of lumber company assisting lumber company's employees in course of loading truck with lumber and if owners of lumber company or their employees knew of such act and acquiesced therein then employee was an invitee, was not error, especially in view of clarifying instructions given at request of both employee and owners.

13. Negligence ⇐139(7)

In action by employee of trucker against lumber company owners for injuries sustained in fall from vehicle while attempting to avoid falling lumber negligently stacked, instruction at request of employee to effect that if jury find that condition of premises was dangerous and known to lumber company and not known to employee and employee was not negligent in failing to discover same, then owners owed duty to inform employee of such danger and failure in that regard would constitute negligence, was erroneous, in that warning was only required if lumber company believed employee would not discover dangerous condition or risk involved.

14. Negligence ⇐52

A landowner will be liable for failure to warn an invitee of a dangerous condition which exists upon premises if he knows or should know of danger which he has no basis for believing that invitee will discover.

15. Negligence ⇐67, 105

Before an invitee may recover for landowner's breach of duty to warn, he must prove himself to be free from negligence in failing to discover danger and show he did not know of it and assume attendant risks.

16. Appeal and error ⇐1170(9)

In action by employee of trucker against lumber company owners for injuries sustained in fall from vehicle while

attempting to avoid falling lumber negligently stacked, where jury determined that employee acting as reasonable man was not negligent in failing to discover dangerous condition, it would be highly improbable that if erroneous instruction relating to owners' duty to warn had included essential element that employee must prove himself to be free from negligence in failing to discover danger and show he did not know of it and assume attendant risks, that jury would have found sufficient factual basis for belief by owners that employee would or should have discovered danger, and accordingly such error was not so prejudicial as to require reversal. Const. art. 6, § 4½.

17. Negligence ⇐105

An invitee does not assume risk of latent dangers which are created by negligence of another and of which he has no notice.

18. Negligence ⇐138(3)

In action by employee of trucker against lumber company owners for injuries sustained in fall from vehicle while attempting to avoid falling lumber negligently stacked, refusal to give an instruction upon doctrine of assumption of risk on theory that evidence as to employee's previous experience in lumber business supported application of doctrine, was not error.

19. Master and servant ⇐300

Responsibility of an employer for acts of his employees under doctrine of respondeat superior is dependent upon injured person's right to recover against employee.

20. Indemnity ⇐13(1)

An employer who has been held liable under doctrine of respondeat superior has right of recoupment against negligent employee.

21. Workmen's compensation ⇐2134

Generally, burden of proof is on the employer to prove that he has complied with the Workmen's Compensation Act and is subject to its terms when defending civil action brought against him. Labor Code, §§ 3601, 3602.

22. Workmen's compensation ⇐2124

Generally, plaintiff need not negative fact that he was within Workmen's Compensation Act, since such is an affirmative defense. Labor Code, §§ 3601, 3602.

23. Workmen's compensation ⇐2133

An employer who contends that he is one of a class of persons protected from an action at law by Workmen's Compensation Act must plead and prove conditions necessary to bring himself within statute. Labor Code, §§ 3601, 3602.

24. Master and servant ⇐332(4)

In action by employee of trucker against lumber company owners for injuries sustained in fall from vehicle while attempting to avoid falling lumber negligently stacked, court properly instructed upon doctrine of respondeat superior in absence of lumber company owners pleading their special relationship to trucker as defense to action and in absence of pleading by owners that they were one of a class of persons protected from an action at law by Workmen's Compensation Act. Labor Code, §§ 3601, 3602.

Sidney A. Moss and Henry F. Walker, Los Angeles, for appellants.

Rogers & Carnes, Paramount, and Byron R. Bentley, Los Angeles, for respondent.

EDMONDS, Justice.

H. H. Hannon, S. F. Hannon and Helen Hannon are partners doing business as Mutual Molding and Lumber Company. H. Sugarman, who conducted a trucking business on his own account, was employed by the Hannons as foreman of their lumber yard. Mac Wade Popejoy worked for Sugarman as a truck driver. Although his trucking business was an independent enterprise, the Hannons permitted Sugarman to have a telephone in the lumber yard which was listed in the name of Sugarman Trucking Company.

Popejoy sued for damages for personal injuries sustained on the premises of the partnership. The appeal from the judgment entered upon the verdict of a jury in his favor, and from the order denying a

motion for judgment notwithstanding the verdict, principally concerns rulings upon instructions.

There is little dispute as to how the accident occurred. The essential facts are as follows:

During working hours, when he was not driving for Sugarman, Popejoy occasionally and gratuitously helped around the lumber yard by answering the telephone, removing blocks of wood from tiers of lumber as they were being moved about the yard, and assisting with the loading of customers' trucks. Usually the trucks were loaded by means of a wheeled machine, known as a hyster, which is used to lift stacks of lumber on horizontal prongs movable in a vertical plane.

On the day of the accident, "Shorty" Kemp, a lumber yard employee, was loading a customer's truck by means of the hyster. Kemp left the hyster to do other work. Popejoy then operated the hyster and moved the top tier of lumber from a stack to the customer's truck. When he had raised the remaining tier about two feet from the ground, a nearby stack of lumber fell toward him. Popejoy jumped from the hyster, striking his knee upon the asphalt surface of the lumber yard. The fall resulted in a fractured kneecap and permanent injury.

At the time of the accident Sugarman said, "Mac, it's all my fault. I shouldn't have had that load on the bottom." This statement was amplified by his testimony at the trial. He told the jury that the bottom tier of the stack which fell had been put in place by him about a week prior to the accident. He had then noticed that the lumber was warped and loose. Later, he said, due to lack of space in the lumber yard, he placed two more tiers of smooth lumber on top of the pile. He thought the lumber would be safe although the lowest tier was somewhat wobbly.

Supplementing this testimony there was evidence to the effect that smooth boards tend to slide more easily than rough lumber. Admittedly the stack which fell did not have "stickers" which are usually placed in a stack of lumber to prevent slipping.

The Hannons denied the allegations of the complaint and set up the affirmative defenses of contributory negligence and assumption of risk. Generally, the defense at the trial was lack of proximate cause and absence of any negligence.

The Hannons present several grounds as justifying a reversal of the judgment and the order denying a motion for judgment notwithstanding the verdict. They contend that the trial court erred in giving a contingently requested instruction, the contingency not having occurred. Other points relied upon relate to the trial court's refusal to instruct the jury upon the scope of the invitation to Popejoy to be upon the property, the duty owed to others than invitees, and the doctrine of assumption of risk. An instruction attacked as erroneous told the jury that failure to give warning to an invitee of certain dangers constitutes negligence. Complaint is made of the trial judge's statement of the facts under which Popejoy was to be considered an invitee, and the definition of the duty owed to an invitee. The Hannons also attack as erroneous the instruction to the jury which declared that Popejoy might recover damages against them under the doctrine of *respondeat superior*.

Popejoy requested an instruction upon the doctrine of *res ipsa loquitur*. In order to determine the necessity for submitting a qualifying instruction, the Hannons asked the trial judge whether Popejoy's proposed instruction would be given. When there was no answer to the inquiry, the Hannons submitted an instruction to be given only in the event that the jury was instructed as requested by Popejoy. His instruction was not given, but the jury nevertheless was charged in the form submitted by the Hannons as follows: "The defendants, however, are not required to prove by a preponderance of the evidence that they were free from negligence which proximately caused the lumber to fall. They are bound to produce only sufficient evidence to create in your minds such doubt as to why the lumber fell that you cannot say you are convinced by a preponderance of

the evidence that the falling of the lumber was proximately caused by the negligence of the defendants."

[1] The Hannons say that when the jury was not instructed upon the doctrine of *res ipsa loquitur*, this instruction cast upon them the duty to produce evidence relating to an issue upon which Popejoy had the burden of proof. In an action founded upon negligence, the burden is upon the plaintiff to prove wrongful conduct of the defendant which was the proximate cause of injury. The challenged instruction, the argument continues, imposed upon the Hannons the duty to produce evidence to the effect that they were free from negligence which proximately caused Popejoy's injury. The error could not have been prejudicial, Popejoy answers, because the jury was instructed that the burden of proof is upon the party who asserts the affirmative of an issue.

[2] Not having instructed the jury upon the doctrine of *res ipsa loquitur*, the qualifying instruction contingently requested by the Hannons should not have been given. Instructions of the court correctly stating the requirements laid upon a plaintiff did not cure the error. By one instruction the jury was told that the burden of proving negligence rested upon Popejoy. The reasonable construction to be placed upon the challenged instruction is that the Hannons were required to present direct evidence either of their freedom from negligence or the absence of proximate cause. Clearly the two instructions are inconsistent.

However, the record shows abundant evidence offered by Popejoy tending to prove his status as an invitee which, if not overcome by the Hannons, would entitle him to a verdict. The effect of the instruction complained of was to say that the Hannons, in order to defeat Popejoy's claim, had the duty to produce a preponderance of evidence to the contrary. There is little difference between the challenged instruction and one given at the request of the Hannons which reads, in part: "When the evidence is contradictory, the decision must be made according to the preponderance of evidence, by which is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein. Should the conflicting evidence be evenly balanced in your minds, so that you are unable to say that the evidence on either side of the issue preponderates, then your finding must be against the party carrying the burden of proof, namely, the one who asserts the affirmative of the issue." Under these circumstances, it cannot be said that the challenged instruction so prejudiced the Hannons as to require a reversal of the judgment. (Cal.Const., Art. VI, § 4½.)

Also assigned as error is the refusal to instruct the jury upon the effect of an invitee's exceeding the scope of his invitation and in regard to the duty owed to others than invitees. One theory of the Hannons is that Popejoy was not an invitee when operating the hyster, although he might have been an invitee as to the premises in general.

At the request of both parties, the jury was instructed as to the distinctions between an invitee and a licensee, and was told that "[T]oward an invitee, he who extended the invitation, express or implied, is obliged to refrain from active negligence and to exercise ordinary care to keep the premises in a condition reasonably safe for the invitee in the pursuit of a purpose embraced within the invitation". But the court refused to give the instruction requested by the Hannons to the effect that, under certain circumstances, an express or implied invitation may be limited in scope; if the invitation extends only to a certain portion of the premises, the invitee is a licensee or trespasser as to the remainder.

Upon the issue as to whether Popejoy was an invitee at the time and place of the accident, there is only slight conflict in the evidence. Silas Hannon testified that he had never seen Popejoy operate the hyster, nor did he ever request him to do so. About three weeks prior to the accident, testified Hannon, some of the employees had been on and about the machine during their lunch period. He instructed Sugarman to keep all men off of it with the exception of "Shorty" Kemp, but this order

was never relayed to Popejoy. Sugarman testified that he had never directed Popejoy to use the hyster. Concededly, Popejoy knew the machine belonged to the Hannons and not to his employer, and that he was neither obligated nor paid to operate it. These facts, the Hannons argue, show that, in operating the hyster, Popejoy was not an invitee but acted as a mere volunteer, gratuitously and outside the scope of the invitation to him to be in the lumber yard.

However, Sugarman, when called as a witness for the Hannons, told the jury that he had seen Popejoy operate the hyster upon several occasions prior to the accident, and had never told him not to use it. He said, "I had quite a few jobs to do and a lot of times, I would go over to the mill to make out a mill ticket, and the carrier would bring up my load of lumber going on the truck, and sometimes Mr. Popejoy would get on * * * [the hyster] and lift * * * [the load] up and set it on this truck while I was making out the mill tickets." Sugarman also testified that he saw Popejoy operating the hyster just prior to the accident, and, when called to the mill, he "* * * just left him there * * *." And the testimony of Silas Hannon was directly contradicted by Popejoy. The injured man told the jury that, at one time, Silas Hannon had asked him to load a customer's truck with the machine.

[3–7] "The question as to whether the invitation, express or implied, included that part of the premises where the injury occurred is generally not one of law. On the contrary, it is usually a question of fact for the determination of the court or jury." Biondini v. Amship Corp., 81 Cal.App.2d 751, 760, 185 P.2d 94, 100; quoted with approval in Boucher v. American Bridge Co., 95 Cal.App.2d 659, 670, 213 P.2d 537. Nevertheless, only those instructions should be given which are supported by the evidence. Davenport v. Stratton, 24 Cal.2d 232, 149 P.2d 4.

"An invitation or permission to enter upon land need not be express but may be implied from such circumstances as the conduct of the possessor, the arrangement of the premises, or local custom." Oettinger v. Stewart, 24 Cal.2d 133, 136, 148 P.2d 19, 21, 156 A.L.R. 1221. "'The gist of liability consists in the fact that the person injured did not act merely for his own convenience or pleasure, but that an owner or occupant held out an invitation or allurement which led him to believe that the use made by him of the premises was in accordance with intention and design.'" Barker v. Southern Pac. Co., 118 Cal.App. 748, 751, 5 P.2d 970, 971, 6 P.2d 982. The testimony of Sugarman shows without dispute that he, as an agent for the Hannons, had seen Popejoy operating the hyster upon several occasions and had never told him not to do so. He saw Popejoy loading a customer's truck just prior to the accident and "left him there". The evidence is uncontradicted that, when the lumber started to fall, Popejoy was on the hyster and operating it to the mutual benefit of Sugarman and the Hannons. The record, therefore, includes no evidence which would justify giving the instruction requested by the Hannons to the effect that the invitation to Popejoy to be upon the premises excluded his operation of the hyster.

In defining the duty owed an invitee, the court stated that the Hannons "* * * owed the duty to use ordinary care to have the premises in a safe condition and to supply a safe place in which to work * * *." Their verdict should be in favor of Popejoy, the jurors were told, if the Hannons failed in that regard and such failure was a proximate cause of the injury. The Hannons contend that a landowner's duty is only to keep the premises in a *reasonably* safe condition, not a *safe* condition. It is further argued that the instruction could be understood to place an absolute duty upon the defendants "to supply a safe place in which to work".

To support their position, the Hannons cite Stickel v. San Diego Electric Ry. Co., 32 Cal.2d 157, 167, 195 P.2d 416, 422, in which the instruction complained of read: "It is the duty of the driver or operator of any kind of vehicle using a public highway to exercise ordinary care at all times to avoid placing himself or others in danger and to avoid a collision." The contention was made, "* * * that the instruction might be misunderstood to impose the ab-

solute duty 'to avoid a collision'; that the jury might believe that the qualifying words, 'to exercise ordinary care,' relate only to the duty 'to avoid placing himself or others in danger' and not to the duty 'to avoid a collision.'" The court held that "The instruction is subject to such possible construction and, therefore, to criticism." However, in that case, the facts and the implied finding of the jury showed that the verdict was not reached because of the instruction.

[8] Prejudicial error does not necessarily result from the giving of an instruction which, subjected to meticulous analysis, might be given a "possible construction" making it subject to "criticism". It is extremely doubtful that the jurors analyzed the instruction with such exactitude as counsel for the Hannons.

[9, 10] As to the argument that the court erred in omitting the qualifying word "reasonable", it was said in Jones v. Bridges, 38 Cal.App.2d 341, 345, 346, 101 P.2d 91, that, as a general rule, the expressions "safe" and "reasonably safe" are used synonymously and interchangeably. Although the omission of the word "reasonable" from certain of the instructions considered in the Jones case was not approved, it was held that the jury could not have been misled by the omission. The same conclusion follows in the present case. In an instruction preceding the one here challenged, the court stated: "Toward an invitee, he who extended the invitation express or implied, is obliged to refrain from active negligence and *to exercise ordinary care to keep the premises in a condition reasonably safe for the invitee* * * *." (Italics added.) It would have been more appropriate for the court to have used the same language in both instructions, but it can hardly be said that the jury was misled or confused by the varied wording to the prejudice of the appellants. Moreover, considering the entire record, it cannot reasonably be said that the instruction complained of compels a reversal of the judgment. (Cal.Const., Art. VI, § 4½.)

At the request of Popejoy, the following instruction was given: "If the plaintiff Mac Wade Popejoy, at the time of the accident, was in the employ of H. Sugarman, and while acting in the scope of such employment was working upon the premises of the defendants assisting the defendants and their employees, in the course of loading a truck with lumber, and if the defendants or their employees knew of such fact and acquiesced therein, then you are instructed that the plaintiff Mac Wade Popejoy was an invitee * * *." The Hannons contend that because "mere knowledge and acquiescence" are not enough to make a person an invitee, the instruction erroneously required the jury to find Popejoy to be an invitee upon an insufficient basis. The fallacy of this argument is that the instruction defined an invitee as a person on the premises of an owner with much more than his "mere knowledge and acquiescence". In addition to this requirement, the jury was told that, to be an invitee, Popejoy must have been working upon the premises assisting the Hannons and their employees to load a truck with lumber.

[11, 12] It is the purpose for which a person is upon the premises of another which renders him an invitee rather than a licensee. For that reason, Herzog v. Hemphill, 7 Cal.App. 116, 93 P. 899, relied upon by the Hannons, has been distinguished from such cases as the present one. Koppelman v. Ambassador Hotel Co., 35 Cal.App.2d 537, 540–541, 96 P.2d 196; cf. Oettinger v. Stewart, 24 Cal.2d 133, 136, 148 P.2d 19, 156 A.L.R. 1221. Furthermore, the following instruction given at the request of both plaintiff and defendants, clarified any possible doubt created by the instruction of which the Hannons complain: "Whether a person entering the premises of another bears the legal status of an invitee or of a mere licensee depends upon the purpose of the visit. So long as its object is the pleasure of only the visitor or of some third party, or of a purely social nature, then he is, at most, only a licensee. When, however, the visitor has a purpose that is related to the occupant's business or that involves some matter of mutual business interest or advantage, then an invitation to use the premises may be inferred,

and whether so inferred or expressed, the invitation and the purpose make the guest an invitee."

[13] At the request of Popejoy the jury was instructed as follows: "If you find that the condition of the premises at the time and place of the injuries in question was dangerous and that the defendants or their agents, including H. Sugarman, their foreman, knew or should have known of such danger, and if the said dangerous condition was not known to the plaintiff and he was not negligent in failing to discover same, you are instructed that the defendants owed a duty to inform plaintiff of said danger and a failure in that regard would constitute negligence on the part of the defendants." The Hannons correctly claim that the instruction is erroneous in that a warning was only required if they believed Popejoy would not discover the dangerous condition or risk involved. Crane v. Smith, 23 Cal.2d 288, 296, 144 P.2d 356.

[14, 15] A landowner will be liable for failure to warn an invitee of a dangerous condition which exists upon the premises if he knows or should know of the danger which he has no basis for believing that the invitee will discover. Crane v. Smith, supra; Rest., Torts, § 343. And it is also obvious that before the invitee may recover for the landowner's breach of duty he must prove himself to be free from negligence in failing to discover the danger and show that he did not know of it and assume the attendant risks. The instruction given in the present case omitted an essential element of the rule. The Hannons contend that, correctly instructed, the jury might have determined that they had no basis for believing a warning to be necessary. They argue that this is a conclusion reasonably to be inferred from the evidence that for about 20 years Popejoy had been employed in lumber yards. It also appears that for about 10 years of that time he had worked with stacked lumber and knew of the likelihood of an accident such as that which occurred.

[16] Upon the same evidence, the jury determined that Popejoy, acting as a reasonable man, was not negligent in failing to discover the dangerous condition. It is highly improbable that if the instruction had included the element omitted from it, the jury would have found a sufficient factual basis for a belief by the Hannons that Popejoy would or should discover the danger. It cannot, therefore, be said that the error was prejudicial.

The Hannons contend that the court erred in refusing to give an instruction upon the doctrine of assumption of risk. They argue that the evidence as to Popejoy's previous experience in the lumber business supports the application of the doctrine.

The lumber which fell was stacked upon ground sloping to the south. Popejoy undertook to remove the boards from this position although he knew that planed or smooth lumber tends to slide more readily than rough lumber. There is evidence that Popejoy was not requested to load any lumber. He knew he did not have to do so, but he voluntarily assumed to operate the hyster and in doing so placed himself to the south of the stack of smooth lumber which fell.

[17, 18] Although the evidence might support a finding that Popejoy, with his previous experience, should have realized the dangers resulting from negligence in stacking lumber, the Hannons do not refer to any testimony which would sustain a finding that he knew of the manner in which the lumber which fell had been stacked. An invitee does not assume the risk of latent dangers which are created by the negligence of another and of which he has no notice. Oettinger v. Stewart, 24 Cal.2d 133, 139, 148 P.2d 19, 156 A.L.R. 1221; Hedding v. Pearson, 76 Cal.App.2d 481, 173 P.2d 382. At the request of both parties, the jury was instructed that Popejoy had the right, as an invitee, to assume that the premises were reasonably safe. For the court to have also given an instruction to the effect that Popejoy assumed the risk of moving negligently stacked lumber, without having any notice of that fact, would have been a serious contradiction of the correctly stated rule.

The last assignment of error is based upon the trial court's instruction upon the doctrine of *respondeat superior*. The Hannons contend that Popejoy may not recover against them because, as an employee of Sugarman, he was included within the provisions of the Workmen's Compensation Act and his exclusive remedy is limited to the benefits provided by that statute. Freire v. Matson Navigation Co., 19 Cal. 2d 8, 118 P.2d 809; Fitzpatrick v. Fidelity & Casualty Co., 7 Cal.2d 230, 60 P.2d 276; Alaska Packers' Ass'n v. Industrial Accident Comm., 200 Cal. 579, 253 P. 926. As he cannot maintain an action for damages against Sugarman for his acts of negligence, there is no basis for this action against the Hannons because their responsibility is only secondary. Bradley v. Rosenthal, 154 Cal. 420, 97 P. 875.

In reply to this argument, Popejoy relies heavily upon Baugh v. Rogers, 24 Cal.2d 200, 148 P.2d 633, 636, 152 A.L.R. 1043, contending that it is determinative of his rights. That action was brought by a woman, employed in the home of Rogers. She was struck by an automobile owned by Warnock and driven by Rogers.

The relationship between the plaintiff and Rogers, and the circumstances under which the injury occurred, limited his liability to workmen's compensation. In the suit brought by the injured woman, the questions presented for decision were: (1) Is the fact that Baugh and Rogers are subject to the provisions of the Workmen's Compensation Act a defense to the action insofar as Rogers is concerned? (2) "If recovery cannot be had in this action by plaintiff against defendant Rogers, the negligent operator, may she nevertheless recover from the owner of the automobile, defendant Warnock, by virtue of the provisions of section 402 of the Vehicle Code"? (3) "If plaintiff recovers judgment herein against the owner Warnock, is such owner necessarily precluded from any recourse against the negligent operator by reason of the latter's relation to the plaintiff?" A divided court held that, although the relationship between Baugh and Rogers was a complete defense to an action against him, there might nevertheless be a recovery against Warnock. This conclusion left Rogers, who had a complete defense against Baugh, liable to Warnock.

However, the liability of Warnock to the plaintiff-employee was based upon the express terms of section 402 of the Vehicle Code which imposes a primary and direct liability upon the owner of a vehicle. 24 Cal.2d at pages 208–209, 148 P.2d at pages 638, 639. The determination as to the ultimate liability of the negligent operator-employer was placed upon the principles governing bailments. To state the rights of Popejoy in the formula which the court used in Baugh v. Rogers, and excluding the application of section 402 of the Vehicle Code, the question is whether Baugh could have recovered against Warnock if Rogers had been Warnock's employee? The Baugh decision did not hold that she could do so and it is not here controlling.

[19, 20] The responsibility of an employer for the acts of his employees under the doctrine of *respondeat superior* is dependent upon the injured person's right to recover against the employee. Freeman v. Churchill, 30 Cal.2d 453, 461, 183 P.2d 4. An employer who has been held liable under the doctrine of *respondeat superior* has the right of recoupment against the negligent employee. See Bradley v. Rosenthal, 154 Cal. 420, 423, 97 P. 875; Myers v. Tranquility Irr. Dist., 26 Cal.App.2d 385, 389, 79 P.2d 419. Popejoy's recovery against the Hannons for the negligence of Sugarman, who would be liable to them, is therefore an indirect recovery of damages from the plaintiff's employer, whose sole liability is that imposed by the provisions of the Workmen's Compensation Act. This is contrary to the purpose and public policy of that statute. See Baugh v. Rogers, supra, 24 Cal.2d at pages 218–219, 148 P.2d at pages 643, 644.

However, the Hannons did not plead their special relationship to Sugarman as a defense to the action. Under these circumstances, the question is whether the employment relationship constitutes an affirmative defense which must be pleaded by the defendant employer.

[21, 22] It has been stated, as a general rule, that "The burden of proof is upon the employer to prove that he has complied with the Act and is subject to its terms when defending a civil action brought against him." Campbell, Workmen's Compensation, § 1279, p. 1074. And in Butler v. Wyman, 128 Cal.App. 736, 739, 18 P.2d 354, 355, it was said, "It is the general rule that a plaintiff need not negative the fact that he is within the act, this being an affirmative defense." The status of the plaintiff has been referred to as an affirmative defense in Baugh v. Rogers, supra, 24 Cal.2d at page 204, 148 P.2d at page 636; Moise v. Owens, 96 Cal.App.2d 617, 618, 216 P.2d 22, and Liberty Mutual Ins. Co. v. Superior Court, 62 Cal.App.2d 601, 605, 145 P.2d 344.

The views expressed in these decisions are completely in accord with the provisions of the act. In all cases where the conditions of compensation do not concur, the liability of the employer is governed by the law of negligence. (Labor Code, § 3602.) It is only where the conditions specified by the act exist that recovery of compensation is the exclusive remedy. (Labor Code, § 3601.)

[23, 24] An employer who contends that he is one of a class of persons protected from an action at law by the Workmen's Compensation Act must plead and prove the conditions necessary to bring himself within the statute. The employee is pursuing a common law remedy which existed before the enactment of the statute and which continues to exist in cases not covered by the statute. It is incumbent upon the employer to prove that the Workmen's Compensation Act is a bar to the employee's ordinary remedy. There is no legal reason why this rule should not apply to Popejoy's action as well as to one by an employee against his own employer.

The judgment and the order denying the motion for judgment notwithstanding the verdict are affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR and SPENCE, JJ., concur.

SCHAUER, J. I concur in the judgment.

37 Cal.2d 269

NORRIS et al. v. SAN MATEO COUNTY TITLE CO. et al.

S. F. 18081.

Supreme Court of California, In Bank.

May 18, 1951.

Rehearing Denied June 14, 1951.

Homer A. Norris, and his wife, Peggie C. Keeler, and William M. Chance, Jr., individually and as copartners doing business under the firm name and style of Peninsula Realty Company, sued the San Mateo County Title Company, a corporation, escrow holder, and Emil J. Ribarsky and Bernice F. Ribarsky, purchasers, to recover a down payment made by the Ribarskys under a contract for the purchase of real property from plaintiffs Norris. The Superior Court, San Mateo County, Edmund Scott, J., granted plaintiffs' motion for summary judgment and defendants Ribarsky appealed. The Supreme Court, Traynor, J., held that since the down payment had been paid to plaintiffs Keeler and Chance, the Norris' agent in negotiating the sale of the property, as the initial payment to vendors in the performance of the contract, title to the down payment had vested in the vendors when they had accepted the contract, and held that since the right of the purchasers to recover the excess of the down payment over the damages caused by their breach of the contract for the sale of property had been foreclosed by a previous judgment, the vendors could recover from the escrow holder, with whom the agents had deposited the funds, the entire amount of the down payment, but would not be awarded a personal judgment in such amount against purchasers.

Modified and affirmed.

Prior opinion 225 P.2d 263.

1. Escrows ⇐8(1), 15

Where vendors sued purchasers for breach of contract and purchasers filed cross-complaint against vendors and their agents alleging fraud and collateral agreement for refund of down payment in event property owned by purchasers was not sold, and judgment was entered against vendors on their complaint and against purchasers on their cross-complaint, judgment conclusively established that none of parties was entitled to any recovery against any of others, and in view of fact that judgment failed to make any disposition

of down payment that had been deposited with escrow holder, whoever had title to deposit at time of action would retain title and could recover money from escrow holder. Code Civ.Proc. § 1908.

2. Escrows ⇐8(1)

Under standard form of escrow instructions, which provides for exchange of money and deed upon stipulated conditions, purchaser retains title to money until conditions have been performed.

3. Escrows ⇐8(1)

Where down payment on purchase of property was not deposited in escrow by purchasers but was paid to vendors' agent pursuant to deposit receipt as initial payment to vendors in performance of contract, title to such down payment vested in vendors when they accepted contract, and upon breach of contract by purchasers, vendors would be entitled to entire down payment from escrow holder with whom agents had deposited funds.

P. H. McCarthy, Jr., F. Nason O'Hara and Herbert S. Johnson all of San Francisco, for appellants.

Norman S. Menifee, Redwood City, for respondents.

TRAYNOR, Justice.

Plaintiffs brought this action against the San Mateo County Title Company and defendants Ribarsky to recover a $2,000 down payment made by the Ribarskys under a contract for the purchase of real property from plaintiffs Norris. The down payment was paid to plaintiffs Keeler and Chance, the Norrises' agents in negotiating the sale of the property. The agents deposited the down payment with the escrow holder, San Mateo County Title Company. The trial court entered summary judgment for plaintiffs based on the affidavit of plaintiff Chance and the judgment roll of a previous action between the parties. It was stipulated that the trial court could consider the judgment roll in ruling upon the motion for summary judgment. Defendants Ribarsky have appealed.

The affidavit in support of the motion for summary judgment avers the following facts: Defendants Ribarsky signed a deposit receipt in which they agreed to purchase the property for $20,000. They paid $2,000 down and agreed to pay the balance within 45 days. Plaintiffs Norris accepted the contract and agreed to pay plaintiffs Keeler and Chance a five percent commission, or in the event of default, one half the down payment. The deposit receipt provided that "In case said purchaser shall fail to pay the remainder of said purchase price or complete said purchase as herein provided, the amounts paid hereon shall, at the option of the Seller be retained as liquidated damages." Plaintiff Chance deposited the down payment with the San Mateo County Title Company, pursuant to authorization of defendants Ribarsky, together with a deed "duly executed by plaintiffs Norris and escrow instructions in conformity with the aforesaid deposit receipt duly executed by plaintiffs Norris." Plaintiffs Norris complied with all the terms and conditions of the deposit receipt, but defendants Ribarsky refused to make any further payment under the contract. The affidavit concludes "That said sum of Two-Thousand Dollars ($2,000.00) remains and is on deposit with defendant San Mateo County Title Company; that plaintiffs Norris are entitled to the whole of said sum, * * * and that plaintiffs Keeler and Chance * * * are entitled to be paid one-half (½) of said sum."

Defendant Emil J. Ribarsky filed an affidavit in opposition to the motion for summary judgment averring the following facts: Defendants were induced to make the down payment under the terms of the deposit receipt by the promise of plaintiffs Keeler and Chance to sell property owned by defendants. By this sale of their own property, defendants intended to secure the funds necessary to perform their contract with the Norrises. Plaintiffs Keeler and Chance did not, however, effect a sale of defendants' property, and as a result of their failure to perform their promise, defendants were damaged in the sum of $2,000.

It appears from the judgment roll in the previous action that after the Ribarskys' refusal to perform their contract, plaintiffs Norris brought an action for damages for breach of contract. The Ribarskys filed a cross-complaint against the Norrises and Keeler and Chance. They alleged that they had been induced to enter into the contract as a result of fraudulent promises by Keeler and Chance that they would sell property owned by the Ribarskys to enable the latter to purchase the Norris property. They further alleged that it was understood that the contract between the Norrises and Ribarskys would be void if Keeler and Chance were unable to sell the Ribarsky property, and that the down payment would then be refunded to the Ribarskys. The cross-complaint also pleaded a cause of action against Keeler and Chance for breach of contract to sell the Ribarsky property.

The trial court in the previous action entered judgment for defendants Ribarsky on the complaint for damages for breach of contract on the ground that plaintiffs failed to prove that they suffered any damage as a result of the breach. It entered judgment against the Ribarskys and in favor of the Norrises and Keeler and Chance on the cross-complaint, based on findings that the allegations with respect to the collateral agreement to sell the Ribarsky property were not true. The judgment failed to make any disposition of the $2,000 that had been deposited with the San Mateo County Title Company.

[1] It is clear from the judgment in the previous action that plaintiffs Norris have no right to recover damages from defendants for breach of contract, and that defendants have no right to damages against plaintiffs Keeler and Chance and no right to restitution against plaintiffs Norris. The rights of all the parties were put in issue and litigated. The judgment entered, having become final, conclusively establishes that none of the parties is entitled to any recovery against any of the others. Sutphin v. Speik, 15 Cal.2d 195, 201–203, 99 P.2d 652, 101 P.2d 497; Bernhard v. Bank of America, 19 Cal.2d 807, 813, 122 P.2d 892; Code Civ.Proc. § 1908.

The previous judgment did not adjudicate the title to the $2,000 down payment held by the San Mateo County Title Company. Since it did determine, however, that none of the parties was entitled to recover from any of the others, it is clear that whoever had title to the deposit at the time of the previous action still retains that title and may recover the money from the title company.

[2, 3] Under the standard form of escrow instructions, which provide for the exchange of money and a deed upon stipulated conditions, the vendee retains title to the money until the conditions have been performed. Hildebrand v. Beck, 196 Cal. 141, 145–146, 236 P. 301, 39 A.L.R. 1076; Kellogg v. Curry, Cal.App., 226 P.2d 381; Hastings v. Bank of America, 79 Cal.App.2d 627, 629, 180 P.2d 358. In the present case, however, the down payment was not deposited in escrow by the vendees pursuant to escrow instructions. It was paid to the vendors' agents pursuant to the deposit receipt as the initial payment to the vendors in performance of the contract, and title to it vested in the vendors when they accepted the contract. Tuso v. Green, 194 Cal. 574, 583, 229 P. 327; Kellogg v. Curry, Cal.App., 226 P.2d 381; Landfield v. Cohen, 89 Cal.App.2d 177, 179, 200 P.2d 149. Since any right the vendees may have had to recover the excess of the down payment over the damages caused by their breach is foreclosed by the previous judgment, the vendors may retain the entire down payment.

The summary judgment is erroneous, however, in awarding plaintiffs a personal judgment against defendants Ribarsky for $2,000. Just as the previous judgment foreclosed any right of the Ribarskys to recover from the plaintiffs, it also foreclosed any right of plaintiffs to recover from them. The judgment must accordingly be modified to provide that plaintiffs recover from the San Mateo County Title Company the sum of $2,000 and that defendants Ribarsky have no right, title or interest in said sum

held by the San Mateo County Title Company. As so modified the judgment is affirmed. Each side is to bear its own costs on this appeal.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.

37 Cal.2d 305

BUCKMAN v. BOARD OF SUPERVISORS et al.

L. A. 21855.

Supreme Court of California, in Bank.

May 25, 1951.

Mandamus proceeding by Elsie Buckman to compel the Board of Supervisors, and others, to reinstate petitioner to her position as a registered nurse, and to approve back pay. The Superior Court, San Luis Obispo County, Ray B. Lyon, J., rendered judgment for respondents, and petitioner appealed. The Supreme Court, Shenk, J., held that if petitioner established certain facts set forth in her petition she would be entitled to reinstatement to an available position and if so reinstated to receive back pay, less any amount otherwise earned by her, from time of her illegal discharge to time of reinstatement.

Judgment reversed.

Prior opinion, 224 P.2d 485.

Hospitals ⚖4

On establishing fact that hospital superintendent's offer to reinstate discharged nurse was not made in good faith, in that it was an offer to reinstate nurse to a position which was not only nonexistent but also deliberately made for a period which superintendent knew was unacceptable to nurse, discharged nurse would be entitled to reinstatement to an available position and if so reinstated to receive back pay, less any amount earned by her, from time of her illegal discharge to time of reinstatement.

Martin Polin, San Luis Obispo, for appellant.

H. C. Grundell, Dist. Atty., San Luis Obispo, and Kingsley T. Hoegstedt, Deputy Dist. Atty., San Luis Obispo, for respondents.

SHENK, Justice.

This is a proceeding in mandamus to compel the respondents to reinstate the petitioner to her position as a registered nurse at the Atascadero General Hospital in San Luis Obispo County; and to approve back pay from the time she was discharged until she is restored to her position. A general demurrer to the petition was sustained without leave to amend. The appeal is from a judgment denying the relief sought. The record on appeal is incorporated in a settled statement which includes a copy of the petition for the writ. On this record the District Court of Appeal reversed the judgment and in the course of the opinion stated that the petitioner, in addition to her prayer for re-instatement, sought "back pay from the time she was discharged until the civil service commission ordered her restored to duty". [224 P.2d 485, 486.] The respondents did not petition for hearing. A petition for hearing on behalf of the appellant was granted mainly to correct the inadvertent statement above quoted lest it become the law of the case.

The question is whether the petition sufficiently states a cause for the relief sought. It alleges, in material respects, that the petitioner was employed as a registered nurse with full and permanent civil service status from the time that service was established in November 1948 and performed her duties as such until she was discharged from her position by the hospital superintendent on February 11, 1949; that she was discharged without sufficient cause; that on March 28, 1949, the county Civil Service Commission unanimously ordered that she be reinstated to her position; that the petitioner had been serving as a nurse at the hospital for several years on the "night shift" from 11:00 p. m. to 7:00 a. m.; that after

the order of reinstatement by the Civil Service Commission the Superintendent offered the petitioner a position only on the afternoon-evening shift from 3 p. m. to 11 p. m.; that the offer of reinstatement of the latter shift was not made in good faith in carrying out the order of the Civil Service Commission for the reasons, first, that there was then no vacancy on the afternoon-evening shift or at any time prior to the commencement of this proceeding; that it was inconvenient if not impossible for the petitioner to accept employment on the afternoon-evening shift because it was necessary for her to be at home in the day time and during those hours to care for an adopted daughter of tender years; that the Superintendent was familiar with the petitioner's situation at her home and offered her a position during the daytime in bad faith, well knowing that the petitioner could accept it (even if a vacancy existed) for that period only at great sacrifice and that she had theretofore refused to accept that assignment; that the Superintendent offered her that non-existent position for the sole purpose of complying in form only with the order of reinstatement of the Civil Service Commission; that the petitioner had requested the respondent Civil Service Commission for a further order of reinstatement but was informed upon the denial of her request that the commission could not interfere in administrative matters; that her claim for back pay had been denied by the respondent board of supervisors.

The petition states a prima facie case for relief. It sufficiently appears therefrom that the offer of the Superintendent was not made in good faith in that it was an offer to reinstate the petitioner to a position which was not only nonexistent at the time but also was deliberately made for a period which the Superintendent knew was unacceptable to the petitioner. If these facts be established the petitioner would be entitled to reinstatement to an available position and, if so re-instated, to receive back pay, less any amount otherwise earned by her, from the time of her illegal discharge to the time of re-instatement.

The judgment is reversed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

104 Cal.App.2d 400

PEOPLE v. SWINEHART.

Cr. 4594.

District Court of Appeal, Second District, Division 1, California.

May 24, 1951.

Frank Edward Swinehart was convicted in Superior Court of Los Angeles County, Thomas J. Cunningham, J., of burglary, and appealed. The District Court of Appeal, Doran, J., held that evidence was sufficient to support conviction.

Judgment affirmed.

Burglary ⇐41(1)

Evidence was sufficient to sustain conviction of burglary.

Eugene V. McPherson, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Defendant was charged with burglary and three prior convictions of felonies. A jury was waived. The defendant was adjudged guilty as charged; two of the alleged prior convictions of burglary were admitted. The appeal is from the judgment.

It is contended on appeal that the evidence is insufficient to support the judgment.

Defendant was accused of entering the home of one Charles M. Bill. It was established by Mr. Bill that the entry was without authority.

Quoting from appellant's opening brief: "Neva Swindle testified as a witness for the People that she resided at 10407 Annetta, South Gate. That this address was directly in back of 10406 Kaufman Avenue and the houses had a yard between them; that Mr. Bill was her father. That on June 26, 1940 while she was in her yard she heard a noise in her father's house. She went to the back door and it was locked, that her key was in the wash-house and when she looked into the house through the back door, and there was a man between the door and the dining room. That the defendant was that man. That about an hour previously she had noticed the man on Annetta Street almost to Michigan. That after she saw the man in the house she went to get her key and unlock the back door but she did not go in the house but went around to the front of the house and saw the defendant on the porch. The screen door was open at that time with the defendant just closing it. That she asked defendant what he was doing in the house and he denied being there. * * That she then went in and called the police officers and noticed defendant walking up the street. That after she had talked to the police she went into the house to inspect it and noticed that the doors and cupboards of the highboy in the back bedroom were open and a jewelry box opened and dumped out and the bed was slightly mussed up. That she made this inspection about 15 or 20 minutes after she saw defendant. That she had never seen the defendant before that day. That when she saw him coming out of the front door he was between the door and the screen."

Defendant was arrested a few minutes later a block or so down the street.

Defendant testified and denied entering the house and testified in substance that, "He went to 10406 Kaufman Avenue in South Gate, went to the front door and opened the screen door and knocked on the door. That he got no answer to his knock so he turned around and was on the porch when a woman approached him and accused him of being in the house. * * * that the purpose of going there was to visit a relative whom he thought lived in South Gate."

The testimony of the witness Neva Swindle and the defendant was substantially the same except the denial of the entry by defendant.

In the light of the record the evidence is abundantly sufficient to support the judgment which is therefore, affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

104 Cal.App.2d 441

ALLSTOT et al. v. CITY OF LONG BEACH et al.

Civ. 17908.

District Court of Appeal, Second District, Division 3, California.

May 25, 1951.

Rehearing Denied June 12, 1951.

Hearing Denied July 19, 1951.

Elmer C. Allstot and others brought action against the City of Long Beach, a municipal corporation, and others for a declaration of rights to pensions under city charter. The Superior Court of Los Angeles County, Percy Hight, J., entered a judgment adverse to the plaintiffs, and they appealed. The District Court of Appeal, Shinn, P. J., held that city had power to modify its pension plan.

Judgment affirmed.

1. Municipal corporations ⇐187(1), 200(1)

City had power to modify its pension plan for firemen and policemen to provide that on and after effective date of amendment a fireman or policeman entitled to retire might do so or not, as he saw fit, but if he chose to continue as an employee he could not thereby earn any additional pension above that to which he was entitled on effective date of amendment. St.1931, p. 2785, § 187; St.1945, p. 2954, § 187.1.

2. Statutes ⇐64(4)

Where section of city charter provided that member of police or fire department could retire after 20 years and would be entitled to receive as pension 50 per cent of salary received one year prior to retirement, plus 1⅔ per cent thereof for each year of service in addition to 20 years and not to exceed 30 years, and thereafter another section of city charter purported to repeal original section with single exception in proviso to effect that any member of department who had served 20 years or more on effective date of amendment would be entitled to retire at any time within 5 years thereafter and be paid pension of such percentage of his salary as he would have been entitled to receive had he retired on effective date of amendment, and it was determined that amendatory section of charter was, except for proviso, invalid, proviso was separable and effective. St.1931, p. 2785, § 187; St.1945, p. 2954, § 187.1.

3. Constitutional law ⇐205(1), 238(1)
Statutes ⇐72

Amendatory provision of city charter modifying pension plan to provide that on and after effective date of amendment fireman or policeman entitled to retire might do so or not, as he saw fit, but that if he chose to continue as employee he could not, as under old pension plan, thereby earn any additional pension above that to which he was entitled on effective date of amendment, did not violate constitutional provisions that all laws of a general nature shall have a uniform operation and prohibiting granting of special privileges or immunities to any class, nor did it violate the equal protection clause of the Fourteenth Amendment to federal Constitution. St.1931, p. 2785, § 187; St.1945, p. 2954, § 187.1; Const. art. 1, §§ 11, 21; U.S.C.A. Const. Amend. 14.

4. Constitutional law ⇐70(3)

Alleged fact that modification of pension rights by statutory amendment of city charter would operate to disadvantage of city through increased expense and loss of experienced employees was not a matter for court in passing on validity of amendment. St.1931, p. 2785, § 187; St.1945, p. 2954, § 187.1.

Kenneth Sperry, Long Beach, for appellants.

Irving M. Smith, City Atty., Clifford E. Hayes, Deputy City Atty., of Long Beach, for respondents.

SHINN, Presiding Justice.

Plaintiffs, 36 in number, brought this action for a declaration of their rights to pensions under the Charter of the City of Long Beach. Nineteen of the plaintiffs are employees of the Police or Fire Departments. The remaining 17 have retired as members of one or the other department. Plaintiffs appeal from portions of the judgment, and the questions involved are common to all of them.

Under section 187 of the City Charter, St.1931, p. 2785, a member of either department could retire after 20 years of service and would be entitled to receive as a pension 50 per cent of the amount of salary received by him one year prior to retirement, plus 1⅔ per cent thereof for each year of service in addition to 20 years and not to exceed 30 years. On March 29, 1945, St.1945, p. 2954, section 187.1 of the Charter was adopted. This section purported to repeal section 187 and, with a single exception to be mentioned, to terminate all rights to retirement pensions. In Kern v. City of Long Beach, 29 Cal.2d 848, 179 P.2d 799, it was denied the effect of a general repeal upon the ground that those were members of either department at the time of the attempted appeal had "a vested pension right and that respondent city, by completely repealing all pension provisions, has attempted to impair its contractual obligations. This it may not constitutionally do, and therefore the repeal is ineffective as to petitioner." 29 Cal.2d at page 856, 179 P.2d at page 803.

Section 187.1 contained a proviso to the effect that any member of either department who had served 20 years or more on the effective date of the amendment, March 29, 1945, would be entitled to retire at any time within five years thereafter and to be

paid a pension of such percentage of his salary as he would have been entitled to receive had he retired on the effective date of the amendment.

After the Kern case was decided, the question arose whether this proviso was effective to place a limitation upon the amounts that might be earned by continuous service under the plan established by section 187, namely, an increase at the rate of 1⅔ per cent for each year of service in excess of 20 years. This question was presented and answered in Palaske v. City of Long Beach, 93 Cal.App.2d 120, 208 P.2d 764; and Allen v. City of Long Beach, Cal.App., 224 P.2d 792. It was there contended by the employees that to deprive them of their right to earn increases in their pensions by remaining in service after the date of the amendment would constitute an unlawful impairment of their contractual rights with the city, and that the attempt so to do was void and ineffectual. This contention, first made by the plaintiff in the Palaske case, was rejected, the court saying, 93 Cal.App.2d at page 132, 208 P.2d at page 771: "His [plaintiff's] contractual right to such a pension has not been impaired by legislation which, operating prospectively, merely withdraws his right or option to earn a bonus by continuing in employment after he has become eligible for retirement." This holding was based upon the opinion of the Supreme Court in Kern v. City of Long Beach, supra, 29 Cal.2d at page 855, 179 P.2d at page 803, that "The employee does not have a right to any fixed or definite benefits, but only to a substantial or reasonable pension. There is no inconsistency therefore in holding that he has a vested right to a pension but that the amount, terms and conditions of the benefits may be altered."

In the Allen case the District Court of Appeal was asked to reverse its holding in the Palaske case and declined to do so, adopting as a part of its opinion the following from the former decision, 224 P.2d at page 795: "'Those who were eligible for retirement on the effective date were entitled to the pension they had earned on the effective date and no more, while those who reached the 20-year mark subsequent to the effective date became eligible for retirement on a 50% pension and no more.'" Plaintiffs now ask us to disregard the quoted holding in the Kern case and also to disapprove of the holdings in the Palaske and Allen cases to the same effect. It is said that the point did not require decision in the Kern case and received practically no consideration by the court in the Allen case. We are not sympathetic to the criticism of either decision.

In Packer v. Board of Retirement, 35 Cal.2d 212, 214, 217 P.2d 660, 662, where the point was directly involved, in referring to the decision in the Kern case, the court said: "It was recognized, however, that the employee was not entitled to any fixed or definite benefits, but only to a substantial pension, and that the statutory language was subject to the implied qualification that the governing body may make reasonable modifications and changes in the system," and quoted from the former decision as follows: "'The rule permitting the modification of pensions is a necessary one since pension systems must be kept flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system and carry out its beneficent policy.'"

The contentions and arguments now made against the validity of the limitation of retirement rights are but a reiteration of those presented by the briefs in the Allen case and by the petitions for hearing in that case and the Palaske case, both of which were denied by the Supreme Court.

[1, 2] It is contended by the present plaintiffs that the proviso of section 187.1, which limits the amount of the employee's pension, cannot stand inasmuch as the attempted repeal of section 187 was void as to vested pension rights; the proviso was not severable from the attempted complete repeal and must fall with it. This contention was urged to and rejected by the District Court of Appeal in the Palaske case and that holding was specifically approved and followed in the Allen case, the court stating, 224 P.2d at page 794: "After due consideration of the arguments advanced by respondents, we adhere to the conclusion reached in the Palaske case, wherein

this court held that the proviso in the repealing amendment saving pension rights to those who had completed the minimum term of service was separable from the invalid portion of the amendment which attempted to repeal all pension rights as to others * * *." In each case the court stated its reasons for so holding, and we considered them to be sound and sufficient. In each case the point was unsuccessfully urged in a petition for hearing. Being familiar with the two decisions it is not difficult for us to understand that counsel are driven to the expediency of asserting they were not well considered. However, the practice of diligent counsel of leaving no stone unturned to escape the consequences of an adverse decision is not uncommon or surprising. Here it is unavailing. Not only are we well satisfied that the former decisions reflect the mature judgment of the court on the points decided, but after giving the problems independent consideration we are fully in accord with the reasoning and the conclusions of the District Court of Appeal in both the Palaske and Allen cases.

[3] In the present action, following the former decisions, the court determined that each of the plaintiffs is entitled to receive as a retirement pension provided by section 187 such percentage of his salary as he would have been entitled to receive had he elected to retire as of March 29, 1945, but that by continuing in the employ of the city subsequent to that date he has not and will not become entitled to any increase above that amount. A further contention is advanced that one result of the limitation accomplished by section 187.1, as construed by the judgment, would be the payment of a greater pension to one who had served more than 20 years on March 29, 1945, than would be payable to one who had served only 20 years on that date, but who might continue in the city service for a number of years thereafter. It is claimed that this is a type of discrimination which is forbidden by sections 11 and 21 of Article I of the State Constitution which provide that: "All laws of a general nature shall have a uniform operation," and which prohibit the granting of special privileges or immunities to any class, and that it is also repugnant to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. The constitutional provisions in our opinion have no application to this situation. The same argument was made in the petition for hearing in the Allen case. It was pointed out that under the decision of the District Court of Appeal one who had served for 30 years on March 29, 1945, would receive two-thirds of his salary, whereas one who had only completed 19 years of service would receive not more than 50 per cent retirement benefits, even though he might continue to serve for a total period of 30 years. It was said in the petition: "Certainly there is no basis for distinguishing between members of a Police or Fire Department who have served 20 years or more and those who have served less than 20 years on a given date which would justify the suggested discrimination." Years of service furnished a logical basis for the grouping of employees. Such classification will not be interfered with by the courts unless it is arbitrary and unreasonable. Deyoe v. Superior Court, 140 Cal. 476, 74 P. 28; In re Willing, 12 Cal.2d 591, 86 P.2d 663. The alleged discrimination results from the fact that those employees who, at the effective date of the amendment had served for the longer periods, had acquired more substantial pension rights than others who had entered the service later, and had served for shorter periods. It was not unreasonable to give recognition to this fact. Upon the contrary, we think it would have been arbitrary and unreasonable to reduce the rights of the older employees to those of the younger class, or to elevate the latter to a higher status which they had not earned. Moreover, we may not overlook the fact that the same argument was advanced in the petition for hearing in the Allen case and that a hearing was denied. So far as we are concerned, the denial of a hearing in a case which decides questions of such widespread interest and importance means that they were fully considered by the Supreme Court and were not deemed to have been decided incorrectly.

[4] The final point made by plaintiffs is that the modification of pension rights as determined by the judgment would operate to the disadvantage of the city through increased expense and the loss of experienced employees. This argument appears to be only a criticism of the advisability of the modification and the good judgment of the electorate. These are matters that are not subject to review by the courts.

It was determined by the judgment that the requirement that employees must retire within five years after March 29, 1945, in order to preserve their pension rights, was inoperative and void. The validity of this provision of the judgment is not here involved.

The judgment, as to the portions appealed from, is affirmed.

WOOD and VALLÉE, JJ., concur.

104 Cal.App.2d 353

PILIBOS et al. v. GRAMAS et al.

Civ. 4318.

District Court of Appeal, Fourth District, California.

May 21, 1951.

Rehearing Denied June 15, 1951.

Hearing Denied July 19, 1951.

A. S. Pilibos and Y. Stephen Pilibos brought action against Mike D. Gramas and Angelo D. Gramas, individually and as copartners doing business under the fictitious firm name and style of Gramas Bros., to restrain any trespass on plaintiffs' realty, on which defendants' predecessor in title had mistakenly erected a deep well for irrigation purposes, and to restrain use of well and removal of pumping equipment, and for damages for water taken from the well, and the defendants filed a cross-complaint to quiet title to realty on which well was located. The Superior Court of Fresno County, Ernest Klette, J., rendered a judgment in favor of the plaintiffs, and the defendants appealed. The District Court of Appeal, Barnard, P. J., held that evidence sustained finding that there was no agreed boundary by common consent of parties.

Judgments reversed in part and affirmed in part.

1. Boundaries ⇐46(1)

In order to establish agreed boundary lines, there must be at least an implied agreement fixing boundary line, actual designation of boundary line on the ground, and an occupation in accordance therewith, and a mutual acceptance of boundary line as common boundary line for such length of time that neither party ought to be allowed to deny its correctness.

2. Boundaries ⇐48(6)

In absence of necessary agreement for boundary line, erection of substantial improvements in reliance on boundary line is not controlling.

3. Boundaries ⇐37(5)

Evidence sustained finding that there was no agreed boundary line by common consent.

4. Waters and water courses ⇐107(3)

In action to recover for water taken from well for irrigation, full value of water was not the proper measure of damage, since cost incurred by defendants in producing the water was a necessary element to be considered.

5. Waters and water courses ⇐107(3)

Where predecessor in title of defendants mistakenly erected a deep well for irrigation purposes on realty of plaintiffs, and defendants, believing that the well belonged to them, used water therefrom for irrigation purposes, and plaintiffs brought action to recover value of water used by defendants, the value of the well received by the plaintiffs as a result of the mistake and unintentional trespass of defendants' predecessor, was an element that should be considered in determining amount to which plaintiffs were entitled.

Linneman, Burgess, Telles & Van Atta, Dos Palos, for appellants.

Milo E. Rowell, Jr., Richard Z. Lamberson, Breckinridge Thomas and Rowell,

Lamberson & Thomas, all of Fresno, for respondents.

BARNARD, Presiding Justice.

This action involves a boundary line between two sections of land on the "West Side" of Fresno County. The plaintiffs are the owners of the Northwest Quarter of section 11, Township 15 South, Range 13 East, M. D. B. & M., and the defendants are the owners of section 2, which adjoins Section 11 on the north.

Section 2 formerly belonged to a farming corporation. Late in 1945, an employee of that corporation was sent to locate a site for a deep well and pump near the southwest corner of Section 2. By mistake, he picked a location which was in fact upon the northwest quarter of Section 11, and about 57 feet south of the true boundary between the sections. A deep well was drilled at that point and a pumping plant installed in December, 1945. Later, a concrete pipe line was installed which was also upon Section 11. The cost of these improvements was about $22,000. The farming corporation leased Section 2 to one Montgomery for the year 1946. From August, 1947 to November 22, 1948, the defendants leased the property. On the latter date they received a deed from the farming corporation conveying to them "Section 2, Township 15 South, Range 13 East, as per United States Government Plats." Prior thereto and on January 12, 1948, a civil engineer employed by the farming corporation had surveyed Section 2, finding monuments placed in the official survey, and disclosing that the well, pump and pipeline were located on the northwest quarter of Section 11. In October, 1948, before they received a deed, and again in March, 1949, the defendants tried to buy from the plaintiffs the strip of land on which the well and pipe line are located. The plaintiffs refused to sell, and ordered the defendants to stay off the property.

This action was brought on May 2, 1949, to restrain any trespass upon the Northwest Quarter of Section 11, to restrain the use of this well or the removal of the pumping equipment, and for damages for water taken from the well. The defendants filed a cross-complaint seeking to quiet their title to Section 2, including the strip of land upon which the well and pump are located. To this end they alleged that the south boundary of Section 2 began at a point 5542.10 feet south of the northwest corner of Section 2, and extended due east.

The court found that the plaintiffs are the owners of the Northwest Quarter of Section 11, and the defendants are the owners of Section 2, both in accordance with the United States Government plat; that the southwest corner of Section 2 and the northwest corner of section 11 is in accordance with the United States Government plats and is located on the west line of Section 2 at a point 5292.15 feet south of an established monument marking the northwest corner of Section 2; that the common boundary line between the two sections commences at that point and runs due east; that the well, pump and pipe line in question are upon the Northwest Quarter of Section 11; and that the parties to this action and their respective predecessors have never at any time agreed or intended to agree, impliedly or expressly, upon a boundary line between these properties, other than the true boundary line as shown by the United States Government plats and as fixed by the court. Other findings were made with respect to damage for water taken.

A judgment was entered decreeing that the plaintiffs are the owners of the Northwest Quarter of Section 11, and the defendants the owners of Section 2, both in accordance with the United States Government plat; establishing the common boundary between Section 2 and Section 11 in accordance with the finding; enjoining the defendants from using said well, pump and pipe line, from removing same, or from further trespassing upon the plaintiffs' property; and awarding the plaintiffs damages in the sum of $6708.00. The defendants have appealed from the judgment.

The appellants first contend that under the doctrine of agreed boundaries it must be held, as a matter of law, that they are the owners of the disputed strip of land

with the improvements thereon. They rely upon the established rules with respect to an agreed boundary as set forth in Roberts v. Brae, 5 Cal.2d 356, 54 P.2d 698; Vowinckel v. N. Clark & Sons, 217 Cal. 258, 18 P.2d 58; Hannah v. Pogue, 23 Cal.2d 849, 147 P.2d 572; Mello v. Weaver, 36 Cal.2d 456, 224 P.2d 691; Young v. Blakeman, 153 Cal. 477, 95 P. 888 and Silva v. Azevedo, 178 Cal. 495, 173 P. 929. They argue that posts were here found purporting to mark the south corners of Section 2 at a point considerably south of the boundaries as found by the court; that there was a road between these purported section posts; that the evidence thus shows the establishment of a line upon the ground; that the appellants and their predecessors occupied Section 2 up to the line thus established for several years; that during such time the owners of Section 11 made no objection; and that since the appellants had made extensive improvements on the land it was not necessary that the period of acquiesence be equal to that required by the statute of limitations.

[1, 2] In order to establish an agreed boundary line under the rules set forth in the cases cited, and many others, there must at least be an implied agreement fixing the line, an actual designation of the line on the ground and an occupation in accordance therewith, and a mutual acceptance of this as the common boundary for such a length of time that neither party ought to be allowed to deny its correctness. While a few of the cases have recognized that the erection of substantial improvements, in reliance upon the mutual agreement, is an element to be considered under some circumstances, it could not be controlling in the absence of the necessary agreement.

It appears from the evidence that late in 1945 an employee of the farming corporation was sent out to locate a site for a well near the southwest corner of section 2. At that time this was all virgin pasture land which had never been farmed, although there was beginning to be some farming a mile or two away. This employee testified that he looked at no maps and made no measurements; that he found a 4 x 4 post and an iron pipe, with a flag in it, standing together; that he thought this marked the southwest corner of section 2 and did not look at any other corners of that section; that there was a road running easterly from where he found these markers; and that Montgomery helped him locate the corner. When asked if this was a well-defined roadway he replied, "Well, they traveled on it". Montgomery testified that he did not look for stakes at other corners; that he farmed Section 2 in 1946; that he just plowed a mile each way and kept it in line with the southwest corner; that he drove his car around "as near as I could on the section line"; that Section 11 was not being farmed; that "There was nothing west of there, or south, being farmed at all"; and that the stake he thought was the corner washed out and he "never marked it again". When asked if there was a road at the point they picked he replied: "Well, I would not call it a road, I'd call it a sheep trail near where we were".

There was evidence that the 4 x 4 post, thus assumed to mark the southwest corner of Section 2, was a remnant of an old sheep corral. Also that the iron pipe with a flag in it was exactly similar to many others, around that part of the country, which had been placed by sheepherders for the purpose of marking the extent of land they had rented for sheep grazing. There is evidence that the Northwest Quarter of Section 11 was never farmed until 1949, when it was farmed by a tenant of the owners; and that its owners were not present during the time the well was being installed. There is no evidence that the respondents or their predecessors knew that the well had been installed, or that Section 2 was being farmed, until sometime in October, 1948. The respondents then objected and continued to object, this action being filed on May 2, 1949. While it is not controlling, the evidence shows that a large number of markers, placed by official surveyors and giving a true basis for starting points, existed within a mile or two of the lands in question.

[3] No agreement for this boundary, either express or implied, and no laying out of the line by common consent appears. The evidence is entirely insufficient to show the required acquiescence. The court's findings against an agreed boundary are fully supported by the evidence.

It is next contended that the award of damages is supported neither by the evidence nor by the law. In their original complaint and in a supplemental complaint filed on January 13, 1950, the respondents alleged that continuously since October 23, 1948, the appellants had taken water from this well; that the reasonable value of said water, so taken, is the sum of $2160.00; and that the respondents were damaged in that amount. In this connection, the court found that the appellants had continuously taken water from this well between October 23, 1948, and May 1, 1950; that the reasonable value of the water so taken is $6708.00, being $12.00 per day from October 23, 1948; and that the respondents have been thereby damaged in the sum of $6708.00.

[4, 5] The only evidence in this connection is the testimony of one of the respondents. He testified that he was familiar with the reasonable value of water pumped from a well in that area with a similar well installation; that this value would vary during different times, depending on whether irrigation was needed; that for the period from October 28 to April 30, he would say the value of water taken was "about $12.00 for 24 hours"; and that he had purchased water on that basis and considered it reasonable. The award exceeds the amount prayed for, and there is no evidence as to the amount of water taken or as to the number of days the pump was operated. In any event, the full value of the water was not the proper measure of damage, and the cost of producing the water was a necessary element to be considered. Union Oil Co. v. Mutual Oil Co., 19 Cal.App.2d 409, 65 P.2d 896; Little v. Mountain View Dairies, 35 Cal.2d 232, 217 P.2d 416. Moreover, in this equitable action the value of the improvements received by the respondents, as a result of a mistake and an unintentional trespass, was an element that should have been considered. The evidence does not sustain the award of damage here made.

That part of the judgment awarding the respondents damages in the sum of $6708 is reversed. All other portions of the judgment are affirmed. Each party to pay his own costs.

GRIFFIN and MUSSELL, JJ., concur.

104 Cal.App.2d 461

HEPLE v. KLUGE et al.

Civ. 14867.

District Court of Appeal, First District, Division 2, California.

May 28, 1951.

Action by Earl W. Heple against Theresa Kluge and Genevieve Kluge. The defendants appealed. Counsel for defendants filed a motion in the District Court of Appeal for leave to withdraw as attorneys for defendants on the appeal. The District Court of Appeal, Dooling, J., held that, where appellants and their attorneys had been in constant disagreement about fees to be paid and conduct of litigation, and attorneys had recommended to their clients that they accept an offer of settlement and clients had refused and had insisted on prosecution of appeal, and suspicion had been created in minds of appellants of the good faith of their attorneys, attorneys' motion for leave to withdraw as attorneys for appellants would be granted on condition that attorneys were entitled to no compensation for whatever services they may heretofore have rendered in connection with the appeal.

Motion granted on condition.

1. Attorney and client ⇐76(1)

The office of attorney is one of the very highest confidence, and when the client suspects and questions good faith of his attorney, the attorney should be permitted to withdraw from the case unless some very

compelling reason exists for forcing the attorney to continue with the case.

2. Attorney and client ⇐76(1)

Where appellants and their attorneys had been in constant disagreement about fees to be paid and conduct of litigation, and attorneys had recommended to their clients that they accept an offer of settlement and clients had refused and had insisted on prosecution of appeal, and suspicion had been created in minds of appellants of the good faith of their attorneys, attorneys' motion for leave to withdraw as attorneys for appellants on the appeal would be granted on condition that attorneys were entitled to no compensation for whatever services they may heretofore have rendered in connection with the appeal.

J. W. Ehrlich, Roy A. Sharff and H. Ward Dawson, Jr., all of San Francisco, for appellants.

Theresa Kluge, Genevieve Kluge, in pro. per.

DOOLING, Justice.

Counsel for appellants have moved this court for an order permitting them to withdraw as attorneys of record for appellants. Appellants in *pro per* oppose the motion.

From the conflicting affidavits it appears that appellants and their attorneys have been in constant disagreement about fees to be paid and the conduct of the litigation, the attorneys having recommended to their clients that they accept an offer of settlement and the clients refusing and insisting on the prosecution of the appeal.

This has created suspicion in the minds of the clients of the good faith of their counsel as indicated by the following language from two letters addressed to one of the attorneys by one of appellants: "We had heard * * * that no one sees the man behind the iron curtain (naming one of the attorneys), also that neither he or (naming another) works on any of the cases, but passes them on to the other members of the firm."

"We have complete confidence in your ability to handle this case if you are on our side (though at time(s) your attitude indicates otherwise)."

This attitude of the clients is further pointed up by the following from the affidavit of one of the attorneys in support of the motion to withdraw:

"That as a result of the attitude expressed * * * your affiant and his associates found no other course of action available than to withdraw; otherwise they would have been placed in the position that if they did not succeed in * * * this appeal, their clients would feel (and so stated) they were not fairly represented, that their best interests were not served, and that there had been a total lack of diligence on the part of their attorneys."

[1] The office of attorney is one of the very highest confidence and when the client suspects and questions the good faith of his attorney the attorney should be permitted to withdraw from the case unless some very compelling reason exists for forcing him to continue with the ungrateful task.

Here appellants suggest that a fee already paid before the trial of the action was agreed to cover services on appeal as well as in the trial court. This might justify our denial of counsel's motion to withdraw, but attached to appellants' own affidavit is a copy of a letter in which one of the appellants stated: "You may rest assured tho' that you will be paid for your services." It thus appears that appellants have recognized counsel's right to additional compensation for handling the appeal.

We are not concerned with the disputes of counsel and their clients as to fees for other services than in the conduct of this appeal and we express no opinion thereon.

[2] The motion of counsel for leave to withdraw as attorneys for appellants on this appeal is granted on the express condition that they are entitled to no compensation for whatever services they may heretofore have rendered in connection with this appeal.

NOURSE, P. J., and GOODELL, J., concur.

104 Cal.App.2d 190

FEJER v. PAONESSA.

Civ. 18291.

District Court of Appeal, Second District, Division 2, California.

May 15, 1951.

Rehearing Denied May 24, 1951.

Action by Tibor Fejer against Ralph D. Paonessa to recover on a contract for services and on a promissory note wherein Miliza Korjus intervened seeking recovery for services rendered under contract with defendant. The Superior Court of Los Angeles County, J. T. B. Warne, J., rendered judgment for plaintiff and intervener and defendant appealed. The District Court of Appeal, Wilson, J., held that plaintiff and intervener were entitled to recover for services rendered either on the contract or on the note executed by defendant in settlement for services rendered.

Affirmed.

1. Appeal and error ⇦1043(7)

Denial of continuance on ground defendant was ill and unable to appear at trial as shown by physician's certificate and his affidavit, was not reversible error where defendant did in fact appear and testified in his own behalf.

2. Continuance ⇦17

A continuance is properly refused on ground that two of defendant's counsel were employed shortly before case was to be tried and were unfamiliar with the action where it was shown that one of counsel was employed the day before case was to be tried and that other counsel had represented defendant from commencement of the action and was present at the trial and took an active part in the proceedings.

3. Continuance ⇦33

Absence of witness on date of trial was not ground for continuance on motion of defendant, where affidavit set forth evidence which defendant claimed absent witness would have given and counsel for plaintiff and intervener stipulated that he would so testify if present. Code Civ.Proc. § 595.

4. Discovery ⇦79

Although statute provides for taking of deposition of one party at instance of the other, there is nothing in the law which compels the latter to have it transcribed and filed. Code Civ.Proc. § 2021.

5. Continuance ⇦7

A motion for continuance of a trial is addressed to the sound discretion of the court.

6. Parties ⇦44

Contention that count of complaint in intervention did not state sufficient facts to constitute a cause of action on ground that it purported to be upon a promissory note made to another person and not assigned to intervener was without merit where the note was for the amount of defendant's indebtedness to intervener and the cause of action might be deemed to be to recover either on the note or the debt.

7. Appeal and error ⇦193(5)

Objection to count of complaint to recover on note for reason that there was no allegation that defendant ever delivered the note was not available to defendant where point had not previously been raised either by demurrer, answer or otherwise and the note represented the total balance arrived at in accounting and found due from defendant to plaintiff and intervener.

8. Trial ⇦397(1)

Where count of amended complaint alleged defendant's indebtedness to third person and her assignment of account to plaintiff, absence of a finding as to whether such assignment was in fact made was without merit where plaintiff and such third person were acting in harmony throughout the action for purpose of collecting amounts due them respectively from defendant and defendant was not required to pay more than the total sum due the parties respectively as required by the judgment.

9. Contracts ⇦290

Defendant, in action on contract failing to plead arbitration clause therein as a defense, waived such defense.

10. Estoppel ⇐52

A person may waive advantage of a law intended solely for his benefit. Civ. Code, § 3513.

11. Trial ⇐395(1)

Objection that finding in action to recover for services rendered on contract that there was due the intervener certain sums for wages and costume rental was a conclusion of law was without merit where other findings were specific as to the services rendered by intervener and the amount agreed to be paid therefor and the amount actually paid.

12. Trial ⇐396(1)

Objection to finding in action to recover on contract for services rendered, that the amount due was "for wages" was immaterial since whether the amount owing was to be considered as wages or money due under contract, the result would be the same.

13. Contracts ⇐355

Judgment in favor of intervener seeking to recover on contract for services was not excessive by reason of inclusion of a certain sum for costume rental where contracts for services and for costume rental were separately made, the latter after the former.

14. Contracts ⇐354

Finding in action to recover for services rendered pursuant to contract to effect that plaintiff and intervener, in order that plaintiff might obtain a release from certain bond moneys, accepted promissory note of defendant together with a check was not outside the issue, since it was based upon evidence that the note and check were executed as part of the transaction wherein an accounting was had between plaintiff and intervener on the one hand and defendant on the other.

Earl Malmrose, John Oliver and William J. Clark, Los Angeles, for appellant.

James M. Gammon, Charles F. Lowy, Los Angeles, for respondent Miliza Korjus.

WILSON, Justice.

By plaintiff's complaint as amended he seeks judgment against defendant upon six causes of action: (1) amount unpaid on a contract whereby plaintiff was employed by defendant to orchestrate and act as musical director of an operetta, and to adapt and arrange a musical score thereof; (2) balance remaining unpaid to Miliza Korjus for services rendered by her as a star singer in the operetta, her claim having been assigned to plaintiff; (3) on a promissory note executed by defendant; (4) on a dishonored check; (5) a percentage of the gross receipts derived from the production of the operetta; (6) for attorney's services rendered in prosecuting Miss Korjus' claim for wages.

The complaint in intervention of Miliza Korjus is (1) for services rendered under her contract with defendant as a star singer and performer in an operetta, and (2) for the use of her gowns and costumes in its production.

The court found that plaintiff and defendant entered into a contract whereby plaintiff agreed to orchestrate an operetta for a salary of $250 a week and to adapt and arrange the musical score for one percent of the gross receipts thereof; that there is due to plaintiff pursuant to the agreement the sum of $2,000 for salary plus $600 representing one percent of the gross receipts from the performances; that defendant is indebted to plaintiff in the sum of $909 for the balance of moneys expended by plaintiff to copyists and orchestrators in copying the music; that defendant became indebted to Miliza Korjus in the sum of $10,000 for her services as a singer and $1,000 for costume rentals and she was paid only $4,500; that on November 1, 1948, plaintiff, intervener, and defendant mutually agreed that the balance due Miss Korjus was $5,500 for services and $1,000 for costume rental, and that the balance due plaintiff was $2,000 for services and $909 for money paid to copyists; that in order to obtain a release of certain bond money posted by defendant with Actors' Equity Association to pay for the services of other actors and workmen employed in the operetta the parties agreed that defend-

ant should execute a promissory note for $8,500 and give plaintiff a check for $909; that the note was made payable to plaintiff; that plaintiff and intervener signed a letter addressed to Actors' Equity Association and delivered it to defendant so that the aforesaid bond could be and it was released by reason thereof; that no part of the check or note has been paid; that at the time of the execution of the note and check the exact amount of the gross receipts of the operetta was not known to the parties and defendant agreed to inform plaintiff at a later date of the amount thereof; that there is due and unpaid from defendant to plaintiff the sum of $2,000 for wages, $600 as his agreed percentage of the gross receipts, and $909 for money advanced by him for orchestration and copyists, totaling $3,509; that there is due to intervener Korjus $5,500 for wages and $1,000 for costume rental.

Judgment was entered in favor of plaintiff and intervener for the respective sums above mentioned. Defendant has appealed from the judgment.[1]

1. Defendant contends that the court erred in denying his motion for a continuance of the trial upon several grounds:

[1] (a) Defendant, as shown by a physician's certificate and his own affidavit, was ill and unable to appear at the trial. However, he did in fact appear and did testify in his own behalf; the fact that he appeared, as he asserts, in violation of his physician's orders does not furnish a ground for reversal. Inasmuch as he actually testified it will be assumed that he gave all evidence which he desired to present to the court.

[2] 2. Two of defendant's counsel, Mr. Oliver and Mr. Clark, were employed shortly before the case was to be tried. A motion was made for a continuance on the ground they were unfamiliar with the action and were unable to go to trial. Mr. Clark stated in his affidavit that he was willing to accept employment if a continuance could be obtained, and that he had a conflicting trial date which compelled him to absent himself during a part of the trial. Mr. Oliver states he was not approached by defendant until November 28, 1949, the day before the case was to be tried, after two previous continuances. Such facts do not entitle defendant to a continuance. (1) The employment of counsel such a short time before the trial is not a sufficient ground for continuance; (2) Mr. Malmrose had represented defendant from the commencement of the action, had prepared and filed answers to the complaint, amended complaint and complaint in intervention, and presumably was familiar with the facts; the record shows he was present at the trial and took an active part in the proceedings, offering objections to questions and cross-examining at least one witness. Moreover, the case was first set for trial on November 7, 1949, and due to the crowded condition of the calendar was continued until November 14, at which time defendant made a motion for a continuance. Over the opposition of counsel for plaintiff and intervener the trial was continued until November 29. There appears to have been ample time within which defendant might have employed counsel who could have familiarized themselves with the case and whose other engagments did not conflict with the trial of the instant action. Defendant cannot take advantage of his own lack of diligence.

[3] (c) A witness on behalf of defendant was absent from the state on the date of trial although he was under subpoena and on a previous date had been instructed to return on the trial date. An affidavit sets forth the evidence which defendant claims the absent witness would have given and counsel for plaintiff and intervener stipulated that he would so testify if present. His evidence was therefore considered as actually given and his absence was not a ground for postponement. Code Civ. Proc., sec. 595.

[4] (d) Defendant contends that his defense was materially injured by the fact

1. The joint brief of plaintiff and intervener (respondents) does not conform with Rule 15(a) of Rules on Appeal (36 Cal.2d 15) in that there is not a single reference to the record in support of any statement of fact contained in the brief.

that his deposition, previously taken by plaintiff, had not been transcribed and filed. Defendant was represented by counsel and was himself an attorney. He knew he had not read and corrected his deposition. If he had desired its use at the trial it was his privilege to have had it transcribed and filed. The statute provides for the taking of the deposition of one party at the instance of the other, Code Civ.Proc., sec. 2021 but there is nothing in the law which compels the latter to have it transcribed and filed.

[5] A motion for the continuance of a trial is addressed to the sound discretion of the court. Since none of the grounds advanced by defendant furnish a sufficient reason for the requested postponement the court did not abuse its discretion in denying the motion.

[6] 2. Defendant contends that the first count of the complaint in intervention does not state sufficient facts to constitute a cause of action for the reason that it purports to be upon a promissory note made to another person and not assigned to intervener. She alleges that defendant employed her to render services as a star singer and performer in a musical stage show and agreed to pay her $10,000 for such services; as a guaranty for prompt payment of her salary defendant executed and delivered to her his promissory note for $10,000; that at defendant's request and for his convenience and agreeable to all parties, he made the note payable to plaintiff, who was the agent of intervener, but delivered it to intervener; that she is the owner and in possession of the note; that only $4,500 was paid on account of her services. The note and the agreed compensation are one and the same debt. The note was made payable to plaintiff at defendant's request, but was delivered to intervener for the reason that it represented salary to be paid to her. The facts with reference to defendant's indebtedness to intervener are fully set forth in the findings above outlined. Furthermore, since the note is for the amount of defendant's indebtedness the cause of action may be deemed to be to recover either on the note or the debt. Ellison v. Henion, 183 Cal. 171, 174, 190 P. 793, 11 A.L.R. 444; Western Fuel Co. v. Sanford G. Lewald Co., 190 Cal. 25, 26, 210 P. 419.

3. Defendant's objection to the second count of the complaint in intervention is also without merit. Such count restates the allegations in the first count and alleges in addition that defendant requested intervener to furnish her own gowns and costumes for the performances and agreed to pay $250 a week for the use thereof; that she used and wore them during the four weeks of the performance for which there became due her the sum of $1,000 in addition to her salary, no part of which has been paid. The contract with reference to costume rental is not a part of the salary agreement. It is further alleged that about November 1, 1948, an accounting was had between plaintiff, intervener and defendant and an account was stated by which it was agreed and determined that there was then due to intervener the sum of $6,500 and to plaintiff $2,000; that as evidence thereof defendant executed and delivered to intervener his promissory note for $8,500, which was, at the request and for the convenience of defendant, made payable to plaintiff, defendant then well knowing that in fact the sum of $6,500 evidenced by the note was due and payable directly to intervener and $2,000 to plaintiff; that no part of the note has been paid. Since the note is for the agreed indebtedness the authorities above cited are applicable.

[7] 4. Defendant asserts that the third count of plaintiff's complaint as amended is insufficient for the reason that there is no allegation that defendant ever delivered the note. The note is the same as that which is the subject of the second count in the complaint in intervention. Defendant's objection is not now available to him since (1) the point has not previously been raised either by demurrer, answer or otherwise, (2) the complaint in intervention specifically alleges delivery of the note, (3) the note represents the total balance arrived at in an accounting and found due to plaintiff and intervener, (4) the facts with reference to the note and the total amount of the indebtedness are fully covered by the findings,

(5) the amounts due and owing to plaintiff and intervener respectively are set forth in the findings and a separate judgment is entered in favor of each for the amount unpaid.

[8] 5. In the second count of plaintiff's amended complaint he alleges the defendant's indebtedness to Miss Korjus and her assignment of the account to him. Defendant complains of the absence of a finding as to whether such assignment was in fact made. Plaintiff is not injured by the absence of such finding and the objection is without merit. Plaintiff and intervener were acting in harmony throughout the action for the purpose of collecting the amounts due them respectively from defendant. Plaintiff has made no claim to ownership of the amount due to Miss Korjus other than by the allegation in his pleading. The findings determine that Miss Korjus is entitled to payment of the amount referred to and the judgment is in her favor for the balance due her. Plaintiff has made no objection to the findings or to the judgment. He is a party to the action and is bound by the judgment. Defendant is not required to pay more than the total sum due the parties respectively as required by the judgment.

[9, 10] 6. Defendant contends that the finding that Miss Korjus kept and performed all the terms of her contracts and rendered services to defendant for the period of four weeks and by reason thereof there became due to her the sum of $11,000, of which $4,500 had been paid, is not sustained by the evidence. He does not question that the evidence shows Miss Korjus performed services for four weeks at an agreed compensation of $2,500 a week; that she furnished her own costumes at defendant's instance and request, for which he agreed to pay her $250 a week; that he paid her $4,500 and no more. Defendant's assertion of error is based upon the fact that the contract between him and intervener contains an arbitration clause requiring that "any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration * * *." The contract does not appear in the pleadings nor did defendant plead the arbitration clause as a defense. He waived his defense by failing to plead it. Trubowitch v. Riverbank Canning Co., 30 Cal.2d 335, 339, 182 P.2d 182; Landreth v. South Coast Rock Co., 136 Cal.App. 457, 461, 29 P.2d 225; Wilson v. Mattei, 84 Cal.App. 567, 576, 258 P. 453. A person may waive the advantage of a law intended solely for his benefit. Civil Code, sec. 3513.

[11] 7. Defendant asserts that the finding "that there is due the intervener" certain sums for wages and costume rental is a conclusion of law. Other findings are specific as to the services rendered by intervener, the amount agreed to be paid for such services, and the amount actually paid, hence the objection to the finding referred to is without merit.

[12] 8. Further objection is made to the same finding that the amount due was "for wages." The materiality of the presence or absence of the quoted words is not pointed out. Whether the amount owing to intervener is to be considered as wages or money due under the contract, the result is the same. Defendant agreed to pay the money and did not do so. In plaintiff's complaint there is an allegation that the amount unpaid was for wages and a prayer for an attorney's fee thereon. Since the court did not allow such fee the allegation and finding are immaterial.

[13] 9. The judgment in favor of intervener is not excessive by reason of the inclusion of the sum of $1,000 for costume rental. The contracts for services and for costume rental were separately made, the latter after the former. The evidence sustains the finding to that effect.

10. Contrary to defendant's contention the conclusions of law are sustained by the findings which have been previously referred to and this opinion will not be encumbered with a further recitation of their contents.

[14] 11. The finding that plaintiff and intervener signed a letter to Actors' Equity Association in order that defendant might obtain a release of certain bond moneys which he had posted for payment of services of other actors and workmen em-

ployed in the operetta and at the same time defendant executed his promissory note for $8,500 and gave plaintiff a check for $909 is not outside the issues. The finding is based upon the evidence that the note and check were executed as a part of the transaction wherein an accounting was had between plaintiff and intervener on the one hand and defendant on the other and an account was stated wherein the parties agreed upon the several amounts owing from defendant to the other parties.

12. Defendant assigns error in the overruling of many of his objections to the introduction of evidence. We have carefully examined all such objections. While some of the evidence objected to may have been immaterial it has no bearing whatsoever upon the final result of the action and cannot have had the slightest influence upon the trial judge in rendering his decision. The evidence to which no objections were offered fully sustains the findings and judgment.

Judgment affirmed.

MOORE, P. J. and McCOMB, J., concur.

104 Cal.App.2d 453

PEOPLE v. SERRANO.

Cr. 4612.

District Court of Appeal, Second District, Division 3, California.

May 25, 1951.

Rueben P. Serrano was convicted in the Superior Court of Los Angeles County, Percy Hight, J., of contributing to the delinquency of a minor and defendant appealed from the judgment and from an order denying his motion for a new trial. The District Court of Appeal, Shinn, P. J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Infants ⇐20

Evidence sustained conviction for contributing to delinquency of a minor.

2. Criminal law ⇐1173(2)

In rape prosecution, elements of included offenses should be stated in appropriate instructions, but where one charged with rape makes admissions of acts which clearly constitute offense of contributing, testifies to having made admissions and does not deny their truthfulness, he is not in a position to claim prejudice for failure to give instruction on contributing which would necessarily bring his conduct within definition of that offense.

Clifton A. Hix, San Pedro, for appellant.

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Rueben P. Serrano, charged with rape, was convicted in a jury trial of contributing to the delinquency of a minor. He appeals from the judgment and from an order denying his motion for a new trial.

The age of the girl, sixteen years, furnished the only element of criminality in the acts to which she testified. It is urged that her testimony was so contradictory and uncertain as to be of no value as evidence, and there is much to be said for the argument. She testified that defendant had sexual intercourse with her on three occasions, naming the places but not specifying dates with any degree of certainty. She also testified that defendant had attempted an act of sexual intercourse with her but none had ever taken place, although she admitted having had intercourse with four other boys. Defendant denied there had been any intercourse. Both testified that they drove around together in defendant's car after dances. Had it not been for the admissions and the testimony of defendant himself, it is doubtful that the jury would have convicted him of any offense. The arresting officer testified that he asked defendant what had occurred on

the night of his arrest and defendant replied that he had "tried to get her" but had not been successful, and that on prior occasions he had been successful. Defendant testified that he had told the officer that he had done nothing that night or any other night; that he tried but just did not want to do it; that he was scared to do it, did not dare to do it; that he tried and was "too darn nervous." This coincides with one line of the girl's testimony.

[1] Defendant's argument ignores the testimony as to the attempt. In arguing the point of insufficiency of the evidence he says: "If the defendant was guilty of anything, he would have been guilty of rape. The jury has found by its verdict that he was not guilty of rape; therefore, he was guilty of nothing, and the verdict is not supported by the evidence." It is conceded that the offense of which defendant was convicted is included in the offense with which he was charged, and it is not claimed that the acts admitted by defendant do not constitute contributing. That the girl was a delinquent in the eyes of the law appears from her own testimony that she made herself available to the youth of the community. It could scarcely be doubted that in so doing she contributed to their delinquency. But her fault does not exonerate the defendant, nor does the fact that she was already a delinquent deprive her of the protection which the law affords her. The offense does not consist of causing delinquency, but only of contributing to it. And if the contribution of defendant tended in substantial degree to perpetuate an existing condition it is immaterial that others may have contributed to the same or a greater extent. There is no merit in the claim that the evidence was insufficient to justify the verdict.

[2] Among the forms of verdicts submitted to the jury was one of conviction of the offense of contributing. No instructions were requested and none were given to the effect that defendant could be found guilty of contributing. It is argued that this was error, but we have been unable to follow the thread of the argument. The jury gave defendant the benefit of the doubt and he does not say how he could have fared better if instructions had been given as to the lesser included offense. The elements of included offenses should be stated in appropriate instructions, but where one charged with rape makes admissions of acts which clearly constitute the offense of contributing, testifies to having made the admissions and does not deny their truthfulness, he is not in a position to claim prejudice for the failure to give instructions on contributing which would necessarily bring his conduct within the definition of that offense. The record discloses no prejudicial error.

The judgment and order are affirmed.

WOOD and VALLÉE, JJ., concur.

104 Cal.App.2d 336

LATHAM v. SANTA CLARA COUNTY HOSPITAL et al.
Civ. 14747.

District Court of Appeal, First District, Division 2, California.

May 21, 1951.

Rehearing Denied June 20, 1951.

Hearing Denied July 19, 1951.

Action by Roy Latham against the Santa Clara County Hospital, the County of Santa Clara, and others, for tortious injuries received by plaintiff as a patient in the county hospital. The Superior Court in and for the County of Santa Clara, Byrl R. Salaman, J., rendered a judgment sustaining defendants' demurrer to the complaint, and the plaintiff appealed. The District Court of Appeal, Dooling, J., held that there could be no liability imposed upon county or its Board of Supervisors for negligent injury incurred by patient in county hospital.

Judgment affirmed.

1. Counties ⇐144

Liability cannot be imposed upon a county or its board of supervisors for negligent injury incurred by any patient in a county hospital, especially in view of statute providing that nothing contained

in statute, providing for rates to be charged patients, should be construed as an enlargement or modification of existing provisions of law relating to admissibility of persons to any county hospital. Welfare and Institutions Code, § 203.5.

2. Hospitals ⇐5

A county is authorized only to furnish hospitalization to those persons who cannot secure it elsewhere. Welfare and Institutions Code, § 203.5.

3. Statutes ⇐212.1

The legislature is presumed to know decisions of courts construing a statute which it is amending.

4. Counties ⇐144

Under statute providing that Board of Supervisors may fix rates to be charged patients admitted to any county hospital, and further providing that nothing contained in the statute shall be construed as an "enlargement or modification of existing provisions of law relating to admissibility of persons to any county hospital," quoted phrase can have no other purpose than to make clear that legislature intended that county hospitals could not move from governmental to proprietary fields by admitting patients who were in a position to secure same service in private institutions. Welfare and Institutions Code, § 203.5.

5. Counties ⇐141
Municipal corporations ⇐732

A governmental agency does not incur liability for negligence by doing an act which is ultra vires.

6. Courts ⇐91(1)

An intermediate appellate court must accept settled law as it finds it.

Emmett R. Burns, Edward A. Friend, San Francisco, for appellant.

Bronson, Bronson & McKinnon, San Francisco, Howard W. Campen, County Counsel of Santa Clara County, San Jose, for respondents.

DOOLING, Justice.

[1] This appeal presents a question in the field of governmental liability for tort. That the law on the general subject, both by legislative and judicial action, is being extended in favor of such liability needs no elaboration. See the excellent discussion of the subject in People v. Superior Court, 29 Cal.2d 754, 756–762, 178 P.2d 1. The tendency both by legislation and judicial decision has been to enlarge the field of governmental liability. Nevertheless in this case we feel constrained both by the precedent of earlier decisions in the particular area of governmental activity involved and by reason of the legislative action in enacting section 203.5, Welfare and Institutions Code, in 1947, Stats. 1947, p. 2974, to hold once again that there can be no liability imposed upon a county or its board of supervisors for negligent injury incurred by any patient in a county hospital.

The earliest decision on the subject in this state is Sherbourne v. Yuba County, 21 Cal. 113. This was followed, in point of time by Davie v. Board of Regents, etc., 66 Cal.App. 693, 227 P. 243. The Sherbourne case held that in caring for an indigent in a county hospital the county was performing a governmental function and could not be held liable for tortious injury to the patient. The Davie case applied the same rule to the University of California in a case in which a student was tortiously injured while a patient in the university infirmary.

Next in point of time comes Goodall v. Brite, 11 Cal.App.2d 540, 54 P.2d 510. Not a tort case, this was a taxpayer's action to enjoin the county board of supervisors from admitting certain classes of patients to the county hospital. In that case the court held that the county hospital might legally only receive patients who by reason of inability to pay the rates charged at private hospitals in the vicinity might be deprived of hospitalization if they were not treated in the county hospital. The court expressly reserved the question of the right to receive patients into a county hospital without regard to ability to pay where there were no other

hospital facilities "within a reasonable distance". 11 Cal.App.2d at page 543, 54 P.2d at page 512.

In Calkins v. Newton, 36 Cal.App.2d 262, 97 P.2d 523, a tort case, the complaint expressly alleged that there were no other hospital facilities in the county, that plaintiff had entered the county hospital as a paying patient and that the hospital was operated at a profit. The court, in holding that no cause of action was stated against the county, first decided the question left open in the case of Goodall v. Brite, supra, saying (after referring to the allegation that no other hospital facilities were available in the vicinity): "Under such circumstances it is proper for the county to furnish the service to such persons * * * because they are in the same situation as the indigent sick in that they cannot obtain the care they need regardless of their ability to pay for it. * * * Such powers, so exercised, are governmental in their character." 36 Cal.App.2d at page 266, 97 P.2d at page 525.

The court concluded that under the statutory provisions governing the operation of county hospitals in California such hospitals cannot legally be operated in a proprietary capacity, saying:

"In view of these decisions we are not inclined to hold that liability for negligence might not exist as against a county if the legislature empowered it to engage in the hospital business * * *. But we do not find such authority in the laws which relate to county hospitals in this state. Here, the operation of the hospital is governmental. * * *

"The imposition of a charge for service is not inconsistent with the exercise of a governmental function. (Citing cases.) Nor is the fact that the county general hospital was operated at a profit controlling. A county is authorized only to furnish hospitalization to those persons within the county who cannot secure it elsewhere. The county can charge only the cost of the service. The board of supervisors has not the power, merely by disregarding the limitations in the law, to admit patients who are not entitled to the service or to charge the persons who should have the service an excessive fee. A governmental agency does not incur liability for negligence by doing an act which is *ultra vires*." 36 Cal.App.2d at pages 267–268, 97 P.2d at page 526.

The same principle was again announced in Griffin v. County of Colusa, 44 Cal. App.2d 915, 113 P.2d 270. In all three of the last cited cases a hearing was denied by the supreme court.

[2] Appellant argues that these cases do not control where the county hospital accepts full-paying patients in competition with private hospitals in the vicinity. This disregards the holdings in Goodall v. Brite, supra, and Calkins v. Newton, supra, that "(a) county is authorized only to furnish hospitalization to those persons * * * who cannot secure it elsewhere."

Appellant cites sec. 203.5, Welfare and Institutions Code, in support of its claim that county hospitals may now accept patients able to pay full rates in competition with private hospitals. That section, adopted in 1947, so far as material, reads:

"The board of supervisors * * * may fix the rates to be charged patients admitted to any county hospital * * *. The board * * * may adjust or compromise hospital charges according to the financial condition of the patient, his estate, or legally responsible relatives. * *

"Nothing contained in this section shall in any way affect or modify the provisions of Sections 200 to 203, inclusive, of this code, nor * * * be construed as an *enlargement or modification of existing provisions of law relating to the admissibility of persons to any county hospital.*" (Italics ours.)

[3, 4] The legislature is presumed to know the decisions of the courts construing the statute which it is amending. 23 Cal.Jur. pp. 795–796. The italicized language of sec. 203.5 can have no other purpose than to make clear that the legislature intended that county hospitals could not move from the governmental to the proprietary field by admitting patients who were in a position to secure the same service in private institutions.

[5] We cannot follow appellant's arguments that the hospital had ostensible authority to enter the proprietary field by admitting patients able to pay the full rate or that it is estopped to deny that it had that authority. As succinctly said in Calkins v. Newton, supra: "A governmental agency does not incur liability for negligence by doing an act which is ultra vires." 36 Cal.App.2d at page 268, 97 P.2d at page 526; see County of San Diego v. California Water, etc., Co., 30 Cal.2d 817, 825–826, 186 P.2d 124, 175 A.L.R. 747; Miller v. McKinnon, 20 Cal.2d 83, 90 et seq., 124 P.2d 34, 140 A.L.R. 570.

Beard v. City and County of San Francisco, 79 Cal.App.2d 753, 180 P.2d 744, went no further than to hold that a consolidated city and county might, in its *municipal* capacity *as a city*, conduct a proprietary hospital.

[6] Much as we may deplore a rule of law which deprives the indigent, who are least able to bear the loss, along with the wealthy, if they are admitted to a county hospital as patients, of recourse against the county for tortious injuries therein received, an intermediate appellate court must accept the settled law as it finds it. The demurrer was properly sustained to this complaint which counted on tortious injuries received by a patient in a county hospital.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

104 Cal.App.2d 359

PEOPLE v. BEBER et al.

Cr. 2623.

District Court of Appeal, First District, Division 1, California.

May 22, 1951.

Edward A. Beber, Richard Kobritz and Harold F. Churchill were indicted for conspiring to violate the Corporate Securities Act, of violating section three of that act by selling shares of a certain corporation without a permit from the State Corporation Commissioner, and of committing grand theft by feloniously taking $20,000, the property of a named individual. The Superior Court in and for the City and County of San Francisco, H. A. Van Der Zee, J., dismissed the indictment and the state appealed. The District Court of Appeal, Wood, J., held that the first two counts of the indictment should not have been dismissed but that evidence before grand jury was insufficient to support accusation that defendant committed grand theft by feloniously taking $20,000.

Order affirmed in part and reversed in part.

1. Indictment and Information ⇐10

Evidence before grand jury was sufficient to support accusation made in count one of indictment that defendants conspired to aid in issue and sale of and to sell and to cause and assist to be issued, executed and sold, securities in nonconformity with a permit of the Commissioner of Corporations of the state and contrary to the provisions of the Corporate Securities Act of the state, and conspired to collect, aid in collecting and make collections of consideration to be paid on account of subscriptions for sales of stock in a certain corporation, prior to and before issuance of a permit of the Commissioner of Corporations. Gen. Laws, Act 3814, § 3; Pen.Code, § 182.

2. Indictment and Information ⇐10

It is function of grand jury, not of courts, to determine whether accusations should be made and court may not substitute its judgment as to weight of the evidence. Pen.Code, § 921.

3. Corporations ⇐98

The issuance of shares of stock of a corporation means the act or contract of corporation by which shares become vested in a person as a member or stockholder.

4. Corporations ⇐98

The time when a share of stock originally comes into existence, and is deemed issued, is controlled by intent of parties and is ascertained by examining contract which they have executed concerning such issue.

5. Licenses ⇐39.12

Fact that certificate of stock was executed and delivered by defendants to certain party after receipt of a permit from Commissioner of Corporations did not give validity to defendants' acts done prior to issuance of permit. Gen.Laws, Act 3814, § 3; Pen.Code, § 182.

6. Licenses ⇐40

Under statute imposing a penalty on any person who knowingly aids in issue or sale of, or issues or executes, or sells, or causes or assists in causing to be issued, executed, or sold, a security in nonconformity with a permit or contrary to provisions of Corporate Securities Act, when appropriately put in issue by pleadings, receipt in absence of a permit of consideration specified in a contract for sale of stock is a public offense. Gen.Laws, Act 3814, § 18; Pen.Code, § 182.

7. Criminal law ⇐147

Where receipt and collection of consideration for stock allegedly sold by defendants to certain person, according to evidence before grand jury, took place while within three-year period, and contract for sale to such person and issuance of stock to him may well have occurred within three years, count of indictment accusing defendants of conspiring to violate Corporate Securities Act by selling shares of certain corporation without a permit from State Corporation Commissioner was not barred by three-year statute of limitations. Gen.Laws, Act 3814, §§ 3, 18; Pen. Code, § 182.

8. Indictment and Information ⇐79

Where count of indictment accusing defendants of selling to a certain person 200 shares of corporate stock for $20,000 and alleging that such stock was then and there offered to public for sale and sold to such person by defendants without having first obtained a permit from Corporation Commissioner and in violation of Corporate Securities Act erroneously referred to section three which dealt with sale by company issuing stock, and offense alleged was really a violation of section prohibiting selling or assisting in sale of shares of stock of a corporation in absence of a permit therefor, erroneous reference to section three did not render count defective. Gen. Laws, Act 3814, §§ 3, 18.

9. Indictment and Information ⇐10

Evidence before grand jury justified accusation made in count two of indictment that defendants sold or assisted in sale of shares of stock of a corporation in absence of a permit therefor in violation of the Corporate Securities Act. Gen.Laws, Act 3814, § 18; Pen.Code, § 182.

10. Criminal law ⇐149

Where indictment charging defendants with selling or assisting in sale of shares of stock of a corporation in absence of a permit therefor in violation of Corporate Securities Act was returned by grand jury on March 29, 1949, if subscription agreement signed by party on March 25, 1946, to whom stock was sold by defendants, was but an offer, not the acceptance of an offer by him, contract of sale was consummated at a later date and within three-year period of statute of limitations. Gen.Laws, Act 3814, § 18; Pen.Code, § 182.

11. Indictment and Information ⇐10

Evidence before grand jury of representations by defendants to certain person that money received from sale of stock would be used for building of a frozen food plant and for buying equipment, that a building was in partial construction but that it was war time and many things were hard to get, in absence of evidence that, at the time defendants made any of the representations, defendants had no intention of carrying them out or seeing them accomplished, was insufficient to support accusation in indictment that defendants committed grand theft by feloniously taking $20,000 from a certain person. Gen.Laws, Act 3814, §§ 3, 18; Pen.Code, § 182.

Marcel E. Cerf, Robinson & Leland, San Francisco, for respondent Beber.

Leslie C. Gillen, John R. Golden, San Francisco, for respondent Churchill.

Arthur F. Edwards, San Francisco, for respondent Kobritz.

Fred N. Howser and Edmund G. Brown, Attys. Gen., Clarence A. Linn, Deputy Atty. Gen., for appellant.

FRED B. WOOD, Justice.

On March 29, 1949, the grand jury presented an indictment in which the People accused defendants of conspiring to violate the Corporate Securities Act, Gen.Laws, Act 3814 (count I), of violating section 3 of that act by selling shares of a certain corporation without a permit from the state corporation commissioner (count II), and of committing grand theft by feloniously taking $20,000, the property of one Harry Randall (count III). The trial court dismissed the indictment. Plaintiff appeals.

In respect to each of the three counts, there are these issues upon this appeal: (1) Were the defendants indicted without reasonable and probable cause? and (2) was the crime charged barred by the statute of limitations?

In count I, defendants Beber, Kobritz and Churchill are accused of violating section 182 of the Penal Code, i. e., that they continuously from January 13 to and including March 30, 1949, willfully, unlawfully and feloniously conspired "to aid in the issue and sale of and to sell and to cause and assist to be issued, executed and sold securities in non-conformity with a permit of the Commissioner of Corporations * * * contrary to the provisions of the Corporate Securities Act * * * and to willfully violate and fail to comply with the provisions of the Corporate Securities Act * * * and to collect, aid in collecting, and make collections of the consideration to be paid on account of subscriptions for sales of stock in a corporation, to wit, Churchill's Frozen Foods, Inc., prior to and before the issuance of a permit of the Commissioner of Corporations * *." The defendants, this count alleges, committed 12 overt acts in pursuance of the objects of the conspiracy. We are concerned principally with the 7th, 8th, 9th and 12th alleged overt acts, described as follows: That on March 25, 1946, defendants Beber and Kobritz had a conversation with Harry Randall and Ed Randall at the office of Allied Produce Company, San Francisco; on March 30, 1946, defendants Beber and Kobritz received and collected $20,000 from Harry Randall; on April 8, 1946, defendants Beber, Kobritz and Churchill mailed to Harry Randall a receipt for $20,000, consideration for 200 shares of stock in Churchill Frozen Foods, Inc., a corporation; and on July 28, 1946, the defendants transported Harry Randall and other persons to Stockton from San Francisco.

It appears from the evidence before the grand jury that Churchill Frozen Foods, Inc., was incorporated March 7, 1946. The first application for a permit for the sale of stock was made April 19th. Supplemental applications or amendments were made April 24 and May 8, 1946. On the latter date a permit was granted.

The permit indicated that the corporation was to take over the business which until then had been conducted as a partnership by Harold F. Churchill, A. Schapiro and Edmund Nies under the name of Harold F. Churchill Company; that the company proposed to issue to each of the partners 914 shares of stock; that the corporation proposed to sell 1500 shares to the public to liquidate the liabilities of the predecessor partnership and to add to the working capital, and 750 shares to certain persons for organization and promotional services. The application showed assets of the partnership were $257,193 and liabilities $191,965. The net worth of the partnership, according to an appraisal made by the appraiser appointed by the corporation commissioner, was about $91,000.

The evidence before the grand jury showed that Harry Randall (who had known Kobritz since 1944, and through his brother, Edward Randall, had heard from Kobritz about Churchill Frozen Foods, Inc.) went to see Kobritz at the office of Allied Produce Company, on March 25, 1946. Beber, called in by Kobritz, told Randall in Kobritz' presence that he, Beber, was selling stock in Churchill Frozen Foods, Inc., of Stockton; that the money from the sale of the stock was to be used for the building of a frozen food plant in Stockton and for buying equipment; that in the last four or five years the company

made a profit of around $15,000 to $18,000 a year; that by building a plant they would be able to materially increase their profit; that he, Beber, dictated the policy of the company, that is, he told them what to do and what not to do when it came to freezing foods; that no processing of foods was undertaken until orders had arrived and in that way there was no possibility of loss due to merchandise on hand not being sold; and that the stock was being sold only to certain people and that he, Beber, was buying $10,000 worth of the stock. At this meeting Beber produced a stock subscription agreement which Randall signed, subscribing for 200 shares of stock at a par value of $20,000. Beber told Randall he would like to have payment by the end of the month, and to make the check payable to "Churchill Frozen Food Corporation," and to bring the check down to Beber and if the latter was not in to leave it with Kobritz.

On March 30, 1946, Randall took to Beber's office a check for $20,000, payable to Churchill Frozen Foods, Incorporated, and signed by Harry Randall as drawer. Beber was not in, so Randall gave it to Kobritz. Kobritz accepted the check and said to Randall, "I'll see Mr. Beber gets it, and you will get a receipt in a few days." Three or four days later, Randall received a receipt, on the letterhead of Harold F. Churchill Company, bearing the signature of Mr. Schapiro. Randall's check was endorsed by Harold F. Churchill, was deposited in the Bank of America at Stockton on April 2, 1946, and was paid by the drawee bank on April 4th. On or about May 16th, Randall received a certificate of stock of the corporation.

In June, Kobritz told Randall that things with respect to the corporation were coming along very nicely. In July, 1946, Randall and his brother were taken to a stockholders' meeting in Stockton. They were notified of this meeting by Beber through Kobritz. They went to Stockton in Beber's car. Randall met Churchill for the first time at this meeting.

Count I of the indictment also alleged the commission of certain overt acts in connection with the sale and issuance of shares of the same corporation to Philip Krieg and to George S. Helms. With reference to those transactions, the evidence before the grand jury indicated that early in 1946 Kobritz told Philip Krieg how good the produce business was, that he had changed from the company he used to work with to another and that they were doing a fabulous business; that his four partners would invest $10,000 each in some frozen food business and if they had their own freezing plant they could save a lot of hauling; and that they were going to organize a corporation and build a plant. In February, 1946, Krieg went to Kobritz' office and Beber was called in. Beber showed Krieg a statement of the Harold F. Churchill Company showing profits of from 25 to 27 per cent. Beber said he was going to invest $10,000 in the company. No mention was made of any indebtedness of the company. Beber produced a stock subscription agreement and asked Kreig if he wanted to subscribe for some stock. Krieg subscribed for 50 shares. Kobritz was present during the entire conversation. Beber and Kobritz said the money from the subscriptions was to go to build a new plant in Stockton. Beber's name was on the list as subscribing for 100 shares. Beber told Krieg he would let him know later as to how the shares were to be paid for. On March 7th, Kobritz telephoned Krieg, asking if he could come to the office and bring a check. Krieg did so and signed it and gave it to Kobritz, who took it to Beber's office. About a week later, Krieg received a receipt on the letterhead of the Harold F. Churchill Company. Sometime in May, 1946, he received through the mail a stock certificate bearing date May 21, 1946. Krieg, with Randall, went to Stockton in July, 1946, in Beber's car to see the new plant, which Krieg described as follows: "And there was a shed there, a shed about a hundred feet long, but there was only the frame up, and the trusses, and part of the roof was on. The roof was aluminum, corrugated aluminum sheets and sides, maybe 20 or 30 feet was up. There was no new machinery, but they showed us a base where a freezer was going to stand, the motor

was going to stand, a cast block concrete base. Outside of that there was nothing done, you couldn't see anything where the money went, yet. But it was war time yet, and they said we had to have a priority, that many things was very hard to get, but they plant would be complete in a short while."

George S. Helms had a conversation with Kobritz in regard to Churchill Frozen Foods, Inc. Kobritz told him of a plan to erect a cold storage plant and that $300,000 was needed to do it. Helms asked if he could invest and Kobritz told him to see Beber. Helms saw Beber in February, 1946, and Beber told him $300,000 was needed to build a cold storage plant; that the three partners of Allied Produce Company were each putting up $10,000, and that he, Beber, had subscribed to $10,000 in stock of Churchill Frozen Foods, Inc. Two or three days later, Helms signed a subscription agreement for $2500 of that stock. Ten days or two weeks later, Beber asked for the money. On March 12th, Helms obtained a cashier's check for $2500, which he delivered to Beber that day or a day or two later. Within 10 days Helms received an undated receipt, on the letterhead of Harold F. Churchill Company, signed by A. Schapiro. In the latter part of May, Helms received a certificate of stock in the mail. He was told nothing of the indebtedness of Churchill Frozen Foods, Inc.

Each of the checks delivered respectively by Randall, Krieg, and Helms was endorsed by Harold F. Churchill and deposited in the Stockton branch of the Bank of America to the credit either of Harold F. Churchill Company or of Churchill Frozen Foods, Inc.

A statement of stockholders of the company as of October 31, 1946, showed a certificate issued to Abraham Schapiro for $39,100 par value of stock "Issued for consideration other than cash." This certificate was surrendered and the stock reissued, $13,100 par value going to Schapiro, $13,000 to Beber, and $13,000 to one Earl L. Johnson, and no cash sale was shown by the corporation to Beber.

[1, 2] This evidence was sufficient to support the accusation made in count I that defendants conspired to aid in the issue and sale of and to sell and to cause and assist to be issued, executed and sold securities in nonconformity with a permit of the Commissioner of Corporations of the state and contrary to the provisions of the Corporate Securities Act of the state, and conspired to collect, aid in collecting and make collections of the consideration to be paid on account of subscriptions for sales of stock in Churchill Frozen Foods, Inc., a corporation, prior to and before the issuance of a permit of the Commissioner of Corporations. The evidence shows that they did sell or assist in the sale of shares of stock of a corporation in the absence of a permit therefor, acts proscribed by section 18 of the Corporate Securities Act, Deering's Gen.Laws, Act 3814, as it existed in 1946. The manner in which these three sales transactions were handled furnished a basis for the inference that Kobritz in finding a prospect and bringing that prospect to Beber, Beber in giving a sales talk and getting the signature and forwarding the check to Churchill, and Churchill in endorsing and depositing the check, were working together in furtherance of a conspiracy or agreement between them for the accomplishment of the purposes described in count I of the indictment. This evidence furnished the grand jury reasonable and probable cause for believing that the crime described had been committed, and that it had been committed by these defendants. As stated in section 921 of the Penal Code, "The grand jury ought to find an indictment when all the evidence before them, taken together, if unexplained or uncontradicted, would, in their judgment, warrant a conviction by a trial jury." It is the function of the grand jury, not of the courts, to determine whether or not the accusation should be made. A court may not substitute its judgment as to the weight of the evidence. See Lorenson v. Superior Court, 35 Cal.2d 49, 55, 57, 216 P.2d 859; Weber v. Superior Court, 35 Cal.2d 68, 69, 216 P.2d 871; Mold v. Superior Court, 35

Cal.2d 73, 216 P.2d 874; People v. Nagle, 25 Cal.2d 216, 153 P.2d 344.

Respondents contend that the three-year statute of limitations had run against the offense charged in count I of the indictment, prior to the filing of the indictment on March 29, 1949. Their theory is that when Harry Randall signed the subscription agreement on March 25, 1946, a sale of stock to him was fully consummated and on that day the statute of limitations commenced to run. They rely principally upon Peopel v. Twedt, 1 Cal.2d 392, 35 P.2d 324. In that case it appeared that Twedt was president of a certain corporation and negotiated the sale of stock thereof to one Kloster. He made her three successive offers, each of which she rejected. Finally, by letter of May 17 she offered to purchase a number of shares at a certain price, if she could pay for them on May 20th. He accepted this offer by letter dated May 18 and postmarked May 19. The court considered that the sale was consummated upon the mailing of Twedt's letter of acceptance, this exchange of letters having constituted the first time that the minds of the parties met on the transaction. If his acceptance was mailed on the 18th, the statute had run; if on the 19th, it had not run. The court sent the case back to the trial court to ascertain which was the date of mailing. On the first trial, the court had treated May 20 (the day on which the subscriber mailed Twedt the consideration for the stock) as the date when the crime was committed. The Supreme Court deemed that erroneous, upon the ground that "The sending of the money was not a necessary part of the making of the contract, any more than the delivery of the stock, which did not take place until June" 1 Cal.2d at page 399, 35 P.2d at page 327. That decision is not applicable here, because in this case it does not appear from the evidence before the grand jury whether the document which Randall signed on March 25, 1946, was in the nature of an offer by him to buy stock, or an offer from the corporation to him which upon his signing became a contract of sale. If the subscription agreement signed by Randall on March 25, 1946, was but an offer on his part, acceptance of that offer by the corporation would be necessary to bring into existence a contract of sale. Receipt of the consideration on March 30, 1946, may have constituted such acceptance if Beber was thereunto authorized by the corporation, or acceptance may have occurred on April 2d, when Churchill endorsed the check and deposited it in bank to the credit of the corporation, or some three or four days after March 30th, when a receipt for the $20,000 was mailed to and received by Randall. By one of those dates a sale quite clearly was effected. The mere fact that the evidence does not show to a certainty the precise date of the making of a contract of sale does not render the indictment insufficient or fatally defective.[1]

[3–5] Even if the subscription agreement which Randall signed on March 25, 1946, became a contract of sale upon his signing, it is possible that the terms of the contract were such that the shares of stock which Randall was purchasing would not be deemed "issued" until he paid, and the corporation received, the consideration for the shares purchased by him. If that were the true import of the agreement of sale, it follows that the stock was issued at no time earlier than March 30, 1946, and hence within the three-year period prior to the presentation of the indictment. Respondents invoke People v. Twedt, supra, 1 Cal.2d 392, 35 P.2d 324, as holding that once a "sale" is effected the statute begins to run. That was correct under the indictment involved in that case, which charged, in three separate counts, an offer for sale, a negotiation for sale, and a sale. It did not charge, as does count I of the indictment in the present case, a conspiracy to aid in the "*issue* and sale of" and "to sell and to cause and assist to be *issued,* executed and sold" securities in violation of the Corporate Se-

1. A possible additional distinguishing feature of the Twedt case is the fact that, although the subscriber's check for the money was mailed from Fresno on May 20th, it was not received and cashed by Twedt at San Francisco until May 21st, which happened to be the very day the corporation commissioner issued his permit.

curities Act. (Emphasis added.) The issuance of shares of stock of a corporation means the act or contract of the corporation by which shares become vested in a person as a member or stockholder. Blythe v. Doheny, 9 Cir., 73 F.2d 799, 803; approved in Domestic and Foreign Petroleum Co., Ltd. v. Long, 4 Cal.2d 547, 554, 51 P.2d 73. The time when a share of stock originally comes into existence, and is deemed issued, is controlled by the intent of the parties and is ascertained by examining the contract which they have executed concerning such issue. See Robbins v. Pacific Eastern Corp., 8 Cal.2d 241, 269–270, 274–275, 65 P. 2d 42; Hertz-Drivurself Stations v. Ritter, 9 Cir., 91 F.2d 539, 541. In the Hertz and Robbins cases, it was found, in accordance with the intent of the parties, that title to the shares did not pass until delivery of the certificates. Upon the other hand, in Mitchell v. Beckman, 64 Cal. 117, 28 P. 110, it was found, upon the basis of the contract there involved, that title to the stock passed even before payment of the consideration, the court saying: "When the corporation has agreed that a person shall be entitled to a certain number of shares in its capital, to be paid for in a manner agreed upon, and that person has agreed to take and pay for them accordingly, he becomes their owner by a valid contract made upon a valuable consideration." 64 Cal. at page 121, 28 P. at page 111. In Garretson v. Pacific Crude Oil Co., 146 Cal. 184, at page 188, 79 P. 838, at page 840, the court found that certain shares had issued when the consideration therefor was received by the corporation, the court saying, "The fact that the Corbin shares were not issued until after other shares had been issued is immaterial, for the Corbin stock passed upon the completion of the agreement by which the consideration was conveyed to the corporation. Nothing remained to be done but the formal issuance of the certificate, upon which the ownership of the stock did not depend." The fact that the certificate of stock was executed and delivered to Randall after the receipt of a permit from the state did not give validity to acts done prior to the issuance of the permit. Miller v. California Roofing Co., 55 Cal.App.2d 136, 130 P.2d 740; Bourke v. Frisk, 92 Cal.App.2d 23, 206 P.2d 407.

[6] Furthermore, we do not interpret People v. Twedt, supra, 1 Cal.2d 392, 35 P.2d 324, as necessarily holding that there can be no set of circumstances under which the collection of the proceeds of the sale of a security is proscribed by the Corporate Securities Act. In that case the inquiry was limited by the wording of the indictment which, at most, narrowly charged that Twedt "offered for sale" and "negotiated for the sale of" and "sold" certain securities. There was no allegation concerning receipt or collection of the proceeds of the sale by Twedt or the corporation, and the court predicated its discussion upon the definitions of "agreement for sale" and "agreement to sell and buy" appearing in sections 1726 and 1729 of the Civil Code, adopting portions of an opinion previously rendered in the case by a district court of appeal. The Corporate Securities Act in 1946 defined "sale" and "sell" as including "every disposition, or attempt to dispose, of a security or interest in a security for value." § 2(a)8. The collection of the "value" for which a security is disposed would seem proscribed by section 18 of the act when it imposes a penalty upon any person who knowingly "aids in the issue or sale of, or issues or executes, or sells, or causes or assists in causing to be issued, executed, or sold" a security in nonconformity with a permit or contrary to the provisions of the act. The fact that section 2 of the act declares that "sale" or "sell" shall *also include* a "contract of sale, an exchange, an attempt to sell, an option of sale, a solicitation of a sale, subscription or an offer to sell" does not render innocuous the proscribed "disposition * * * of a security * * * for value" which seems to be the main feature of the act. We are of the view that when appropriately put in issue by the pleadings the receipt (in the absence of a permit) of the consideration specified in a contract for the sale of stock is a public offense under the act. This court was of this view in 1942 when, in Miller v. California Roofing Co., supra, 55 Cal.App.2d 136, 130 P.2d 740, we said, "the plaintiff having parted with and

the defendant corporation having accepted the sum of $2,500 in pursuance thereof, without a permit, the defendants were guilty of a public offense" 55 Cal.App.2d at page 141, 130 P.2d at page 743, and in 1949 when, in Bourke v. Frisk, supra, 92 Cal.App.2d 23, 206 P.2d 407, this court said, "In the latter cases money was paid, an essential part of the sale, at a time when there could be no valid sale" 92 Cal.App. 2d at page 31, 206 P.2d at page 412. In the instant case, count I expressly charges as one of the objects of the alleged conspiracy that defendants conspired "to collect, aid in collecting, and make collections of the consideration to be paid on account of subscriptions for sales of stock in a corporation, to wit, Churchill's Frozen Foods, Inc., prior to and before the issuance of a permit * * *." This was supplemented by the allegations, among others, that on or about March 30, 1946, in pursuance of the object of the conspiracy, defendants Beber and Kobritz received and collected from Randall the sum of $20,000; that on or about April 2, 1946, defendant Churchill received, collected and accepted from Randall the sum of $20,000; and that on April 8, 1946, defendants Beber, Kobritz and Churchill caused to be sent to Randall by mail a receipt for $20,000 for 200 shares of stock in Churchill Frozen Foods, Inc., a corporation. Here, there was no failure, as there appears to have been in the Twedt case, to plead specifically and in sufficient detail the "for value" feature of the transaction by which "disposition" was made of stock to Randall.

[7] We conclude that count I was not barred by the statute of limitations. The contract of sale to Randall and the issuance of stock to him may well have occurred within the three years. The receipt and collection of the consideration for the stock sold, according to the evidence before the grand jury, took place well within the three-year period.

Count I should not have been dismissed.

[8] In count II, the People accuse defendants of selling to Harry Randall on or about March 30, 1946, 200 shares of Churchill Frozen Foods, Inc., for $20,000, and allege that said stock was then and there offered to the public for sale and sold to Randall by defendants without defendants or anyone else having first applied to or obtained a permit therefor from the corporation commissioner of the state, and in violation of section 3 of the Corporate Securities Act. The reference to section 3 is an obvious error, for that section deals with the sale by the company issuing the stock, which this alleged transaction clearly was not. The offense alleged in count II is really a violation of the provisions of section 18 of the act. Therefore, the erroneous reference to section 3 does not render this count defective. See People v. Aresen, 91 Cal.App.2d 26, 36, 204 P.2d 389, 957.

[9] We have already given a summary of the evidence before the grand jury which supports the accusation made in count I. Much of that evidence is relevant to and supports the accusation made in count II. That evidence furnished the grand jury reasonable and probable cause for believing that the crime described in count II was committed and that it was committed by these defendants.

[10] As to the statute of limitations, if the subscription agreement signed by Randall on March 25, 1946, was but an offer (not the acceptance of an offer) by him, then the contract of sale was consummated at a later date and within the three-year period of the statute of limitations.

We conclude that count II should not have been dismissed.

[11] In count III of the indictment, the People accuse defendants of committing grand theft on or about March 30, 1946, by willfully, unlawfully and feloniously taking $20,000 in money, the personal property of Harry Randall. The evidence before the grand jury was insufficient to support this accusation. It amounted, at most, to representations by the defendants to Randall that the money received for the stock would be used for the building of a frozen food plant in Stockton and for buying equipment. That evidence also showed that in July a building was in course of construction but that it was war time yet and many things were hard to get. That

is not evidence that the defendants were not faithfully endeavoring to make good on the representations made by them when they sold the stock to Randall. The only other representation was by Beber to the effect that he was buying $10,000 worth of stock. It appears that he did receive $13,000 par value of stock, apparently, or inferentially, through some interest of his in the business and assets acquired by Churchill Frozen Foods, Inc. Especially was there lack of evidence before the grand jury that any of the defendants, at the time they made any of these representations, had no intention of carrying them out or seeing them accomplished. Count III was properly dismissed.

The portion of the order dismissing count III is affirmed; that portion of the order dismissing count I and count II of the indictment is reversed.

PETERS, P. J., and BRAY, J., concur.

104 Cal.App.2d 317

O'BRIEN et al. v. GATEWAY STABLES et al.

Civ. 18309.

District Court of Appeal, Second District, Division 2, California.

May 18, 1951.

Dorothy Ruth O'Brien, by Lola Belle O'Brien, her guardian ad litem, brought action against Gateway Stables, fictitious firm composed of Llewellyn Phillips and Llewellyn Phillips, Jr., and Llewellyn Phillips, Jr., and others to recover for injuries sustained by plaintiff when horse furnished the plaintiff by Llewellyn Phillips, Jr., ran away and threw the plaintiff to the ground. The Superior Court of Los Angeles County, Percy Hight, J., entered a judgment against Llewellyn Phillips, Jr., and an order denying motion for new trial, and Llewellyn Phillips, Jr., appealed. The District Court of Appeal, Moore, P. J., held, that the appellant was not negligent in permitting the plaintiff to ride the horse, and therefore not liable for plaintiff's injuries.

Judgment reversed, and appeal from order dismissed.

1. Livery stable keepers ⇐11

Where horse, which was furnished plaintiff for riding purposes by defendant, and which ran away and threw plaintiff to the ground, had never indicated to defendant a disposition to pitch, run away, kick, bite, or indulge in any other equine vice, but had been kind and docile, defendant was not negligent in permitting plaintiff to ride the horse, and was not liable for injuries sustained by the plaintiff.

2. Animals ⇐70, 71

If owner of horse knowingly keeps a mean or vicious horse, he is liable for injuries to another who has been invited to the premises where the horse is kept, or one whom the owner allows to use the horse without first having been advised of its vicious proclivities, but owner of horse is not liable for injuries caused to another while riding or driving the horse with the owner's permission, if the owner has no knowledge of horse's untrustworthiness or if the user knows of the horse's vices.

3. Appeal and error ⇐110, 782

Order denying motion for new trial was nonappealable, and appeal therefrom would be dismissed.

Clifton A. Hix, San Pedro, for appellant.

John A. Shidler, Torrance, for respondent.

MOORE, Presiding Justice.

Respondent recovered judgment against appellant, Llewellyn Phillips, Jr., for his negligence in assigning to, and allowing her to ride, Roxan, knowing (1) the beast to be a blooded and spirited mare and (2) respondent to be an inexperienced rider. She had sued appellant's father who operated the Gateway Stables and his uncle, the animal's owner, but they were both exculpated by the decision. While not disputing the propriety of the amount of the award, appellant demands a reversal on the grounds

that (1) neither the findings nor the conclusions justify the judgment and (2) the evidence does not warrant the finding of any negligence on the part of appellant.

Appellant's father, herein referred to as Senior, had been for some years prior to November 30, 1948, owner of Gateway Stables near San Pedro. He boarded the horses of his patrons and kept two horses which he rented as an accommodation to such patrons as were accompanied to the Stables by persons who desired to ride. Appellant's uncle, Leslie Phillips, had owned Roxan since she was two years old. While she could boast of some pure blood registered stock, she came from a dam of no pedigree, but better than the ordinary saddle horse. Her disposition was kindly and quiet, and she had never bucked from the time Leslie first saddled and rode her. She had been brought from a 500-acre pasture to Senior's stables three or four weeks prior to the accident of November 28, 1948. She had been at the Stables on two prior occasions. Roxan was first bred there in 1945 and her foal was delivered November 11, 1946. In June, 1947, having become separated from her colt, she ran into a truck while attempting to rejoin her progeny.

A few days prior to respondent's last visit to the Stables, appellant arranged for her to have dinner at the home of his parents and to go horseback riding. He called for her about four thirty p. m. at her place of business in San Pedro and drove to the Gateway Stables. His own horse being already under saddle, appellant selected Roxan for respondent as a good horse for her to ride. She looked on as Roxan was saddled in the barn and anticipated no evil results from the ride. Although appellant had never seen respondent ride, and they had never discussed her riding ability, she told him of one horse that had run away with her.

She mounted Roxan, took the reins and the twain rode out of the Stables' yard about a quarter of a mile. Though the mare stepped lively, respondent easily kept her in check. She neither went sideways, nor reared, nor pitched. About a quarter of a mile south they turned back in order to go upon another riding area. After she had trotted on a trail forty or fifty yards, Roxan began to canter, then galloped for a 100 yards when she turned to the right, then to the left and onto a fence and fell, respondent plunging to the ground at the left of the mare.

Appellant had ridden Roxan; had seen her often. While she stepped high, she was neither wild nor mean. She was neither vicious nor saddle-shy; was easily caught, bridled and saddled; did not bite or kick; had never reared up nor run sideways; had no bad habits; had not been known to pitch; she was not blind and had no defect of vision. She had never broken out of her stall to go with her colt. There was no reason for suspecting difficulty on account of instinctive inhibitions against leaving the stable: she had weaned her first colt and had been in foal two weeks.

Respondent testified that she had ridden a horse before at three different stables, and "I knew how to hold the reins." If the mare "bucked" and "pawed the air," as respondent testified, it was her first performance of the kind which appellant had no reason to anticipate and did not see as he followed. Respondent did not speak of her inexperience to her companion, but mounted the mare unassisted and rode with safety and comfort until the nag was thrilled by a call of the wild.

[1] The court found that Roxan was not unkind, dangerous, or vicious then or before, but "was a normal, riding animal, having the usual energy of a blooded, spirited mare"; that appellant did not know, nor should he have known that the mare was dangerous or had refractory propensities. Since the animal had never indicated to appellant a disposition to pitch, run away, kick, bite, or to indulge in any other equine vice, but had been kind and docile, it cannot be said that he was negligent in permitting respondent to ride her. While her tragical fall and serious injuries are most regrettable, it would be unjustifiable and arbitrary oppression to burden appellant with the obligation to pay for injuries he had no reason to anticipate, and to cause which he made not the slightest contribution by way of a neglectful act or omission. He

was entertaining his friend in a genteel and chivalrous manner. He displayed neither wantonness nor lack of interest in the young lady's welfare, but eagerly attempted to enrich her happiness with a rural ride.

[2] From a review of all the decisions of the California appellate courts, it may be announced as the law relating to the liability of the owners of horses that if the owner knowingly keeps a mean or vicious beast, he is liable for injuries to another who has been invited to the premises where the animal is kept, or to a person whom the owner has allowed to use the horse without first having been advised of its vicious proclivities. See Baugh v. Beatty, 91 Cal.App. 2d 786, 205 P.2d 671; Kersten v. Young, 52 Cal.App.2d 1, 125 P.2d 501; Heath v. Fruzia, 50 Cal.App.2d 598, 123 P.2d 560; Finney v. Curtis, 78 Cal. 498, 21 P. 120. But the owner of a horse is not liable for injuries caused to another while riding or driving the animal with the owner's permission if the latter has no knowledge of his animal's untrustworthiness, or if the user knows of the latter's vices. Hackelberry v. Sherlock Land and Cattle Company, 39 Cal.App. 764, 180 P. 37; Haneman v. Western Meat Company, 8 Cal.App. 698, 97 P. 695; Whalen v. Streshley, 205 Cal. 78, 269 P. 928, 60 A.L.R. 445.

[3] The order denying the motion for a new trial being nonappealable, the appeal is dismissed. The judgment is reversed.

McCOMB and WILSON, JJ., concur.

104 Cal.App.2d 488

KRIEGER v. KRIEGER.

Civ. 17877.

District Court of Appeal, Second District, Division 2, California.

May 29, 1951.

Rose Krieger brought action against Michael Krieger for divorce. The Superior Court of Los Angeles County, Frank G. Swain, J., entered order directing defendant to pay to plaintiff $750 as her total attorney's fees for services to be rendered in the action, and denying plaintiff any costs, and plaintiff appealed. The District Court of Appeal, Wilson, J., held that order was not an abuse of discretion.

Order affirmed.

1. Divorce ⇐184(5), 188, 223, 286

The matter of allowance of attorney's fees and costs to wife in divorce action is in sound discretion of court, and its conclusion will not be disturbed unless shown to be an abuse of discretion. Civ.Code, § 137.

2. Divorce ⇐189, 223

Where wife's liquid finances were greater than those of husband, and she had exclusive right to occupation of community residence of parties without payment of rent, and other community real property was unproductive, trial court's order in divorce action, directing husband to pay wife $750 as her total attorney's fees and denying wife any costs, was not an abuse of discretion. Civ.Code, § 137.

Samuel Reisman, Los Angeles, for appellant.

Levy, Bernard & Jaffe, Los Angeles, for respondent.

WILSON, Justice.

This is an action for divorce. Plaintiff has appealed from an order directing defendant to pay to plaintiff the sum of $750 as her total attorney's fees for services to be rendered in the action, denying plaintiff any costs and directing that she bear her own costs, on the ground that the court abused its discretion in so limiting the amount of attorney's fees and denying costs to plaintiff.

The evidence showed that the community real property had a value, according to defendant's estimate on May 18, 1949, of $94,000. An expert testified at the hearing that on September 30, 1949, it was valued at $51,300. Defendant was drawing a salary of $300 a week up to July 22, 1949, immediately prior to service of the order to

show cause in this action. Two days later he voluntarily reduced his salary to $200. On May 11, 1949, defendant furnished a financial statement to a bank reciting that his net worth was $137,255. All the real property was unimproved except the residence. Defendant's insurance policies had no cash surrender value and he had procured a loan on the policies of $4,800 in order to meet his obligations and those of the corporation in which he was the principal stockholder. At the time of the hearing defendant's checking account in his bank showed a balance of $64.

The evidence showed that at the time of the hearing plaintiff was possessed of $548.39 cash in the bank; that in 1947 she had loaned her son $4,000 and received from him a written promise to repay the amount; that shortly prior to the hearing of the order to show cause she had in the Union Bank the sum of $1,036.75; that shortly before the hearing she withdrew the sum of $1,195.73 from a savings and loan account and $350 from the Union Bank account; plaintiff also has jewelry valued at $3,000 and a fur coat worth $1,500.

The court ordered that during the pendency of the litigation plaintiff should have the exclusive right, rent free, to occupy the residence of the parties, and defendant was ordered to pay all taxes becoming due thereon.

Defendant testified that the reason for his voluntary reduction of his salary was that the corporation from which he was drawing the salary was in such a financial condition that it was unable to secure loans to meet its obligations and was unable to pay the former salary.

[1] The matter of allowance of attorney's fees and costs to a wife in a divorce action is in the sound discretion of the court, Civil Code, sec. 137, and its conclusion will not be disturbed unless there is a showing of abuse of discretion. Comey v. Comey, 8 Cal.2d 453, 454, 66 P.2d 148. The indebtedness of plaintiff's son to her in the sum of $4,000 was properly treated as an asset by the court. Plaintiff is not required to dispose of her jewelry and furs in order to meet the expenses of the action. However, her liquid finances are greater than her husband's. She is occupying the community residence without the payment of rent, and the other community real property is unproductive.

[2] The financial condition of the respective parties does not justify this court in declaring that the trial court abused its discretion either in the award of attorney's fees or in the refusal to allow costs to plaintiff.

Order affirmed.

MOORE, P. J., and McCOMB, J., concur.

104 Cal.App.2d 371

PACIFIC TURF CLUB, Inc. v. COHN.

Civ. 14100.

District Court of Appeal, First District, Division 2, California.

May 22, 1951.

Action by the Pacific Turf Club, Inc., against Paul Cohn to restrain the defendant from attending races at a race track operated by plaintiff. The Superior Court, Alameda County, A. T. Shine, J., entered an order granting plaintiff a temporary injunction, and the defendant appealed. The District Court of Appeal, Nourse, P. J., held that defendant could not be excluded from plaintiff's race track even though the California Horse Racing Board had instructed plaintiff to bar defendant or suffer a revocation of its license to operate the track.

Order reversed.

1. Civil rights ⇐2

Under statutes which generally grant citizens equal rights of admission and treatment in places of public accommodation and amusement, State in exercise of police power has plenary authority to regulate public race tracks and places of public amusement. Civ.Code, §§ 51–53.

2. Administrative law and procedure ⇐9
Theaters and shows ⇐2

The State's power to regulate public race tracks and places of public amusement has been validly delegated to the California Horse Racing Board. Civ. Code, §§ 51–53; Business and Professions Code, §§ 19420, 19561; Const. art. 4, § 25a.

3. Theaters and shows ⇐4

Insofar as exclusion of undesirables from attendance at horse racing tracks is concerned, only provisions of statutes relating to equal rights of admission and treatment in places of public accommodation and amusement are controlling and rules of the California Horse Racing Board apply only to regulation of licensee and its employees in conduct of races and of wagering and results thereof. Business and Professions Code, §§ 19420, 19561; Civ. Code, §§ 51–52; Const. art. 4, § 25a.

4. Administrative law and procedure ⇐386
Theaters and shows ⇐4

State Horse Racing Board may make only such exceptions in public right of equal participation in public entertainment afforded at race courses as are validly included in provision of Civil Code permitting proprietor of race course to exclude any person who is intoxicated or quilty of boisterous conduct and persons of lewd or immoral character. Civ. Code, § 53; Business and Professions Code, § 19561.

5. Theaters and shows ⇐4

A person may be excluded from a race track only if he is observed behaving in a manner injurious or obnoxious to others or committing an illegal act such as bookmaking while on the grounds. Business and Professions Code, § 19561; Civ. Code, §§ 51–53.

6. Injunction ⇐94

A turf club was not entitled to restrain individual convicted of felony, from attending races at track under instructions from horse racing board to do so or suffer a revocation of its license to operate track. Business and Professions Code, § 19561; Pen. Code, § 337a; Civ. Code, §§ 51–53.

Leo R. Friedman, San Francisco, for appellant.

Donahue, Richards, Rowell & Gallagher, and George E. Thomas all of Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiff had a temporary injunction restraining defendant from attending races at the track operated by plaintiff. The hearing was had on the verified complaint, oral testimony and the demurrer and opposition filed by defendant.

The proceeding rests on the rules of the California Horse Racing Board adopted pursuant to statute. Business & Professions Code, sec. 19561. The pertinent provisions of these rules read:

"41. All persons quilty of any dishonest or corrupt practice, fraudulent act or other conduct detrimental to racing, committed while within or without any racing enclosure, shall be ruled off all racing enclosures under the jurisdiction of the California Horse Racing Board, and it shall be the duty of the stewards and those authorized by them to exclude from all places under their jurisdiction persons who commit such offenses or are so ruled off."

"310. Any person found quilty of the violation of Section 337a, 337b, 337c, 337d, 337e, 337f or 337g of the Penal Code of the State of California shall be suspended and the matter referred to the California Horse Racing Board which may in its discretion revoke the license of or rule off such person."

"355. Any association conducting race meetings under license from the racing board shall properly police its grounds, including the stable area, and shall eject therefrom known undesirables, touts, persons under suspension or ruled off, persons of lewd or immoral character, and persons guilty of boisterous or disorderly conduct or other conduct detrimental to racing or the public welfare * * *."

It was alleged in the complaint and not denied that the California Horse Racing Board had instructed plaintiff to bar defendant Cohn from its track and informed plaintiff that if it did not do so its license

to operate the track would be revoked. The conviction of defendant of a felony under section 337a of the Penal Code and the appeal then pending from the judgment was stipulated to at the hearing.

[1, 2] Appellant relies on sections 51 to 53 of the Civil Code which generally grant citizens equal rights of admission and treatment in places of public accommodation and amusement, and, sec. 53, prohibits the denial of admission to anyone who presents a proper ticket or tenders the price thereof. Exceptions are made including one "of lewd or immoral character". It has been held under those sections that the State in the exercise of the police power had plenary authority to regulate public race tracks and places of public amusement, Sandstrom v. California Horse Racing Board, 31 Cal.2d 401, 407, 408, 189 P.2d 17, 3 A.L.R.2d 90, and that this power has been validly delegated by section 25a of Article IV of the Constitution and sections 19561, and 19420, Bus. & Prof. Code to the California Horse Racing Board. The question presented is therefore the general one of the relation of a regulation under the police power and civil liberty rights granted by Constitution or statute.

The submission in this case was set aside awaiting the decision by the Supreme Court in Orloff v. Los Angeles Turf Club, 36 Cal. 2d 734, 227 P.2d 449, 452, a case similar to ours, in which Orloff, who had been convicted of violation of 337a, Penal Code and other offenses sought an injunction against the Los Angeles Turf Club to prevent it from barring him from admission to the horse races at Santa Anita Park, which the court denied. The Supreme Court reversed the judgment.

[3–6] The Supreme Court held that as far as exclusion of undesirables from attendance at horse racing was concerned only the provisions of the Civil Code, §§ 51–54, were controlling; that the more rigid rules of the California Horse Racing Board applied only to "the regulation of the licensee and its employees in the conduct of the races and of wagering on the results thereof." The opinion states: "However, insofar as they govern the licensee in exercising the power of exclusion of persons from participation in the public entertainment afforded, they may not be deemed to narrow the established right of participation by all persons on an equal basis." The opinion thereby narrows the exclusion to undesirable characters coming under section 53 of the Civil Code which provides: "Any person under the influence of liquor, or who is guilty of boisterous conduct, or any person of lewd or immoral character, may be excluded from any such place of amusement." The opinion contains a definition of "immoral" in part as follows: "The term 'immoral' has been defined generally as that which is hostile to the welfare of the general public and contrary to good morals." It then states: "But the private business, the personal relations with others, the past conduct not on the premises, of a person applying for or admitted to the course, whether or not relevant to indicate his character, are immaterial in the application of the statutory standards under the facts of this case." It would therefore appear that in line with this opinion a person may be excluded from a race track only if he is observed behaving in a manner injurious or obnoxious to others or committing an illegal act such as book making while on the grounds.

On the authority of the Orloff case, which we deem controlling, the order is reversed.

DOOLING, Justice.

I concur in the judgment of this court reversing the order granting the temporary injunction. I do so reluctantly, not because I disagree with the result, but because in my opinion the question presented by the appeal is moot and the appeal should be dismissed for that reason; but since it takes the concurrence of two members of this court to order an appeal dismissed the appeal is before the court and must be decided on its merits. I cannot refrain, however, from a brief statement of the grounds upon which I base my conclusion that the appeal should have been dismissed.

The order granting the temporary injunction from which this appeal is taken was signed on October 28, 1948. It only en-

joins the appellant from "entering upon, attending or being present at the race meeting presently being held by plaintiff." At the hearing on October 28, 1948 the parties stipulated "that the horse race meeting of the Pacific Turf Club—the present racing days—will expire two days from now." The temporary injunction was served on appellant on November 1 and filed with the clerk on November 3, and the notice of appeal was filed on November 4, all after the expiration of the race meeting "presently being held", which appellant was enjoined from attending.

The question was already moot at the time that the notice of appeal was filed. E. J. Carroll Co. v. Insurance Com., 2 Cal. 2d 60, 38 P.2d 780; Fletcher v. Dexter, 60 Cal.App.2d 275, 140 P.2d 697; Covina Union High School v. California Interscholastic Fed., 136 Cal.App. 588, 29 P.2d 323. An appellate court should not decide a moot case simply to establish a principle of law or because a party "might be able to utilize a favorable decision" in his future dealings. Consol. Vultee Aircraft Corp. v. United Automobile etc. Workers, 27 Cal.2d 859, 865, 167 P.2d 725, 728.

104 Cal.App.2d 311

DICKENSON et al. v. SAMPLES.

Civ. 18071.

District Court of Appeal, Second District, Division 2, California.

May 18, 1951.

Rehearing Denied June 7, 1951.

Hearing Denied July 12, 1951.

Suit by Ralph E. Dickenson against Joe Samples to recover rentals due under lease of business property. The defendant filed a cross-complaint against plaintiff and Ed Davis for damages for alleged breach of contract, fraud, and conspiracy between plaintiff and Davis to defraud. The Superior Court of Ventura County, Chas. F. Blackstock, J., entered judgment against plaintiff in suit to recover rentals and directed verdict in favor of plaintiff and defendant Davis on all counts of cross-complaint, and plaintiff and cross-complainant appealed. The District Court of Appeal, Moore, P. J., held that appellate court was bound by implied finding of jury on conflicting evidence that there had been no agreement between plaintiff and cross-complainant for payment of minimum rental but merely for one third of profits as rent.

Judgment denying defendant recovery on cross-complaint affirmed, judgment for defendant on complaint reversed, with instructions.

1. Appeal and error ⇐1002

Where plaintiff sought to recover rental due for lease of business property by defendant and there was conflict in evidence as to whether there was agreement whereby defendant had agreed to pay minimum rent or one third of profits whichever was greater, implied finding of jury inherent in verdict for defendant that there had been no minimum rental agreement was binding on appellate court.

2. Landlord and tenant ⇐231(8)

Where plaintiff sought to recover rentals due for lease of business property by defendant allegedly on basis of agreement for minimum rental or one third of profits from business whichever was greater, and defendant denied agreement for minimum rental but admitted that rentals were to be one third of profits, and evidence showed that there had been profit for given period, verdict denying plaintiff any relief was improper and plaintiff was entitled to one third of profits proved.

3. Evidence ⇐588, 594

Evidence which is uncontradicted and not inherently improbable may not be disregarded by trier of fact.

4. Landlord and tenant ⇐231(8)

Where plaintiff sought to recover rentals due for lease of business property by defendant on alleged agreement for minimum rental rate or one third of profits from business whichever was greater and defendant admitted liability for one third of profits only, and jury's implied finding indicated that no agreement for minimum rental rate existed, plaintiff's right to recover of one third of profits was

limited to profits of business as to which evidence had been introduced at trial.

5. Landlord and tenant ⇦18(3)

In suit by plaintiff to recover rentals due for lease of business property by defendant wherein defendant filed cross-complaint for damages for plaintiff's breach of oral contract to form partnership or joint venture, evidence sustained finding that plaintiff was landlord and defendant tenant.

6. Partnership ⇦8

A mere sharing in profits paid as rent to landlord does not justify inference of partnership with tenant but it is virtually essential that it be shown that landlord participated to some extent in management of business conducted on leased premises. Corporations Code, § 15006.

7. Landlord and tenant ⇦180(3)

In action by landlord to recover rentals due for lease of business property by defendant wherein defendant filed cross complaint seeking damages for wrongful eviction under oral lease and it appeared that plaintiff had given notice in good faith terminating tenancy and to pay rent or quit and that defendant had voluntarily surrendered premises, evidence was insufficient to support defendant's allegation of wrongful eviction.

8. Landlord and tenant ⇦171(1)

The giving of notice in good faith terminating tenancy and to pay rent or quit followed by voluntary surrender of premises is not wrongful eviction and does not give rise to cause of action.

9. Fraud ⇦58(1)

In action by landlord to recover rentals due from tenants for lease of business property wherein tenant filed cross-complaint for damages on ground of fraud in that landlord had made oral agreement for joint venture with tenant which he had never intended to perform, evidence was insufficient to establish fraud on part of landlord.

10. Conspiracy ⇦9

Where tenant failed to establish cause of action for fraud against landlord for lack of intent to perform alleged oral agreement by landlord to enter into joint venture with tenant, there was no wrongful act in violation of right which would entitle tenant to maintain action for conspiracy to defraud.

11. Conspiracy ⇦15

Conspiracy as civil action in and of itself is not actionable but it requires that some right must first have been violated by wrongful act of defendant whereby cause of action independent of conspiracy arose.

12. Torts ⇦12

Where tenant filed cross-complaint alleging that third-party defendant had induced landlord to breach contract and evidence failed to show breach of contract by landlord, there was no cause of action against third party defendant.

Blaine T. Romney, Santa Paula, for appellant Ralph E. Dickenson.

Roy B. Woolsey, Los Angeles, and Harry C. Wesley, Santa Paula, Roy B. Woolsey, Los Angeles, for appellant Joe Samples.

Hammons & Willard, Ventura, for Ed Davis.

MOORE, Presiding Justice.

Plaintiff Dickenson seeks reversal of a judgment entered pursuant to a verdict denying him relief in his suit to recover rentals from defendant. The latter also appeals from the same judgment denying him relief on his cross-complaint seeking damages for an alleged breach of contract on the part of plaintiff.

Dickenson was the owner of certain business property in Santa Paula which he leased to defendant and one Pace for the operation of a billiard parlor. The lease was in effect from October, 1946, until early March, 1948. In the following month plaintiff leased the premises to defendant and his new partner Ed Davis who is also named a cross-defendant. Varying sums were paid as rentals from April through December, 1948. At that time Davis withdrew from the business, and defendant thereafter continued its operation alone until April 10, 1949, when he vacated the property in compliance with plaintiff's no-

tice terminating the tenancy. No rentals were paid after December, 1948.

The evidence is conflicting as to the amount of rent which was to be paid for the premises. Plaintiff testified that it was agreed that the rent was to be $125 per month, or one third of the net profits of the business, whichever was larger. Defendant testified that the rent was to be one-third of profits and not otherwise.

A loss was sustained in January, 1949, but a profit of $163 resulted in February. There was no evidence as to what occurred during the months of March or April.

Plaintiff's Appeal.

It is plaintiff's contention that the jury erred as a matter of law in finding that no rentals whatsoever were due him. He argues that the evidence without dispute established defendant's obligation to pay from January 1 to April 10, 1949, on the basis of either the agreed minimum sum of $125 per month or on one third of the net profits realized.

[1–3] There is a conflict in the evidence as to an agreement for rentals at an agreed minimum figure. Consequently this court is bound by the jury's implied finding that no such agreement was made. However, defendant admitted that the rentals were to be one third of the profits and since the evidence without conflict shows a profit of $163 in February, 1949, plaintiff is entitled to the sum of $54.33 for that month. Evidence which is uncontradicted and not inherently improbable may not be disregarded by the trier of fact. Dobson v. Dobson, 86 Cal.App.2d 13, 14, 193 P.2d 794.

[4] Plaintiff can recover nothing additional inasmuch as no evidence was introduced as to the existence of profits in March or April, 1949.

Defendant's Appeal.

The cross-complaint purported to state five causes of action seeking damages against Dickenson for (1) breach of an oral agreement of joint venture, (2) wrongful eviction or constructive eviction under an oral lease, (3) fraud, (4) damages against Dickenson and Davis for conspiracy to defraud, and (5) damages against Davis alone for breach of contract and inducing a breach of contract. Both cross-defendants denied all material allegations. At the conclusion of the trial the court directed a verdict in favor of Dickenson and Davis on all counts.

Defendant contends that substantial evidence was before the court supporting the allegations in all five counts and that consequently the court erred in refusing to submit the matter to the jury.

Viewed in the light most favorable to defendant, the essential facts established by the evidence are as follows: In April, 1948, plaintiff orally agreed to lease his building to defendant and Davis jointly for five years upon defendant's buying out the interest of his current partner, one Todd. Defendant having consented to make the purchase, he and Davis immediately acquired Todd's interest for $1,000 in cash and assumed an obligation owed by Todd of $2,500. Davis and defendant also orally agreed to improve the building by constructing a new front on the store at their own expense, before plaintiff would be under a duty to execute the new lease. Defendant testified, however, that he understood that this construction was to be paid for out of profits realized from the operation of the billiard parlor. He based this understanding on statements made to him by Davis alone.

Thereafter defendant and Davis took possession of the premises and operated the business. Defendant actively conducted its operation and was paid a salary of $325 per month for his services. Davis rendered services as an accountant for no compensation other than a one-third share in the profits. Plaintiff received one third of the profits from March, 1948, through December, 1948, but there was no evidence that he took any part in the management of the business.

In December, 1948, Davis informed defendant and plaintiff that he was withdrawing from his partnership with Samples who remained in possession and continued to operate the billiard parlor alone. On March 2, 1949, plaintiff caused a written notice terminating tenancy and a notice to pay rent

or quit to be served upon both Davis and Samples. On April 10 defendant vacated the premises upon the advice of Davis. At about the same time plaintiff leased the property to one Barker who purchased some of the billiard equipment from Samples for $2,500. No new store front was ever installed and no rentals were paid after Davis withdrew from the business.

[5, 6] Defendant's first cause of action sought damages for plaintiff's breach of a contract to form a partnership or joint venture, the wrong alleged being that defendant was excluded from the operation of the business. There was no evidence to establish that a joint venture or partnership was intended. The only reasonable inference from all of the evidence is that plaintiff was to be the landlord only and that defendant and Davis as partners were to be his tenants. Samples himself testified that such was the arrangement. It is true that rent was to be paid on a basis of profits realized but there is no further evidence of any joint liability for debts and losses. Also, there is no evidence of a community of interest insofar as plaintiff's having any control or management of any of the factors influencing the net worth of the business. To participate to some extent in the management of a business is a primary element in partnership organization, and it is virtually essential to a determination that such a relationship existed. Corporation Code, sec. 15006; Smith v. Grove, 47 Cal.App.2d 456, 462, 118 P.2d 324; Kersch v. Taber, 67 Cal.App.2d 499, 504, 154 P.2d 934. A mere sharing in the profits paid as "rent to a landlord" does not justify an inference of partnership. Corp. Code, sec. 15007, (4) (b).

[7, 8] As to the alleged wrongful eviction (count 2), the evidence does not support defendant's allegations. The first bar to recovery under that count is that defendant failed to pay rent for the period after December, 1948. Regardless of the basis used for computing rentals, it cannot be gainsaid that profits were realized in February, 1949, and that the tenants failed to account to the landlord for any sums whatsoever. Accordingly, such a breach of the tenant's obligation furnished a valid basis for an eviction. Assuming plaintiff to have been entitled to evict his tenant the evidence does not support a finding or conclusion that such eviction actually occurred. The giving of the notice in good faith terminating tenancy and to pay rent or quit followed by voluntary surrender of the premises is not a wrongful eviction and does not give rise to a cause of action. Lindenberg v. MacDonald, 34 Cal.2d 678, 683, 214 P.2d 5, 14 A.L.R.2d 1436; Psihozios v. Humberg, 80 Cal.App.2d 215, 220, 181 P.2d 699. No substantial evidence of malice or bad faith on the part of plaintiff appears in the record.

[9] The cause of action based on the alleged fraud on the part of Dickenson (count 3) in that he never intended to perform his agreement as alleged in the first count is likewise not supported by the evidence. Any determination that fraud was present would be based on nothing more than conjecture. The only proof relied upon by defendant is the evidence that plaintiff admitted that he was doubtful from the outset that either defendant or Davis could carry out the obligations they had incurred. This is not the equivalent of an intent on the part of defendant not to carry out his promise.

[10, 11] Also, as no fraud was established, no cause of action for conspiracy to defraud is present. Conspiracy as a civil action in and of itself is not actionable. Some right must first have been violated by a wrongful act of the defendant whereby arose a cause of action independent of the conspiracy. Scarborough v. Briggs, 81 Cal. App.2d 161, 167, 183 P.2d 683; Anderson v. Thacher, 76 Cal.App.2d 50, 72, 172 P.2d 533.

[12] The evidence likewise does not support the allegations of count 5 that Davis (1) breached his agreement with defendant to construct a new store front on the premises, and (2) induced plaintiff to breach his contract with defendant and to evict the latter. There is no proof that Davis only was to be responsible for the installation of the new building front. Also, since there was no breach of contract by plaintiff, it follows that Davis cannot be held to account

for a nonexistent wrong of inducing a breach of such contract.

It is ordered that judgment denying defendant recovery on his cross-complaint is affirmed. Judgment for defendant on the complaint is reversed with instructions to enter judgment for plaintiff in the sum of $54.33.

McCOMB and WILSON, JJ., concur.

Hearing denied; EDMONDS and CARTER, JJ., dissenting.

104 Cal.App.2d 271

ROBERTS v. WACHTER et al.

Civ. 17864.

District Court of Appeal, Second District, Division 1, California.

May 17, 1951.

Action by Marcus L. Roberts against Fred L. Wachter, Jose Drudis, and Drudis, Means and Wachter, a copartnership, on an account stated and for money had and received. The Superior Court, Los Angeles County, Edward R. Brand, J., rendered a judgment for plaintiff, and defendants appealed. The District Court of Appeal, Drapeau, J., held that an oral agreement under which plaintiff claimed had been fully executed, and hence the statute of frauds did not apply.

Judgment affirmed.

See, also, 231 P.2d 540.

1. Attorney and client ⇦123(1)

Where confidential relationship exists between attorney and client and attorney profits from dealings with client, rebuttable presumption of fraud or undue influence arises, and presumption can only be overcome by clear and satisfactory evidence that transaction between attorney and client was fair and equitable, that attorney had taken no advantage of relationship and that client was fully informed as to all matters relative to transaction.

2. Attorney and client ⇦123(1)

Where confidential relation of client and attorney exists and attorney profits from dealings with client, when the resulting rebuttable presumption of fraud or undue influence is overcome is ordinarily a question for the trier of fact.

3. Appeal and error ⇦1010(1)

Determination of trier of fact that rebuttable presumption of fraud or undue influence which arises where attorney profits from dealings with client has been overcome should not be disturbed on appeal except in cases of abuse of discretion or where there is no sufficiently substantial evidence supporting trier's conclusion.

4. Attorney and client ⇦123(1)

In action based on settlement arising out of alleged oral agreement between attorney and client providing that attorney would manage and organize business in return for stated share of profits, attorney's evidence was sufficient to overcome presumption of invalidity of contract.

5. Attorney and client ⇦123(1)

In action based on settlement arising out of alleged oral agreement between attorney and client providing that attorney would manage and organize business in return for stated share of profits, evidence failed to support client's allegation that he consented to modification of original agreement for different share of profits because of false statements made to him by attorney regarding recoupment of losses client had previously sustained in the business.

6. Attorney and client ⇦123(1)

In action based on settlement arising out of alleged oral agreement between attorney and client providing that attorney would manage and organize business in return for stated share of profits, evidence disclosed nothing tending to establish fraud or overreaching on part of attorney.

7. Account stated ⇦1

Generally, an "account stated" is a mere unperformed promise by one party to pay a stated sum to another, and is an executory contract. Civ.Code, § 1661.

See publication Words and Phrases, for other judicial constructions and definitions of "Account Stated".

8. Frauds, statute of ⇐139(1)

Statute of frauds has no application to executed agreement.

9. Frauds, statute of ⇐129(2)

When a contract has been so far performed that nothing remains but payment of consideration, fact that contract does not require payment within a year furnishes no defense to action for price.

10. Frauds, statute of ⇐139(1)

Where attorney and client entered into written agreement that attorney would manage and organize business in return for 1/6th of client's profits, and thereafter parties entered into oral agreement that attorney was entitled to 50% of client's profits, and attorney performed contemplated services, and net profit from partnership was ascertained and allotted and attorney drew portion of his share and left balance at request of partnership for use in business, oral agreement was fully executed for year in which profits had been allotted and for prior years, and statute of frauds did not apply thereto. Civ.Code, §§ 1624, subd. 1, 1661, 1698.

Earl D. Killion, North Hollywood, for appellants.

Elmer Patrick Friel, Marcus L. Roberts, Los Angeles, in pro. per.

DRAPEAU, Justice.

The complaint herein alleges that in 1942, plaintiff, an active member of the State Bar of California, organized the produce firm of Drudis, Means & Wachter, with assets valued at $6,500 furnished by defendant Drudis and $20,000 cash furnished by the latter's wife. That Means and Wachter were taken in as partners but furnished no capital. Defendant Drudis was to take no active part, but under an oral agreement between him and plaintiff, the profits from his share of the business were to be divided between them in consideration for plaintiff's services in organizing the business, representing Mr. Drudis and looking after their joint interests.

It is further alleged that in 1945 the net profit from the business was $60,640.62, of which defendant Drudis' share was $22,813.54; that on December 30, 1945, plaintiff and said defendant had a settlement and an account stated was made between them that $10,406.77 was due to plaintiff, whereupon defendant Drudis paid plaintiff $6,406.77, but failed upon demand to pay the balance of $4,000.

The complaint contains a second cause of action based on a common count for money had and received for the use of plaintiff which is predicated upon the following facts: that plaintiff's 1945 profits amounting to $4,000 were on deposit with the partnership subject to plaintiff's withdrawal as in former years; that at a time when neither objection nor dispute existed as to plaintiff's withdrawal of the money, the partnership asked for and was granted by plaintiff a loan of the $4,000 which upon demand it refused to pay.

Defendant Drudis interposed a general and special demurrer which was overruled. By his amended answer, he alleged among other things that in July, 1942, he orally agreed to pay plaintiff one-sixth of his share of the net profits realized from the partnership "which was in consideration of legal services rendered and to be rendered by plaintiff to this defendant"; and that on October 9, 1942, said agreement was reduced to writing; that subsequently, either in December of 1944, or in January, 1945, he and plaintiff orally modified the agreement of October 9, 1942, whereby he agreed to pay plaintiff one-half of his share in the profits after deducting an amount equal to 5% on his investment, provided he had recouped his losses previously sustained.

Defendant also alleged that when the contract was orally modified, his consent thereto was procured through reliance upon statements of plaintiff that all of defendant's losses had been recouped; that such statements were false and known to plaintiff to be false; that when the contract was modified he neither had nor sought any independent legal advice because he assumed that the terms of the agreement and the modification were fair and reasonable and provided for a just and reasonable compensation; but that on the

contrary the compensation provided therein was greatly in excess of the value of the services rendered and to be rendered. Accordingly, by way of counterclaim, defendant sought to recover the $6,406.77 which he had paid to plaintiff.

From a judgment in plaintiff's favor for the sum of $4,000, defendants appeal. Defendant Drudis will hereinafter be referred to as appellant.

It is here urged that the contract which was made during the existence of the relationship of attorney and client is presumptively invalid and without consideration, and that respondent did not sustain the burden of proof to overcome such presumption.

While it is true that many of the findings are negative in form, it is to be noted that the trial court affirmatively found that the parties entered into an oral agreement during the month of July, 1942, wherein appellant agreed to pay respondent one-sixth of his profits from the partnership; that on October 9, 1942, a written memorandum to that effect was signed by appellant and delivered to respondent; and that subsequently, appellant orally agreed to increase respondent's share to 50% of the profits accruing to appellant. From such findings, it must be inferred that the trial court was satisfied with the manner in which respondent met the burden of proof cast upon him.

Respondent testified he had known appellant since 1935; that prior to 1941 he had handled a few legal matters for him; that in 1941 he made out income tax returns for appellant and his wife. During that year appellant sought respondent's advice regarding the acquisition of a business in which to invest some money his wife was going to give him. Respondent discouraged this and advised him to lend the money on trust deeds or mortgages. After Pearl Harbor, appellant told respondent he wanted to get into the farm produce business, and as a result of information supplied by respondent, appellant became interested in the American Produce Company, formerly owned by a Japanese who had been interned for the duration of the war. Respondent made a thorough investigation of this business and reported to appellant, who was then ready to invest but did not wish to take an active part. It was arranged that appellant should put up the money and that respondent's son-in-law, Mr. Higgins, should acquire appellant's interest as trustee and be paid a straight salary. They then discussed division of the profits and compensation to respondent, appellant agreeing that after he got 5% on his invested capital, he would give respondent 50% of the net profit realized from his share of the business. In respondent's words: "I was merely putting in my services and if he made any money I was to get my cut. If there were any losses that he would have to bear them * * * I would give all the time I could to looking after the business, whatever was needed. * * * He said that was satisfactory to him. * * * I was to go out and help the Japanese organize this company and look after it, see that the business was properly carried on and that I would keep close watch * * * over everything, and see that we got our proper returns from his investment. This was * * * the latter part of January, 1942." Operations started immediately, respondent handling all the details of organization, obtaining the necessary permits and bonds, and starting a bookkeeping department. Many difficulties were encountered because of evacuation of the Japanese growers and workers with resulting loss of farm connections and competent help. During this period, respondent was putting in over ten hours a day, buying produce and hiring men. Meanwhile the bookkeeping and accounting department went awry and the business was operating at a loss. Respondent suggested discharge of the accountant, but appellant objected, saying he would rather have the accountant manage the business than respondent. "I told him I thought he was doing the wrong thing; that I was doing my best; that I thought I could straighten matters out, but if he desired it that way, it was all right with me and if he'd come to the office I would draw up a little agreement in which we would release one another from any further obligations. * * *

We signed this on June the 22nd, 1942." And respondent left.

Three weeks later respondent had a talk with appellant and Mrs. Drudis at which time he informed them that he believed appellant was doing the wrong thing to discontinue the business; that if appellant would not interfere with his management, he could put the business on a paying basis by carrying out plans he had formulated before he was asked to leave. It was then agreed that respondent should again manage the business but without interference from appellant. Thereupon, respondent proceeded to work out a cooperative plan through various produce growers in the State of California. While so doing, he met appellants Means and Wachter, experienced produce men who were willing to join appellant and respondent on a salary and percentage basis. By that time, appellant had no money with which to finance the continuation of the produce business. Respondent informed appellant and Mrs. Drudis that he would require $20,000 for this purpose. Mrs. Drudis said she would advance it, if it were approved by her business advisors: her brother-in-law, Mr. Hamilton Cotton of the Dominguez Land Co., and her brother, David Carson, of the Carson Estate Co. Respondent discussed the matter with both. Mr. Cotton advised appellant to quit business; Mr. Carson thought it better to continue in order to avoid loss of money already expended, and advised Mrs. Drudis to advance the $20,000 which she did. The partnership between Drudis, Means and Wachter was formed. Appellant had sustained a loss under the original agreement, and in order to help him recover it, respondent agreed in July, 1942, to reduce his percentage from 50% to 1/6th of appellant's share of the net profits, or 5½% of what the partnership made. Appellant in return agreed to follow respondent's advice and permit him to manage the affairs of the partnership without unnecessary interference, to wit: to keep in constant touch with the business; to see that a proper system of bookkeeping was installed; to pass upon any loans that might be made. Accordingly, respondent had the proper books installed, monthly accounts were rendered to all partners, and he arranged for the necessary licenses, bonds and insurance, and was in daily contact with the business.

The partnership was operated on this basis until October 9, 1942, when a written memorandum of the existing oral agreement was executed by appellant at respondent's request, to wit:

"Memorandum of Agreement.

"For and in consideration of legal services heretofore and hereafter to be rendered by Marcus L. Roberts for and in behalf of Jose Drudis in connection with his farming and/or Produce House undertakings, the said Jose Drudis has agreed, and by these presents does agree, to pay to the said Marcus L. Roberts, one-sixth (1/6th) of whatever he receives or is entitled to receive, including drawing account paid to him, out of and from any produce or farming partnership business of which he is a member. Said compensation and services to continue during the life of the present partnership of Drudis, Means and Wachter, and during any other partnership hereafter created as a result of death or change of membership therein.

"And the said Jose Drudis hereby authorizes the partnership of Drudis, Means and Wachter to pay the compensation of Marcus L. Roberts direct to him.
Dated *October 9th, 1942.* *"Jose Drudis"*

Under the terms of this agreement, respondent received his allotted 1/6th share of the profits from July of 1942, through the year 1944, which he drew from the company as and when he wanted it.

Early in 1945, respondent called to see appellant and Mrs. Drudis at their home in Sierra Madre, because he wanted Mrs. Drudis "to thoroughly understand all my business relations with Mr. Drudis". Respondent there stated, "Now, owing to the fact that I reduced my percentage from fifty down to five and a half per cent, the only way I feel that I can get any real compensation out of this is that things go on smoothly and the partnership is continued. * * * You must remember that Mr. Wachter is getting about $28,000 a year and Means is getting around $20,000 a

year. * * * When the five years is up they are going to be independent and they won't need your finances. * * * I don't want to see any friction or Mr. Wachter come in between us. * * * I just want to show you now what Mr. Drudis had lost in the produce business and I want to show that he has recovered all his losses." Respondent then explained at length how this recoupment of losses had been effected and stated: "When you add all those up, that is what she saved on her Federal tax report, what you saved on your State tax report and * * * considering too the business which I established which nets about $68,000 a year * * * I think Mr. Drudis is even, not only even with the board for what he lost in the produce business but I think altogether he's ahead. * * * by me reducing my fifty per cent to five and a half per cent * * * It really boils down that I am paying those farm losses of his which I had nothing to do with." Mrs. Drudis then spoke up: "I think you have treated Mr. Drudis fair. I think you ought to be getting your fifty per cent now." To this respondent replied: "That's up to you people but all I am complaining about at this time is that I don't want to see any rupture of our good relations or let Wachter come in between us."

Appellants' counsel here interposed an objection to this testimony on the ground of its incompetency to vary the terms of the agreement of October 9, 1942 and stated: "I realize that some of it might be admissible under the theory that it might be an executed oral agreement up to a certain extent * * * but the excess of $4,000 remaining would still be subject to the objection." The objection was overruled.

The next day appellant went to see respondent at his home and told him: "Amelia (Mrs. Drudis) thinks you ought to be getting the fifty per cent now and I just want to let you know it is agreeable to me." Respondent replied: "Well, that's very nice of you but * * * if you are willing to do that I can afford to give your matters a great deal more of my time * * * and I agreed then to perform services that I wasn't then required to and I would try to formulate some plan so that we'd be in a position to entice these fellows to continue the partnership with us. He said it was agreeable and I said okay. Then from now on, it's a fifty-fifty basis over and above your five per cent? And he said yes."

[1–3] The following language in Re Estate of Phillipi, 76 Cal.App.2d 100, 102–103, 172 P.2d 377, 378, appears particularly applicable to the facts disclosed by the instant record: "Where such a situation exists [confidential relation of attorney and client] the rebuttable presumption of fraud or undue influence arises where the attorney profits from his dealings with his client. That presumption can only be overcome by clear and satisfactory evidence that the transaction between the attorney and his client was fair and equitable and that the attorney had taken no advantage of the relationship and that the client was fully informed as to all matters relative to the transaction. In re Estate of Witt, 198 Cal. 407, 245 P. 197. * * * While, in cases of this kind, the presumption can be overcome only by clear, convincing and satisfactory evidence, the question of what constitutes such evidence, and when the presumption is overcome ordinarily and primarily, are questions addressed to the trier of fact. His conclusions on them should not be disturbed on appeal except in cases of an abuse of discretion or where there is no sufficiently substantial evidence supporting them."

[4, 5] The evidence presented by respondent was amply sufficient to overcome the presumption of invalidity of the contract under consideration. On the other hand appellant failed to produce any evidence tending to prove his allegation that he consented to the modification because of false statements made to him by respondent regarding recoupment of losses he had previously sustained.

[6] Neither is there anything in the record tending to establish fraud or overreaching on the part of respondent. In fact certain portions of appellant's deposi-

tion of July 7, 1949, read in evidence at the trial herein, included the following:

"Q. So far as you know, he never concealed any facts from you, did he? A. I don't know.

"Q. Well, so far as you know. Do you know of any facts that he concealed from you that would have changed your mind so that you would not have agreed to these terms? A. I had all the confidence in you.

"Mr. Roberts: That is not the question. Read the question. (Previous question read by the reporter.)

"Q. In other words, do you think he defrauded you in any way? A. No.

"Q. No. Is that your answer? A. Yes. * * *

"Q. Now, do you claim there is any kind of fraud by which Mr. Roberts secured this agreement for 5½ per cent? A. I don't claim any fraud.

"Q. Do you claim it was a fair bargain? A. I thought it was for your services.

"Q. You claim it was a fair bargain at a reasonable compensation? A. I believe so. * * *

"Q. In making that agreement you do not consider that he took advantage of any trust or confidence you had in him, do you? A. No."

Appellants next urge that the oral modification of the written agreement of October 9, 1942, is prohibited by section 1698 of the Civil Code, to wit: "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."

As heretofore shown, the relationship between the parties hereto had subsisted for a number of years. Their practice was to ascertain and divide the profits each year. That custom was followed in 1945. In his amended answer appellant alleged that his share of profits for that year was $22,813.54; that $10,406.77 was reported in his income tax return for 1945 "and in the tax return of plaintiff."

As between appellant and respondent, the oral modification respecting percentage of profits was fully executed for the year 1945. Its object was fully accomplished: The contemplated services had been performed by respondent, and the net profit from the partnership had been ascertained and allotted. Early in 1946, respondent drew $6,406.77 from his allotted share of $10,406.77. It was only at the request of the partnership that it be allowed the use of the balance for awhile, that respondent in April or May of 1946 consented not to withdraw the $4,000 which is the subject of this action. See section 1661, Civil Code, and In re Estate of Morrison, 68 Cal.App.2d 280, 285, 156 P.2d 473, 476, where the court stated, quoting from Treadwell v. Nickel, 194 Cal. 243, 258, 228 P. 25, "'If thereafter the relations of plaintiff and Miller & Lux were governed by such oral agreement, and its object was fully accomplished, the agreement became executed and worked a modification of the original contract of employment.'"

Appellants argue that an account stated is an executory contract, hence is insufficient to alter the terms of a written contract.

[7] Twohey v. Realty Syndicate Co., 4 Cal.2d 379, 383, 49 P.2d 819, 821, is authority for the statement: "'An account stated is a mere unperformed promise by one party to pay a stated sum to another, and it is therefore an executory contract. Civ.Code, § 1661; Pearsall v. Henry, 153 Cal. 314, 325, 95 P. 154.'"

As heretofore stated, performance was complete as between respondent and appellant. The money was on deposit subject to respondent's order of withdrawal. Part of it he received. He was entitled to the balance and could have withdrawn it. Instead he granted the request of the partnership and permitted the $4,000 to be used in the business "for awhile".

Appellants contend that since the instant agreement is one which was not to be performed within a period of one year, it comes under the statute of frauds, section 1624(1) of the Civil Code, and must be in writing.

[8–10] As held in Dean v. Davis, 73 Cal.App.2d 166, 168, 166 P.2d 15, 16: "The statute of frauds has no application to an

executed agreement. McComsey v. Leaf, 36 Cal.App.2d 132, 142, 97 P.2d 242. * * * '"When a contract has been so far performed that nothing remains to be done but the payment of the consideration for the performance, the fact that the contract does not require the payment within a year furnishes no defense to an action for the price."' Hellings v. Wright, 29 Cal.App. 649, 656, 156 P. 365, 368. In 49 American Jurisprudence 860, it is said: 'To state the rule another way, where the employee has fully performed the contract on his part and there is nothing left for the other party to do but to pay the agreed compensation, the statute does not apply, and the contract may be enforced against the employer according to its terms. Such is the view of the American Law Institute.' See Restatement, Contracts, vol. 1, § 178. When the parties to a contract which is not to be performed within a year have partly performed it, neither can avoid its obligation as to past transactions by objecting that it was oral and within the statute. 12 Cal.Jur. 858; Pico v. Cuyas, 47 Cal. 174, 179."

Since this court is of the opinion that the agreement here was fully executed for the year 1945 and prior years, the statute of frauds does not apply.

As heretofore shown, the evidence amply supports the findings and judgment.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

104 Cal.App.2d 281

ROBERTS v. WACHTER et al.
Civ. 17876.

District Court of Appeal, Second District, Division 1, California.

May 17, 1951.

Action by Marcus L. Roberts against Fred L. Wachter, Jose Drudis and J. B. Douglass for a declaration of the rights of the parties, for damages for an alleged breach of trust by the defendant Drudis, and for inducing a breach of contract. The Superior Court, Los Angeles County, Wm. B. McKesson, J., entered a judgment after demurrers to the sixth amended complaint had been sustained without leave to amend, and plaintiff appealed. The District Court of Appeal, Drapeau, J., held that the defendant Drudis was estopped from relying on the statute of frauds.

Judgment reversed in part, and affirmed in part.

1. Appeal and error ⇐917(1)

On appeal from judgment sustaining demurrer to complaint, allegations must be regarded as true.

2. Pleading ⇐34(1)

Pleadings must be reasonably interpreted and must be read as a whole, and each part must be given meaning that it derives from context wherein it appears.

3. Pleading ⇐205(1)

All that is necessary as against general demurrer is to plead facts entitling plaintiff to some relief.

4. Trusts ⇐17(1)

In action by attorney against client for alleged breach of trust in refusing to fulfill obligation to pay portion of profits of business organized by attorney by way of compensation, where attorney pleaded written memorandum of agreement for division of profits and alleged a subsequent oral agreement restoring original written basis for division of profits and alleged that client refused to recognize any obligation under oral agreement because it was not in writing, statute of frauds had no application to oral agreement pleaded. Civ.Code, §§ 1624, subd. 1, 1698.

5. Attorney and client ⇐123(1)

Whether relationship between attorney and client under agreement by which attorney was to organize and operate business in return for share of profits was that of joint adventurers, employer and employee, or trustor and trustee was a question of fact.

6. Partnership ⇐52

Receipt by person of share of profits of business is prima facie evidence that he is a partner, but inference is not drawn if profits were received in payment as wages of employee.

7. Frauds, statute of ⇐144

Where party to oral contract has been induced by another seriously to change his position in reliance upon, or in performance of, contract, and would suffer unconscionable injury if it were not enforced, or if unjust enrichment would result if party who has reaped benefit of other's performance were allowed to rely upon statute of frauds, estoppel will be invoked, and statute will not be available to perpetuate the fraud.

8. Frauds, statute of ⇐144

Where written contract provided that attorney would perform services for partnership by organizing and aiding in management in return for certain percentage of profits of client, and attorney allegedly then rendered additional service under oral agreement not required under written memorandum and was induced to do so by client's promise to pay 50 per cent of his share of profits, and attorney also waived right to quantum meruit claim for value of services, client was estopped from relying upon statute of frauds to avoid liability arising out of the oral agreement. Civ. Code, §§ 1624, subd. 1, 1698.

9. Torts ⇐16

Person is not justified in inducing breach of contract simply because he is in competition with one of the parties to the contract and seeks to further his own economic advantage at expense of the other.

10. Torts ⇐12

Action will lie for inducing breach of contract by resort to means in themselves unlawful such as libel, slander, fraud, physical violence, or threats of such action.

11. Torts ⇐12

Where two partners allegedly with knowledge of third person's agreements with third partner wrongfully induced third partner to breach those agreements and enter into contract under which third partner had a smaller percentage of interest in the partnership, and third partner's agreements provided for payment to third person of certain percentage of profits allotted to third partner, those inducing breach would be liable to third person in tort.

12. Pleading ⇐205(1)

Where adjudication of rights asserted in first three causes of action stated in complaint would obviate any necessity for other declaration of rights between the parties, court properly sustained general demurrer to fourth cause of action generally seeking declaration of rights of parties.

13. Pleading ⇐207

In action by attorney against client and his two partners for declaration of rights, for damages for alleged breach of trust by client and for alleged inducement of breach of contract by partners, based on agreement between client and attorney for portion of share of profits in partnership in return for services rendered by attorney, complaint alleging that client repudiated agreement and made further performance impossible, that client refused to recognize obligation to attorney under subsequent oral agreement, and that partners wrongfully induced client to breach the two agreements, stated facts with sufficient clarity to apprise defendants of issues for purpose of special demurrers.

Elmer Patrick Friel, for appellant.

Marcus L. Roberts, Los Angeles, in pro. per.

Earl D. Killion, North Hollywood, for respondents.

DRAPEAU, Justice.

By the instant action, plaintiff seeks a declaration of the rights of the parties, and recovery of damages (1) against defendant Drudis for breach of trust; and (2) against defendants Wachter and Douglass for having induced such breach.

It is a so-called companion case to Roberts v. Wachter, Cal.App., 231 P.2d 534. Both actions are based upon the same agreements. The first is to recover money due thereunder for the year 1945, while the

instant action covers a period subsequent to January 1, 1946.

Demurrers were sustained to plaintiff's amended complaints first to fifth, inclusive, with leave to amend. Thereafter plaintiff filed his sixth amended complaint to which general and special demurrers were sustained without leave to amend. The latter ruling was set aside on motion, and upon reconsideration, the demurrers were again sustained without leave to amend. From the ensuing judgment, plaintiff appeals.

It is here urged that the court erred in sustaining the demurrers and abused its discretion in denying appellant the right to amend his complaint.

The first and second causes of action of the sixth amended complaint are directed against respondent Drudis. The first alleges that appellant is an active member of the State Bar of California; that he and said Drudis made an oral agreement in January, 1942, to acquire an interest in a wholesale produce commission business; respondent to finance the same but to take no active part; appellant "to represent said interest, help in the formation of said business and thereafter manage and devote such time and attention to said business as conditions warranted aside from actually conducting said business himself"; that appellant should have no quantum meruit claim against Drudis for his services "but would be entitled to 50% of net profits from said business interest, after first deducting and allowing Drudis an amount equal to 5% per annum on his invested capital therein."

Accordingly, the business was acquired and operated, appellant devoting thereto 8 to 10 hours of his time daily until June 22, 1942, when Drudis interfered with his management and requested him to leave. Appellant rescinded the agreement and left, but received no compensation for his time or efforts theretofore expended.

Shortly thereafter, when the business showed a deficit of $16,130.47, appellant and Drudis renewed their association, Drudis promising not to interfere with appellant's management, and because of prior business dealings, it was understood that appellant should receive 50% of the net profits from Mr. Drudis' interest after allowing the latter 5% on his investment. At this time, appellant induced the financial advisors of Mrs. Drudis to approve an advance of $20,000 to refinance the business.

Appellant proceeded to organize the partnership of Drudis, Means and Wachter for a period of five years ending July 31, 1947, in which respondent Drudis was to take no active part. At this time, in order to help Mr. Drudis recoup the loss he had previously sustained in the business, appellant voluntarily agreed to reduce his percentage of the profits from 50% to a straight 1/6th during the term of the partnership or "any partnership thereafter to be created for carrying on such business in which Drudis held an interest."

In order to acquaint the partners "with the terms of the fiduciary relationship then existing between appellant and Drudis and to authorize the payment of plaintiff's share of the profits direct to him", respondent Drudis signed a written memorandum of said agreement on October 9, 1942, to wit:

"For and in consideration of legal services heretofore rendered and hereafter to be rendered by Marcus L. Roberts for and in behalf of Jose Drudis in connection with his farming and/or produce house undertakings, the said Jose Drudis has agreed, and by these presents does agree, to pay to the said Marcus L. Roberts, one-sixth (1/6th) of whatever he receives or is entitled to receive, including drawing account paid to him out of and from any produce or farming partnership business of which he is a member. Said compensation and services to continue during the life of the present partnership of Drudis, Means and Wachter, and during any other partnership hereafter created as a result of death or change of membership therein.

"And the said Jose Drudis hereby authorizes the partnership of Drudis, Means and Wachter to pay the compensation of Marcus L. Roberts direct to him.

"Dated October 9, 1942.

(Signed) Jose Drudis."

Appellant constantly kept himself informed on the operation of the business under conditions which required less of his

time than under the original agreement; was at all times ready and willing to give more time if necessary, and did render all the services required "under the terms of the agreement evidenced by said memorandum dated October 9, 1942, until on or about September 20, 1946, when Drudis again and without cause, breached and repudiated his agreement with plaintiff, and made further performance thereunder impossible."

It is then alleged on information and belief "that owing to plaintiff's nonrepresentation of the interest financed by Drudis, said interest has not received nor been credited with the share of the net profits due it."

That when the said partnership was terminated on July 31, 1947, the business was perpetual and since that date has been carried on under a new partnership, i. e., Drudis, Wachter and Douglass, which was formed for another five-year period. It is alleged that Drudis entered into the new partnership without the help, advice or experience of appellant, thereby causing the interest held in Drudis' name to become greatly depreciated in value. Its percentage of profits was reduced from 44.77% to 33.33%, to the detriment of appellant. That appellant demanded his share of the profits accruing since January 1, 1946, but respondent Drudis has refused to comply therewith or to make any accounting to appellant.

Appellant then alleges a relationship of trust and confidence between him and Drudis; alleges that all of his agreements and dealings were fair and equitable and free from undue influence in their making, but that Drudis, contrary to his obligation of utmost good faith toward appellant, "seeks unjustly to enrich himself by retaining for himself all the profits which have accrued and will accrue to said business interest since January 1, 1946.

"That by reason of the premises, Drudis has become and now is a trustee for plaintiff of said interest and of the profits derived and to be derived therefrom since January 1, 1946, which trust is subject to the terms of their said agreement.

"That Drudis, by his aforesaid acts and breach of said agreement, has caused plaintiff the loss of the moneys which would have come to him from a division of the profits made from the interest financed by Drudis and those that could have been made under plaintiff's supervision thereof subsequent to January 1, 1946, as well as the loss of all future moneys from said source, all of which has caused plaintiff damages in the sum of $68,000.00, no part of which has been paid."

The second cause of action incorporates by reference that portion of the first cause of action with respect to the terms of the oral agreement of January, 1942. It is then alleged that neither Wachter nor Means contributed to the captial of the partnership and waived all their rights to any assets at its termination on July 31, 1947. After reciting the amounts received in 1942, 1943, and 1944 by respondent Drudis, after payment of one-sixth of his share to appellant and recoupment by Drudis of his loss sustained in 1942, appellant alleged an oral agreement between him and Drudis restoring the "original basis for the division of profits between them commencing January 1, 1945, namely 50% * * * over and above Drudis' 5% invested capital"; that in consideration therefor appellant agreed to devote more time to the business than was then required, and it was mutually agreed that appellant should try to continue the existing partnership for another five years or form a like partnership; and if Drudis was dissatisfied that he should drop out and permit appellant to take over "exclusively for himself" upon payment to Drudis of whatever amount he then had invested in said business. Accordingly, appellant gave a great deal more of his time to the business and performed services not required of him by the agreement evidenced by the memorandum of October 9, 1942, until September 20, 1946 when further performance was made impossible by Drudis, who refused to recognize any obligation to appellant under said agreement because it was not in writing.

It is further alleged that the interest here in question was held by Drudis in trust; that a beneficial interest in a trust is not required to be in writing; but if the statute of frauds does apply, Drudis is estopped to

assert it because of the confidential relation he occupied toward appellant; that his declarations led appellant to believe that he would fulfill his promises and that he thereby induced appellant to render services which he otherwise would not have done, because he had waived any right to a quantum meruit claim for them.

Prior to the termination of the Drudis, Wachter and Means partnership, appellant demanded that he be permitted to arrange a continuation of the business after July 31, 1947, or that Drudis accept from him the amount of his investment therein, which appellant was ready, able and willing, and did in fact offer, to pay; that said demand was refused. That Drudis' refusal to carry out the terms of their agreement caused appellant the loss of the profits to which he otherwise would have been entitled, all to his damage in the sum of $68,000.

The third cause of action is directed against Wachter and Douglass, members of the new partnership, it being alleged that they had notice of the agreements between Drudis and appellant; that on June 12, 1947, to safeguard his rights thereunder, appellant gave written notice to Wachter that he would hold anyone liable who interfered with the fulfillment of the terms of such agreements. Later in June, appellant gave notice to Wachter and Drudis that Mr. Means, who had contributed greatly to upbuilding the business, had consented to remain as a partner, but Drudis and Wachter refused to consider his retention and chose in his place, J. B. Douglass, an employee of the partnership who was under the domination of Wachter. Thereupon, appellant demanded that Drudis retire and permit him to take over Drudis' interest, as agreed upon, which demand was refused.

It is further alleged that on July 31, 1947, respondents Wachter and Douglass, with full knowledge of appellant's agreements with Drudis, wrongfully induced the latter to breach the same and to enter into a contract with them to continue the business after July 31, 1947. That the latter agreement was detrimental to appellant in that it reduced the percentage of said interest in the profits of the business from 44.77% to 33.33%, and otherwise reduced its value to a fraction of its actual worth; that Drudis was incapable of conducting the business without appellant's help, and would have conformed to the terms of their agreements except for the deliberate and wrongful influence and persuasion of Wachter and Douglass. As a result of such wrongful acts of Wachter and Douglass, appellant's valuable rights under his agreement with Drudis have been destroyed all to his damage in the sum of $68,000.

The fourth cause of action is for a declaration of the respective rights and duties of the parties mentioned under the agreements made with Drudis.

[1–3] An often repeated rule is stated in Hardy v. San Fernando Valley C. of C., 99 Cal.App.2d 572, 577, 222 P.2d 314, 317, as follows: "On appeal from a judgment sustaining a demurrer to a complaint the allegations of the complaint must be regarded as true. The court must, in every stage of an action, disregard any defect in the pleadings which does not affect the substantial rights of the parties. Code Civ. Proc., sec. 475. 'Pleadings must be reasonably interpreted; they must be read as a whole and each part must be given the meaning that it derives from the context wherein it appears.' Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 42, 172 P.2d 867, 872. All that is necessary as against a general demurrer is to plead facts entitling the plaintiff to some relief. Tristam v. Marques, 117 Cal.App. 393, 397, 3 P.2d 947."

In support of the court's ruling sustaining general demurrers to the first cause of action, respondents urge in their points and authorities and also in their brief on appeal that, since the agreement of October 9, 1942 was not to be performed within one year, any oral modification thereof is barred by the statute of frauds. Sec. 1624(1), Civil Code. This for the reason that an agreement in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise. Sec. 1698, Civil Code.

[4] The statute of frauds has no application to the oral agreement pleaded in this particular cause of action. This agreement had been reduced to writing by the memo-

randum of October 9th which was subscribed by Drudis, the party to be charged. This memorandum was pleaded in *haec verba,* but nowhere in this cause of action is any subsequent oral modification thereof alleged. As a result, it was error to sustain the general demurrers to appellant's first cause of action.

As heretofore stated, the second cause of action alleges the oral agreement of January, 1945, increasing appellant's share from one-sixth to fifty percent of the profits realized by respondent Drudis from his interest in the produce business. It is also alleged that such interest was held by Drudis in trust, therefore he is estopped to assert the statute of frauds as a defense.

[5, 6] Whether the relationship between appellant and respondent Drudis was that of joint adventurers, employer and employee or trustor and trustee is a question of fact. See Nelson v. Abraham, 29 Cal.2d 745, 750, 177 P.2d 931, 933, where it is stated: "The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner, but the inference is not drawn if the profits were received in payment as wages of an employee. Civ.Code, § 2401, subd. 4. Whether the agreement to share profits is merely to provide a measure of compensation for services or for the use of money, or whether it extends beyond and bestows ownership and interest in the profits themselves so as to constitute the undertaking a partnership or a joint venture, presents primarily questions of fact. Spier v. Lang, 4 Cal.2d 711, 53 P.2d 138. It has been said to be a 'mingled problem of law and fact.' Swanson v. Siem, supra, 124 Cal.App. 519, 523, 12 P.2d 1053, 1055, citing 20 R.C.L. 849, § 55."

The allegations of this cause of action reveal that appellant rendered additional services under the oral agreement of January, 1945, which were not required of him under the written memorandum of October 9, 1942; that he was induced to render these services by respondent's promise to pay him fifty percent of the profits realized from the business; and further relying upon that promise appellant waived his right to a claim in quantum meruit for the value of the services so rendered.

[7] As was recently stated in Berkey v. Halm, 101 Cal.App.2d —, 224 P.2d 885, 889: "Where a party to an oral contract has been induced by the other party seriously to change his position in reliance upon, or in performance of, the contract, and would suffer an unconscionable injury if it were not enforced, or if unjust enrichment would result if a party who has reaped the benefit of the other's performance were allowed to rely upon the statute, the doctrine of estoppel will be invoked and the statute of frauds will not be available to perpetuate the fraud."

[8] This is a situation where an estoppel arises as a bar to the statute of frauds.

The third cause of action alleges that respondents Wachter and Douglass with knowledge of appellant's agreements with respondent Drudis wrongfully induced him to breach his contract with appellant and enter into a contract with them to continue the business after July 31, 1947, the date of termination of the partnership of Drudis, Means and Wachter.

In support of the general demurrer which was sustained by the court to this cause of action, respondents say: "It is true that the law in this state allows a party to recover damages against one who has induced another to breach a contract with the party complaining, but such damages are allowed only in case there has been a fraudulent or unlawful inducement"; and that the reduction of the percentage of interest that respondent Drudis held from 44.77% to 33.33% did not constitute a wrongful inducement.

[9–11] The language employed in Imperial Ice Co. v. Rossier, 18 Cal.2d 33, 35–36, 112 P.2d 631, 632, discloses a tendency to permit recovery of damages for inducing a breach where the means used were lawful, to wit: "It is universally recognized that an action will lie for inducing breach of contract by a resort to means in themselves unlawful such as libel, slander, fraud, physical violence, or threats of such action.

See cases cited in 24 Cal.L.Rev. 208; 84 A.L.R. 67. Most jurisdictions also hold that an action will lie for inducing a breach of contract by the use of moral, social, or economic pressures, in themselves lawful, unless there is sufficient justification for such inducement. See cases cited in 84 A. L.R. 55; 24 Cal.L.Rev. 208, 209; see Sayre, Inducing Breach of Contract, 36 Harv.L. Rev. 663, 671; Carpenter, Interference With Contractual Relations, 41 Harv.L. Rev. 728, 732; Restat. Torts, sec. 766. * *

"It is well established, however, that a person is not justified in inducing a breach of contract simply because he is in competition with one of the parties to the contract and seeks to further his own economic advantage at the expense of the other."

As to the fourth cause of action, i. e., declaration of rights of the parties, respondents assert that the general demurrer thereto was properly sustained, for the reason that such rights can be determined in the other causes of action.

[12] It appears to be the fact that an adjudication of the rights asserted in the first three causes of action would obviate any necessity for other declarations of rights.

[13] Regarding the special demurrers which were interposed to the first, second and third causes of action upon the ground of uncertainty in several specified particulars, while the instant complaint is not a model pleading, the facts upon which appellant relies are stated with sufficient clarity to apprise respondents of the issues to be met. See Merlino v. West Coast Macaroni Mfg. Co., 90 Cal.App.2d 106, 108, 202 P.2d 748.

For the reasons stated, that portion of the judgment which sustains the demurrers to the first, second and third causes of action of the sixth amended complaint is reversed; that portion of said judgment which sustains the demurrers to the fourth cause of action of said complaint is affirmed.

WHITE, P. J., and DORAN, J., concur.

104 Cal.App.2d 480

AUTRAND v. SUPERIOR COURT IN AND FOR LAKE COUNTY.

Civ. 8004.

District Court of Appeal, Third District, California.

May 28, 1951.

A. A. Autrand, petitioner, filed a petition for writ of review against the Superior Court of the State of California, in and for the County of Lake, respondent, to review orders of the respondent with respect to an appeal from judgment of justice of the peace, and to have those orders vacated and set aside. The District Court of Appeal, Peek, J., held that respondent had no jurisdiction of the appeal because of the failure of the appellant to pay required fees prior to expiration of 30-day period following notice of appeal.

Orders vacated and set aside.

1. Justices of the peace ⇐158(1)

Though superior court may acquire jurisdiction of appeal from judgment of justice of the peace, if justice, waiving payment of his fees, transmits to superior court record of appeal together with all fees payable to clerk of superior court, and though there is sufficient compliance with statute requiring payment of fees to justice for county clerk at time of filing notice of appeal, if fees are paid within 30-day period in which to appeal, yet, if fees payable to county clerk are not paid within 30-day period, superior court can acquire no jurisdiction of appeal. Code Civ. Proc. § 981.

2. Justices of the peace ⇐158(3)

Where, at time of filing notice of appeal from justice of the peace to superior court, defendant failed to pay either required fees to justice of the peace or those required by law to be paid to the justice for county clerk for filing appeal, superior court acquired no jurisdiction of appeal, notwithstanding that after expiration of 30-day period following notice of appeal defendant paid directly to county clerk the filing fee required by statute. Code Civ.Proc. § 981.

Fred S. Crump and Lovett K. Fraser, Lakeport, for petitioner.

H. G. Crawford, Lakeport, for real party in interest, Gail Lang.

PEEK, Justice.

This is a petition for a writ of review of the proceedings in an unlawful detainer action begun in the Justice's Court of Number Five Township, Lake County, and from there appealed to the Superior Court of that county.

Originally plaintiff Autrand instituted an unlawful detainer action against defendant in the above mentioned Justice's Court. Thereafter a default was entered against defendant who then moved to set aside the default and the judgment which had been entered pursuant thereto. Defendant's motion was denied and within the prescribed thirty day period an appeal from that order was taken to the Superior Court of said county. Prior to the hearing on appeal to the Superior Court, plaintiff moved said court to dismiss the same on the ground of lack of jurisdiction. The matter was submitted and thereafter said court by a memorandum decision granted defendant's motion to set aside the default, denied plaintiff's motion to dismiss, and proceeded to hear the appeal on questions of both law and fact. Plaintiff, petitioner herein, now seeks to review said orders of the Superior Court and to have the same vacated and set aside.

The record shows that at the time of filing this notice of appeal defendant failed to pay either the required fees to the Justice of the Peace or those required by law to be paid to the county clerk for filing the appeal as provided in Section 981 of the Code of Civil Procedure. However, the record does show that subsequent to the expiration of the thirty day period following his notice of appeal, defendant paid directly to the county clerk the nine dollar filing fee required by said section.

The portion of that section pertinent to the question now raised provides that no appeal taken from a Justice's Court is "effectual for any purpose whatever" unless at the time of filing the notice of appeal the fees payable to the Justice of the Peace and to the county clerk are paid.

[1] While the Superior Court may acquire jurisdiction of the appeal if the Justice of the Peace, waiving the payment of his fees, transmits to the Superior Court the record of appeal together with all fees payable to the Clerk of the Superior Court, Gunn v. Superior Court, 73 Cal.App.2d 564, 166 P.2d 906, and while there is sufficient compliance with Section 981, supra, if the fees, though not paid at the time of filing the notice of appeal are nonetheless paid within the thirty day period in which to appeal, Simmons v. Superior Court, 30 Cal.App. 252, 157 P. 817, still, if the fees payable to the county clerk are not paid within that thirty day period, the Superior Court can acquire no jurisdiction of the appeal from the Justice's Court. Johnson v. Superior Court, 28 Cal.App. 618, 621, 153 P. 404.

[2] In the Johnson case, where, in appealing from a judgment of the Justice's Court the appellant paid only a part of the fees made by law payable to the county clerk, this court held that payment of the fees is a "jurisdictional prerequisite" under the statute, and a failure to pay the same is a failure to perfect the appeal. Thus, in the present case, since no fees were paid to the county clerk within the time prescribed, the Superior Court of Lake County acquired no jurisdiction in the proceedings here reviewed, and its orders are therefore vacated and set aside.

In view of our conclusion on this phase of the case it becomes unnecessary to discuss the additional contentions made by petitioner.

The order of said Superior Court heretofore made on December 19, 1950 granting defendant's motion to open said default is annulled and set aside.

ADAMS, P. J., and VAN DYKE, J., concur.

104 Cal.App.2d 340

FERNANDEZ v. AMERICAN BRIDGE CO.

Civ. 7904.

District Court of Appeal, Third District, California.

May 21, 1951.

Robert Fernandez brought action against the American Bridge Company to recover for injuries sustained when defendant's crane knocked piece of steel over onto plaintiff who was an employee of company which had been employed by defendant to sandblast the steel of the defendant. The Superior Court of Shasta County, Albert F. Ross, J., entered a judgment for plaintiff, and defendant appealed. The District Court of Appeal, Adams, P. J., held that evidence sustained finding that defendant was negligent and that plaintiff was not contributorily negligent, entitling plaintiff to recover.

Judgment affirmed.

1. Appeal and error ⇐930(1)

On appeal, District Court of Appeal would consider evidence in light most favorable to respondent.

2. Negligence ⇐32(1)

Regardless of status of plaintiff as licensee, trespasser, or invitee, if defendant knew or should have known of plaintiff's presence in place of danger, duty of reasonable care was owed by defendant to plaintiff.

3. Negligence ⇐134(4)

Where defendant which had a contract with government to furnish and install steel drum gates at dam, contracted with plaintiff's employer to sandblast steel, and arranged with railroad to use yard for sandblasting operation, and crane was stationed on flat car, and at yard was a drinking fountain, which was only water supply on premises, and which was used by both defendant's crew operating crane and by employees of plaintiff's employer, and plaintiff went to fountain to get drink when crane was not in operation, but while plaintiff was still at fountain crane was moved, though some members of crane crew knew of presence of plaintiff, and crane caused plaintiff injury, evidence sustained finding in injury action that negligence of defendant was active and not passive, so as to entitle plaintiff to recover.

4. Negligence ⇐135(4)

Where defendant which had a contract with government to furnish and install steel drum gates at dam, contracted with plaintiff's employer to sandblast steel, and arranged with railroad to use yard for sandblasting operation, and crane was stationed on flat car, and at yard was a drinking fountain, which was only water supply on premises, and which was used by both defendant's crew operating crane and by employees of plaintiff's employer, and plaintiff went to fountain to get drink when crane was not in operation, but while plaintiff was still at fountain crane was moved, though some members of crane crew knew of presence of plaintiff, and crane caused plaintiff injury, evidence sustained finding in injury action that plaintiff was not contributorily negligent, and was not precluded from recovering for injuries.

5. Negligence ⇐138(3)

Where defendant which had a contract with government to furnish and install steel drum gates at dam, contracted with plaintiff's employer to sandblast steel, and arranged with railroad to use yard for sandblasting operation, and crane was stationed on flat car, and at the yard there was a drinking fountain, which was only water supply on premises, and which was used by both defendant's crew operating crane and by employees of plaintiff's employer, and plaintiff went to fountain to get drink when crane was not in operation, but while plaintiff was still at fountain crane was moved, though some members of crane crew knew of presence of plaintiff, and crane caused plaintiff injury, court did not err in injury action in giving instruction that defendant owed plaintiff a duty of using ordinary care in active operation of its equipment in yard.

Walter Shelton, San Francisco, Carr & Kennedy, Redding, for appellant.

L. C. Smith, and Chenoweth & Leininger, all of Redding, for respondent.

ADAMS, Presiding Justice.

Defendant has appealed from a judgment against it for $40,000 which followed a verdict in favor of plaintiff for that amount as damages for personal injuries which he sustained in an accident attributed to the negligence of employees of defendant. Appellant urges as grounds for reversal that the evidence is insufficient to prove negligence on its part, and that the court erred in instructing the jury.

[1] Considering the evidence in the light most favorable to respondent as perforce we must do, the following facts are established.

The American Bridge Company had a contract with the U. S. Reclamation Bureau to furnish and install the steel drum gates in Shasta Dam. It was necessary, before the steel was installed, that it be sandblasted, and defendant contracted with D. E. Burgess Company to perform that service. Defendant arranged with the Southern Pacific Company to use a yard at Coram, below the dam, for the sandblasting operation. There, about 50 feet south of the railroad company's main line, and parallel thereto, running east and west, was a spur track upon which a crane stationed upon a flat car was operated. The steel ribs, brought in on the main line, were unloaded and stacked just south of main line, and the sandblasting equipment was located about 20 feet south of the spur track. It was defendant's business, with the use of the crane, to deliver the ribs to the sandblasting equipment and remove them therefrom when the operation was concluded. These ribs were in the form of an arc, were 26 feet long, and, when upright as they were stacked, the arms extended upward about 7 feet. About midway between the main line and the spur track, and about 100 feet east of the compressor which operated the sandblasting equipment, a drinking fountain was located. It consisted of an upright pipe about 4 feet high, which brought in cool spring water for the use of all employees on the job, and which was allowed to run continuously to keep the water cool. A keg was placed so as to catch the flow, and some of the men kept milk in it. It was the only water supply on the premises, and not only furnished water for drinking, but for use in the compressor and the crane. It was used by all of the employees of both companies.

The crew operating the crane consisted of Rountree, the operator, Wilkinson, the foreman, Lewis, Elliott and Brewster, hook tenders, Oswalt, also known as Thomas, signalman, and Ingle, the foreman who was in the yard only occasionally.

On August 12, 1948, plaintiff Fernandez was, and had been since early in June, employed to operate the compressor for the Burgess Company. About 9:00 a.m. he went to the fountain to get a drink. The crane was then standing on the spur track, having just been used to load a truck with steel bound for dam which was east of the field of operation. The arm was pointed in that direction. On his way to the fountain Fernandez talked with Brewster, Elliott and Lewis. The latter two passed him and crawled up on a stack of some seven steel ribs which were and had been for some weeks standing upright, that is, upon the rounded base, just north of the fountain. They apparently were looking for numbers on the ribs, as the numbers indicated the ribs that were next in order for sandblasting. The crane was not in operation—not moving. While plaintiff was getting his drink and facing southerly, Brewster, who was near him, called "Look out." Fernandez started to run south but was struck by one of the steel ribs which had fallen over. He sustained serious injuries.

Brewster testified that he saw Fernandez getting a drink; that the signalman gave the crane operator the signal to pick up a steel rib, and when the crane started to do so it knocked over two of the ribs. Rountree, the operator of the crane, testified that he did not see Fernandez at the fountain; that he operated the crane according to the signals of Oswalt, the signalman. Lewis said that he thought Oswalt was in a position where he could see Fernandez. Elliott testified that after the crane had hooked onto the steel he gave the signal to lift it, and when he saw the other ribs were tipping he called "Look out" to Fernandez, and to Brewster who was also near the fountain.

Appellant contends that Fernandez, when he went to the fountain, was a trespasser, or at most a bare licensee in that he came to the fountain for a purpose solely his own, in nowise connected with his employment, without defendant's knowledge or expectation, and that defendant was under no obligation toward him except not to injure him wantonly or wilfully. Cases are cited as to the duty owed trespassers or licensees. Respondent replies that he was not a trespasser, that his presence at the fountain was known to members of the crane crew, and that the duty of ordinary care was owed him.

The evidence does not show that Fernandez was a trespasser or a mere invitee at the fountain. It does not appear that the yard was divided into areas to which the Bridge Company and the Burgess Company were limited in their operations. It was a small area. The crane moved up and down the spur track, though it was usually parked near the fountain when not in use elsewhere. Ribs awaiting sandblasting were stacked at different places. There is ample proof that the fountain was maintained for and used by the crews of both companies. It was August and cool water for the employees was an obvious necessity, and there was no other supply. Also, the evidence shows that the crane was not used continuously but only occasionally, and it could well have been anticipated that some one of the various employees would be at the fountain not infrequently.

[2] The California rule seems to be that, regardless of the status of a plaintiff as licensee, trespasser or invitee, where defendant knew, or should have known, of plaintiff's presence, the duty of reasonable care was owed to him. See Yamauchi v. O'Neill, 38 Cal.App.2d 703, 102 P.2d 365; Demmon v. Smith, 58 Cal.App.2d 425, 432–433, 136 P.2d 660; Newman v. Fox West Coast Theatres, 86 Cal.App.2d 428, 194 P.2d 706; Oettinger v. Stewart, 24 Cal.2d 133, 148 P.2d 19, 156 A.L.R. 1221; Fernandez v. Consolidated Fisheries, Inc., 98 Cal.App. 2d 91, 219 P.2d 73 hearing in Supreme Court denied; and 156 A.L.R. 1228.

In the Yamauchi case, 38 Cal.App.2d at pages 707–708, 102 P.2d at page 367, it was said: "The rule upon which defendants rely finds expression in many of the authorities but it is limited in its application to cases dealing with the duty owed to a licensee with respect to the condition of the premises or, as sometimes expressed, to cases involving only passive negligence as distinguished from active negligence. The authorities may not be entirely in accord in determining what constitutes passive negligence and what constitutes active negligence but there can be no doubt whatever that the negligent operation of a moving vehicle in a place where the operator has good reason to expect the presence of licensees constitutes active negligence as distinguished from passive negligence. Under such circumstances the duty owed by the operator of the moving vehicle to a licensee, whether such operator be the licensor or any other person, is not merely the duty to refrain from wilful or wanton conduct but is the duty to exercise ordinary care."

Also, 38 Cal.App.2d at page 709, 102 P.2d at page 368: "In the case before us plaintiff was in no sense a trespasser. She was admittedly either an invitee or a licensee and she was injured by the active negligence of defendants at a place where defendants had good reason to expect the presence of invitees and licensees. Under these circumstances, we believe the question of whether plaintiff was an invitee or licensee was wholly immaterial for in either case defendants owed to plaintiff the duty to exercise ordinary care in the operation of the delivery truck and could be held liable for their breach of that duty." Hearing in the Supreme Court denied.

In the more recent case of Fernandez v. Consolidated Fisheries, Inc., we find the rule stated on pages 95–97 of 98 Cal.App.2d, on page 76 of 219 P.2d as follows:

"The law in reference to the duty owed to trespassers, licensees and invitees has largely developed in reference to the duty of an owner or occupier of real property or structures thereon. The statutes of this state do not provide that a different duty is owed to persons in the three named categories. The only relevant statute is section 1714 of the Civil Code * * *. In spite

of this code section * * * our courts, in some cases at least, and in apparent disregard of the section, have followed the common law rule, which purports to make precise and rigid distinctions as to the duty owed by the owner or occupier to invitees, licensees and trespassers. * * * Such an approach is unrealistic, arbitrary, and inelastic. The point where the duties towards members of each of the classes begins or ends, or where it should begin or end, or where the duty not to act becomes supplemented by the duty to act, is almost impossible of perception. It is no wonder that exceedingly fine distinctions have been developed so that the law is most confused in this field. See note 13 Cal.L.Rev. 72. Many cases, and particularly the more recent ones, have in fact applied the general doctrine of negligence embodied in section 1714 of the Civil Code rather than the common law rigid categories test. * * *

"* * * This duty of reasonable care not only extends to situations where the land owner knows of a trespasser's presence, but also to situations where he should know of his presence. Thus, the Restatement of Torts Vol. 2, § 336, declares that if the possessor of land does not know of a trespasser's presence, but 'from facts known to him should know or believe that another is or may be' trespassing, he is 'subject to liability for bodily harm thereafter caused to the trespasser by the possessor's failure to carry on his activities upon the land with reasonable care for the trespasser's safety.' Many California cases are cited as being in accord in the California annotation to this section.

"Many courts, in imposing this duty of reasonable care towards trespassers and licensees, have drawn a distinction between active and passive negligence, and have limited the reasonable care test to overt acts of negligence. See annotations 49 A. L.R. 778. California has quite clearly adopted this distinction and imposed a duty to exercise reasonable care towards known licensees or trespassers so far as active operations are concerned. In the well-reasoned case of Oettinger v. Stewart, 24 Cal. 2d 133, 138, 148 P.2d 19, 156 A.L.R. 1221, cases to the contrary were expressly overruled. See, also, Herold v. P. H. Mathews Paint House, 39 Cal.App. 489, 493, 179 P. 414; Barnett v. La Mesa Post No. 282, 15 Cal.2d 191, 194, 99 P.2d 650; Yamauchi v. O'Neill, 38 Cal.App.2d 703, 708, 102 P.2d 365; Hamakawa v. Crescent Wharf & Warehouse Co., 4 Cal.2d 499, 503, 50 P.2d 803. This rule imposing a duty to exercise reasonable care towards known trespassers so far as affirmative acts are concerned, is in accord with the modern trend of authorities. See 38 Am.Jur. p. 771, § 109, at p. 773."

[3] In the case before us the negligence of defendant was active and not passive.

[4] As for appellant's contention that there was contributory negligence on the part of Fernandez, the jury by its verdict has found to the contrary. The evidence hereinbefore recited sustains such finding. In this connection appellant again argues that plaintiff had no right to be upon the premises, but there is plenty of evidence to the contrary. The crane was not in operation when he went to the fountain where, as one witness said, "everybody" went for water. The steam was kept up on the crane, though it was not in continuous use. Its arm was pointed east. Plaintiff talked to some of its crew, and while he saw two of them on the steel, he thought they were looking for numbers. He did not see the arm of the crane move toward it. His back was turned toward the ribs when two of them were knocked over as the third one was lifted. Elliott, the crane man who gave the order to lift the steel, had talked to plaintiff and knew he was at the fountain and but a few feet from the steel. It cannot be said that plaintiff was guilty of negligence as matter of law, and the evidence sustains the finding that he was not so guilty as matter of fact.

Appellant's final assignment of error is that the trial court erroneously changed one of the instructions proposed by defendant, before giving it. The instruction as given reads as follows, the portion in italics being the addition made by the court: "If you find from a preponderance of the evidence that Robert Fernandez was an invitee on the premises under the control of the defendant but that the invitation did not

extend to the use of the premises in and about the locomotive crane where it was moving and handling steel, then you are instructed that the said Robert Fernandez was a mere licensee at the time he is alleged to have been in, around and about the locomotive crane and the defendant owed him no duty of seeing that the premises at that place were safe for his attempted use, ~~and your verdict should be for the defendant.~~ (Insert) *but did owe him a duty of using ordinary care in the active operation of its equipment thereon.*"

[5] The only objection made by appellant is that the italicized portion should not have been added; but under the decisions hereinbefore cited, we are satisfied that defendant did owe plaintiff the duty of using ordinary care, and that the portion added by the court was not erroneous.

The judgment is affirmed.

VAN DYKE, J., and DEIRUP, J. pro tem., concur.

104 Cal.App.2d 482

KUITEMS et al. v. COVELL et al.

Civ. 17890.

District Court of Appeal, Second District, Division 1, California.

May 29, 1951.

John H. Kuitems, and another, brought action against Charles W. Covell, Jr., and others, roofing contractors, for damages to home caused by failure of roof covering, installed by defendants, to hold water. Defendants filed cross-complaint to foreclose mechanic's lien. The Superior Court of Los Angeles County, John J. Ford, J., entered judgment adverse to defendants and they appealed. The District Court of Appeal, Doran, J., held that contract to install roof covering was subject to implied warranty that roof covering would be proper and fit for its intended use of effectively keeping water out of the home.

Judgment affirmed.

1. Negligence ⇐2

Negligent failure to observe common-law duty which accompanies every contract, to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done, is a tort, as well as breach of contract.

2. Contracts ⇐168

Obligation of a person, who by contract undertakes professional or other business engagements requiring the exercise of care, skill and knowledge, to perform with care, skill, reasonable expedience, and faithfulness, is implied by law and need not be stated in the agreement.

3. Contracts ⇐205

Where roofing contractors contracted to and installed roof covering on flat roof deck on home, contract was subject to implied warranty that roof covering would be proper and fit for its intended use of effectively keeping water out of home, even though contract stated that it contained the entire agreement of the parties.

4. Evidence ⇐442(5)

Where roofing contractors' written contract to install roof covering on flat roof deck on home was subject to implied warranty that roof covering would be proper and fit for its intended use of effectively keeping water out of home, testimony relating to implied warranty was admissible, notwithstanding that contract did not contain written warranty and that contract stated that entire agreement of the parties was contained therein.

5. Appeal and error ⇐1039(13)

Where roofing contractors' contract to install roof covering on flat roof deck on home was subject to implied warranty that roof covering would be proper and fit for its intended use of effectively keeping water out of home, and ultimate facts involving implied warranty were in complaint, findings and judgment adverse to roofing contractors in action for damages caused by failure of roof to hold water, supported by substantial evidence and reasonable in-

ferences deducible therefrom, would not be reversed for failure to directly plead implied warranty.

Alfred E. Cate, Glendale, for appellants.

David Welts, Los Angeles, for respondents.

DORAN, Justice.

The present controversy arose out of a written contract under which appellant roofing contractors agreed to and did install a roof covering for the respondents on a flat roof deck which had been erected by respondents on an owner-built home, the agreed price therefor being $487.12. The complaint, in a first count, alleges faulty workmanship by appellant contractors, and that the roofing material used was insufficient and not of a proper type, even if properly installed, to withstand the pressure of static water resulting from rainfall, the flatness of the roof being known to appellants. A second count sets forth that in the matter of the selection of materials and method of installation, respondents asked for and relied upon the skill and knowledge of appellant contractors. The complaint prays for damages in the sum of $8,900.

Appellants filed a cross-complaint seeking to foreclose a mechanics lien, asking judgment for the contract price of $487.12. The answer filed by appellants consists of a general denial together with an allegation that "the roof structure * * * was negligently and improperly designed and erected by plaintiffs. That plaintiffs did not provide adequate slope from the drainage of said roof structure, but * * * caused same to be erected so that it was concave to such an extent that it was impossible for same to drain naturally. Furthermore plaintiffs caused the drainage outlets for said roof structure to be designed and constructed on the upper side of the roof and not on the lower side of same. That plaintiffs well knew these defects and did not communicate same to defendants".

The trial court found that "defendants installed roofing material and slabs insufficient and not of proper type" for a flat roof, by reason of which the roof covering "failed to hold water, and in the rains occurring in the months of December, 1948 and January, 1949, water leaked in and through the said roof covering, causing warping and permanent water staining of the hardwood floors * * * warping of window sills, and water-logging and staining of inside plaster, warping of the roof deck, and water damage to the building generally", plaintiff's damage being assessed at $1,825.

It is further found that "plaintiffs informed defendants that the roof-deck * * was approximately flat, and that the defendants would be required to provide drains for said roof"; that the roof material used was manufactured by defendants and was "the only type of roof covering they installed"; that defendants were roof specialists upon whose judgment plaintiffs relied, and that defendants had recommended the type of roof covering used. The trial court also found that defendants "were negligent in not making a proper inspection of said roof-deck before applying said roof covering"; that defendants did not provide proper drains, and that "said roof covering as installed by the defendants was of no value to plaintiffs".

In the trial court's Conclusions of Law it is stated "That the law implied a warranty that said roof covering would be proper and fit for its said intended use, to wit, to effectively keep water out of plaintiff's said house"; and that said warranty, "whether stated expressly in said written agreement of November 30, 1948, or implied in law, is a part of the contract".

One of appellants' main contentions is that the contract contained no written warranty "that the roofing material should be sufficient to withstand the pressure of static water"; that the trial court was in error in finding that there was any implied warranty, and that the contract by its terms provided that the written instrument was only agreement between the parties.

[1–3] As pointed out in respondents' brief, the trial court's conclusion "That the law implied a warranty that said roof covering would be proper and fit for its said intended use, to wit, to effectively keep water out of plaintiff's said house", is correct. The following quotation from Roscoe Moss Co. v. Jenkins, 55 Cal.App.2d 369, 376, 130 P.2d 477, 481, is applicable to the present situation: "A general statement is found in 38 Am.Jur. 662, § 20, reading as follows: 'Accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of the contract.' The rule which imposes this duty of universal application as to all persons who by contract undertake professional or other business engagements requiring the exercise of care, skill and knowledge; the obligation is implied by law and need not be stated in the agreement. * * * It is applicable of course to a contract for the drilling of a well."

[4] The contract here under consideration involves a construction job and not a mere sale of roofing material as appellants' brief seems to suggest. Obviously, the statement in the written contract that it contains the entire agreement of the parties cannot furnish the appellants an avenue of escape from the entirely reasonable obligation implied in all contracts to the effect that the work performed "shall be fit and proper for its said intended use", as stated by the trial court. Such rule is as applicable to a roofing contract as to one for the drilling of a well which was the subject of the contract in Roscoe Moss Co. v. Jenkins, supra, cited in the preceding paragraph. Such being the law, the admission of testimony relating to this matter furnishes no reversible error.

[5] Appellants' contention that no such warranty was directly pleaded likewise presents no ground for reversal. As mentioned in respondents' brief, the ultimate facts involving the implied warranty appear in the complaint, and this issue appears to have been "vigorously and exhaustively contested" at the trial. The findings and judgment, supported by substantial evidence and reasonable inferences deducible therefrom, may not be reversed for what is, at most, a mere defect in pleading. No substantial rights have been infringed upon, and no prejudicial error has been pointed out. Appellants' various contentions are all untenable.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

104 Cal.App.2d 323

PEOPLE v. WILLIAMS.

Cr. 2253.

District Court of Appeal, Third District, California.

May 18, 1951.

Charles Edward Williams was convicted in the Superior Court, Solano County, Harlow V. Greenwood, J., of first degree robbery and he appealed. The District Court of Appeal, Adams, P. J., held that where prosecutor attempted to impeach witness for prosecution by use of prior inconsistent statements which were allegedly made to police officer, and prosecutor admitted such statements were hearsay and not admissible against defendant, and despite such admission, prosecutor persisted, over sustained objections, in pursuing same course with another witness and argued objectionable matter to jury, prosecutor's misconduct was so prejudicial as to entitle defendant to a new trial.

Judgment reversed and cause remanded.

1. Witnesses ⇐379(1)

Proof of prior inconsistent statements of witness which is admitted under statute for impeachment purposes can only be considered for purpose of neutralizing and counteracting effect of witness' statements at trial. Code Civ.Proc. § 2049.

2. Witnesses ⇐380(5), 382, 397

A party may impeach his own witness by proof of prior statements inconsistent with his testimony only if such testimony was prejudicial and detrimental to party by whom witness was called since otherwise previous statements shown would stand out, not as offsetting contrary testimony already given, but as substantive evidence of fact. Code Civ.Proc. § 2049.

3. Witnesses ⇐397

Where witness called by party has failed to testify to all that party expected or desired, but has not given testimony against him, it is not permissible for party calling witness to prove that such witness had previously made statements which, if sworn to at trial, would tend to make out party's case. Code Civ.Proc. § 2049.

4. Witnesses ⇐323

Party producing witness cannot claim surprise and thereby acquire right to cross-examine such witness simply because witness does not testify as expected.

5. Criminal law ⇐1171(1)

In prosecution for robbery, where prosecutor attempted to impeach witness for prosecution by use of prior inconsistent statements made to police officer by witness, and prosecutor admitted such prior statements were hearsay and not admissible against defendant, and despite prosecutor's admission, prosecutor insisted, over objections sustained, in pursuing same course with another witness, and argued objectionable matter to jury, prosecutor's misconduct was so prejudicial as to entitle defendant to new trial.

Edises & Treuhaft, John Chas. Henderson, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

A jury convicted defendant of robbery in the first degree. This appeal is taken from the judgment which followed, and from a subsequent order denying his motion for a new trial. Mrs. Marlatt, the victim of the robbery, testified that about 10:35 p. m. on January 11, 1950, when she was alone in her house in Vallejo, she went to her door to let her dog in; that a man grabbed her and pushed her back into the house; that defendant followed them and both men demanded money, and slapped and kicked her until she surrendered her purse containing $45, which money they took and departed; and that she subsequently identified defendant at the police station. Defendant denied her accusations and relied upon an alibi, testifying that he was at his mother's home; that his wife, his mother, his sister, Louise Toles, and two friends, Robert Williams and L. C. Martin, were also there. The mother testified in support of this alibi, as did Lloyd C. Martin and Robert Williams.

On rebuttal the prosecution first called Louise Toles on behalf of the prosecution. She testified that on January 11, 1950, she and her husband, her brother (the defendant) and his wife were living with her mother. She was then asked if she recalled a visit to her by Captain Horan, a police officer, on January 23, 1950, in the absence of defendant. She replied that she did, and was asked what was said during that conversation. Objection was made by counsel for defendant on the ground that any conversation held outside the presence of defendant was inadmissible. The objection was sustained. The deputy district attorney then said: "Counsel is absolutely correct. I merely put this in the record for the purpose of what will follow." Louise then testified that her brother was at home the night of the robbery. The following then occurred:

"[Mr. Krause] Q. Is it not a fact that you told Dan Horan on that occasion—

"Mr. Henderson: (Interrupting) Just a moment. * * * To which I will object. It is attempting to impeach his own witness.

"Mr. Krause: That is right.

"Mr. Henderson: He has not shown any surprise. Counsel knows the rules of evidence.

* * * * * *

"The Court: The objection is good as set. You had better remodel your question.

"By Mr. Krause: Q. Have you at any time ever stated to anyone anything different than you have just testified to regarding the whereabouts of this defendant, Charles Edward Williams, on the 11th day of January, 1950?

"Mr. Henderson: * * * The same objection. It is cross examination of his own witness.

"The Court: Same ruling. The objection is good.

* * * * * *

"By Mr. Krause: Q. You talked to Captain Dan Horan at that time, did you not? A. I did.

"Q. Did you say anything to him other than you have testified to now on the witness stand regarding the whereabouts of this defendant on the 11th day of January, 1950?

"Mr. Henderson: * * * Any statement that she made, if it was outside the presence of the defendant, the law clothes the defendant with that protection to keep prejudicial evidence from coming in. She cannot testify to anything she said to anybody unless the defendant was present. * * *

"Mr. Krause: If the Court please, before I can impeach her by the other party to this conversation, I have to ask her whether she did not make the statements. That is perfectly permissible, and I intend to do that; if she says that she did not make the statements, I intend to put Captain Dan Horan on the stand to testify she made statements different than she is making now. I have a right to be surprised, because I have a right to rely on the police department's investigation, and the investigation of Captain Dan Horan as to the facts he found out and supplied the District Attorney prior to the prosecution of this case. I have a right to rely upon what the persons he has interviewed have told him, and if she changes her story now, I have a right to bring that out. I can show surprise, and I am showing surprise that she would tell Captain Horan one story and now change her testimony to something else at another time, and the law certainly permits that."

Objection to the question was sustained by the court. The jury was then excused, and in their absence counsel for the prosecution argued that he had a right to impeach his own witness when taken by surprise. The court said:

"Did you really believe that when you put her on?

"Mr. Krause: Yes. That is one of the main reasons we have gone forward with this prosecution, the police investigation. My offer of proof is that this witness—

"The Court: (Interrupting) I don't believe that you thought in your own heart that she would testify he was away that night. I don't believe when you put her on you felt that. I want to be right in these cases, and I want to act in good faith with everybody concerned.

* * * * * *

"The Court: (Interrupting) Did you ever ask her any questions before you put her on the witness stand?

"Mr. Krause: Captain Horan did.

"The Court: Did you?

"Mr. Krause: I didn't.

"The Court: You are the one to be taken by surprise, because you are the trial lawyer in the matter. Did you ever ask her any questions?

"Mr. Krause: I relied upon the Police Department's investigation."

The jury having been returned, Mrs. Williams, wife of defendant, was called as a witness for the prosecution and was asked if she, also, had had a talk with Captain Horan, to which she answered that she had. Then followed:

"Mr. Krause: I see. Of course, I can't ask her what that was. That was objected to as hearsay. I am anticipating something of the sort. I will ask what was said and let counsel object.

"Mr. Henderson: To which I will object on the grounds it would be hearsay, not being made in the presence of this defendant.

"Mr. Krause: The objection is good, your Honor."

"The Court: The objection is sustained."

Captain Horan was then called by the prosecution and testified that he had interviewed Louise Toles. Objection to what was there said was sustained, and the prosecuting attorney said: "The objection is good, your Honor." Captain Horan then testified that he had called upon defendant's sister, Lulu Mae Brown, and asked her the same questions asked Louise Toles. The deputy district attorney said:

"Q. And what was the reply to that? A. They—

"Mr. Henderson: * * * To which I will object on the grounds it is irrelevant and immaterial and hearsay.

"The Court: The objection is sustained.

"Mr. Krause: Yes, counsel's objection is good, your Honor."

Captain Horan next testified that after talking to Louise Toles and others he returned to the police station where he told defendant that he had "seen his sister Louise and had asked her if he was home that night of January 11, 1950, and she told me that Williams had gone to his sister's house on that night and had returned around midnight, and that he slept there that night and had been there the next morning"; and that defendant made no reply. Regarding this line of testimony the court ruled that it was admissible only for the purpose of showing defendant's reactions, and not as evidence of the truth of the statements made to the officer; and the prosecution attorney said, "There is no question about it."

But in the course of the argument to the jury the deputy district attorney commented on the fact that the wife and sisters of defendant were present at the trial but did not testify. He said: "Where are they? Where are the three sisters and the wife of the defendant, and where is the brother-in-law of the defendant? The other sister's husband? Why aren't they brought here and put under oath to testify? There is something very peculiar there, and I have my ideas of what it is. Unfortunately, under the rules of evidence, we can't bring out everything in these criminal cases that we would like to bring out, but fortunately the jury in a criminal case can form inferences and can read between the lines, so to speak, by the facts that are shown to them before the jury themselves. I had to call the wife of the defendant. I asked her if Captain Dan Horan talked to her the day after her husband was arrested, and she said yes, he had been there. I asked what was said. Counsel objected. *I asked purposely, just to get that into the record:* I wanted to get that conversation in, and counsel objected, and of course his objection was good. It is hearsay, outside the presence of the defendant, and I could not get it in. I followed the same procedure with Louise, the other sister of the defendant, and got the same results." (Italics added.)

Appellant charges that the action of the prosecuting attorney as above outlined constituted misconduct, justifying reversal. In view of the decision of our Supreme Court in the recent case of People v. Newson, 37 Cal.2d 34, 230 P.2d 618, we agree with that contention. There the Supreme Court reversed the conviction of the defendant because the district attorney was permitted to impeach his own witness by use of prior inconsistent statements made to a deputy district attorney and testimony previously given by the witness at the preliminary examination. The court said, 37 Cal.2d at page 41, 230 P.2d at page 622:

"The right of a party to impeach his own witness is the subject of extensive legal writing and has been considered in numerous decisions. Such impeachment generally was forbidden under the Roman law, as appears inferentially from the Code Justinian. English common law followed the same rule. 3 Wigmore, Evidence (3d ed. 1940), § 896 et seq.; Crago v. State, 28 Wyo. 215, 202 P. 1099. The first case in this country upon the subject is State v. Norris, 2 N.C. 429 [1 Am.Dec. 564], in which the court held that the state may produce contradictory statements of its witness. However, in 1806, the doctrine was repudiated. Sawrey v. Murrell, 3 N.C. 397. Since those early years, exceptions have been engrafted upon the rule to prevent injustice when a party who

calls a witness is surprised or entrapped by one who gives adverse testimony.

[1,2] "In 1872, the California Legislature enacted § 2049 of the Code of Civil Procedure, which provides: 'The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony * * *.' However, the prior statements inconsistent with the witness' present testimony can only be considered for the purpose of neutralizing and counteracting the effect of his statements upon the trial.

"The purpose of the statute is to allow a party to wipe out, as nearly as possible, the evidence which has been given. Where a witness states no fact against the party calling him, there is nothing to counteract. The testimony which may be contradicted must be prejudicial and detrimental, otherwise the previous statement shown would stand out, not as offsetting contrary testimony already given, but as substantive evidence of a fact."

Pertinent cases there cited are People v. Jacobs, 49 Cal. 384, People v. Mitchell, 94 Cal. 550, 29 P. 1106, In re Kennedy's Estate, 104 Cal. 429, 431–432, 38 P. 93, People v. Godwin, 123 Cal. 374, 55 P. 1059, People v. Crespi, 115 Cal. 50, 46 P. 863, People v. Creeks, 141 Cal. 529, 75 P. 101, and People v. De Witt, 68 Cal. 584, 10 P. 212. In the Jacobs case the court said, 49 Cal. at page 385: "* * * though the witness had failed to testify to all the prosecution expected or desired, he had not, as a witness for the prosecution, testified against the prosecution or to any matter advantageous to the prisoner." In the Mitchell case, 94 Cal. at page 556, 29 P. at page 1108, the court said: "A witness, whichever party calls him, cannot be impeached unless he has given testimony against the impeaching party. This witness had not testified against the prosecution. He simply failed to testify to a fact which the district attorney thought he could prove by him. * * * The impeaching statements were evidently desired as evidence. If such testimony were admissible, it would be easy to manufacture evidence of that kind. If a witness merely fails to testify as expected, that does not authorize the party calling him to prove that the witness had elsewhere made the desired statements. It is only when he has given damaging testimony that he can be impeached." In the Crespi case, 115 Cal. at page 55, 46 P. at page 865, we find the statement that the attempt to impeach was not permissible; that "It was an attempt by a party to impeach his own witness, not because that witness had given hostile evidence which had taken him by surprise, but because he did not admit what was sought to be elicited from him." In the Godwin case the court said, 123 Cal. at page 375, 55 P. at page 1060: "It is only when the witness gives hostile evidence that a party may impeach him by showing contradictory statements made at other times. The answer of the witness being 'No,' the evidence was purely of a negative character. It was neither favorable to one side nor the other, and, if the witness had been impeached, the case before the jury would have assumed no different aspect."

[3] Language used by the Supreme Court in the Creeks case is particularly pertinent here. It said, 141 Cal. at pages 531–532, 75 P. at page 102: "The testimony was sought to be elicited solely for the purpose of getting before the jury statements made by the mother on a prior occasion, tending to make out the case of the people. Where a witness called by a party has simply failed to testify to all that party expected or desired, but has not given testimony *against* him, it is not permissible for the party calling him to prove that such witness had previously made statements which, if sworn to at the trial, would tend to make out his case."

[4] In People v. Berg, 96 Cal.App. 430, 440, 274 P. 433, 437, the court quoted as follows from the Creeks case: "If a witness merely fails to testify as expected, that does not authorize the party calling him to prove that the witness had elsewhere made the desired statements." See, also, People v. Flores, 37 Cal.App.2d 282, 287, 99 P.2d 326, 329, in which it was said:

"There was no showing that the district attorney had ever talked with the witness Almerez or that the latter at any time led the prosecutor to believe that he would testify as counsel for the People declared he expected the witness would. It requires no citation of authority for the statement that the party producing a witness cannot claim surprise and thereby ipso facto acquire a right to cross-examine such witness simply because the latter does not testify as expected. The examination of the witness proceeded apparently upon the theory that the district attorney could pursue the inquiry as a matter of right. Such is not the law."

[5] In the case before us the claimed previous statements of the witnesses which the prosecutor sought to get to the jury were admitted by him to be hearsay and not admissible against the defendant. Despite such admission of the prosecutor he persisted, over objections sustained, in pursuing the same course with another witness, and then argued the objectionable matter to the jury as hereinbefore stated.

In People v. Anthony, 185 Cal. 152, 159, 196 P. 47, 50, the court said: "Ordinarily the prompt sustaining of objections to improper questions, coupled with instructions to the jury to disregard the question, will cure an error of this kind. But where the offense has been repeated in various forms and where the evidence is so evenly balanced and the district attorney after being warned by the court continues in his course, we must hold that the misconduct was so prejudicial as to entitle the defendant to a new trial."

In People v. Ephraim, 77 Cal.App. 29, 42, 245 P. 769, hearing in Supreme Court denied, the court held that where the misconduct on the part of the state occurs throughout the examination of witnesses and in the arguments to the jury with such frequency that the jury is led to believe that the district attorney, as the sworn officer of the court, has in his possession facts so damaging to the defendant on trial that the defendant must insist on their being withheld, the judgment should be reversed.

The record before us reveals a sharp conflict of evidence and an examination of the entire transcript does not convince us that the same verdict would have been reached without the weight of the objectionable incidents above set forth. In People v. Pang Sui Lin, 15 Cal.App. 260, 262, 114 P. 582, 584, this court said that a district attorney "is the representative of the people in a very important capacity, is generally of consequence in the community, and it is a reasonable and almost necessary inference that some at least of the jurors would conclude that the district attorney would not ask such questions unless he could prove what was implied in such questions if he had been allowed to do so."

Also see People v. Terramorse, 30 Cal. App. 267, 272, 157 P. 1134; and People v. Wells, 100 Cal. 459, 464, 34 P. 1078, 1079, quoting from People v. Mullings, 83 Cal. 138, 23 P. 229, to the effect that "It is quite evident that the *questions*, and not the answers, were what the prosecution thought important. The purpose of the questions clearly was to keep persistently before the jury the assumption of damaging facts which could not be proven, and thus impress upon their minds the probability of the existence of the assumed facts upon which the questions were based. To say that such a course would not be prejudicial to defendant is to ignore human experience and the dictates of common sense."

Other grounds for reversal are urged by appellant, but in view of our conclusion that for the foregoing reasons the judgment must be reversed, they need not be considered here.

The judgment and the order denying a new trial are, and each of them is, reversed, and the cause is remanded for a new trial.

DEIRUP, J. pro tem., and PEEK, J., concur.

104 Cal.App.2d 486

HOOPS et al. v. TATE et al.

Civ. 17995.

District Court of Appeal, Second District, Division 1, California.

May 29, 1951.

Hearing Denied July 26, 1951.

Action by Alwina Elisabeth Hoops, and others, against Adelaide A. Tate, O. N. Tate, Ora E. Miner, Milo C. Miner, Mae L. Campbell, Mae L. Howard, John Doe and Jane Doe, for possession of leased premises and for damages for alleged breach of covenant in lease. The Superior Court of Los Angeles County, Robert Clifton, J., rendered judgment adverse to the plaintiffs and the plaintiffs appealed. Adelaide A. Tate, O. N. Tate, Marjorie L. Howard and Mae L. Campbell were the respondents. The District Court of Appeal, Drapeau, J., held that, where plaintiffs leased store building to two married couples operating retail ladies' ready-to-wear store and one of the couples sold out to the other couple and retired from the business and the other couple continued to operate the store, and lease contained no express or implied covenant that each couple would continue active participation in the store for term of lease, the transfer of one couple's interest in the business to the other couple was not in violation of the lease.

Judgment affirmed.

1. Landlord and tenant ⇐76(1)

Covenants against assignment of lease do not apply to colessees.

2. Landlord and tenant ⇐76(2), 104

Where plaintiffs leased store building to two married couples operating retail ladies' ready-to-wear store, and one of the couples sold out to the other couple and retired from business and the other couple continued to operate the store, and lease contained no express or implied covenant that each couple would continue active participation in the store for term of lease, the transfer of one couple's interest in the business to the other couple was not in violation of the lease and did not entitle plaintiffs to terminate the lease.

3. Contracts ⇐168

Implied covenants must arise from the language used in agreement or must be indispensable to effectuate the intention of the parties.

Kemper Campbell, John G. Sobieski and Johnson & Sobieski, all of Los Angeles, for appellants.

Allard, Brownsberger, Shelton & O'Connor, Joseph A. Allard, Jr., and Maurice O'Connor, all of Pomona, for respondents.

DRAPEAU, Justice.

Plaintiffs own a store building in Pomona which they leased to four defendants, husbands and wives.

The lease was for a term of ten years. Defendants proposed to, and did operate a retail ladies' ready-to-wear store on the leased premises.

Differences as to the conduct of the business arose among the parties. One of the couples sold out to the other couple, and retired from the business. No written assignment of the lease was made, nor were the premises sublet.

Plaintiffs served defendants with notice terminating the tenancy, and demanded possession of the store.

The demand being refused, plaintiffs brought this action for possession of the property, and for damages, upon two theories: First. That the transfer by two of the defendants of their interest in the business was an assignment of the lease, contrary to a covenant requiring consent of the lessors. Secondly. That the percentage feature of the lease was an essential part of it, the rent to be paid being $275.00 per month plus a percentage of the gross retail sales of the business, with a fair rental value of the store of $600.00 per month; that it was understood and agreed that all of the defendants were to work in the business, the ladies being experienced sales people and the husbands experienced business men, the services, capital, and "know how" of all of them being necessary to make maximum gross sales; that this was "actually the factor" which induced plaintiffs to lease the property; and that this agreement was breached when two of the defendants disposed of their interest in the business to the other two.

The trial court found that the transfer of the interest in the business resulted in an assignment of the lease, but that no

covenant in the lease had been violated. From the judgment which followed plaintiffs appeal.

[1] Covenants against assignment do not apply to co-lessees. Spangler v. Spangler, 11 Cal.App. 321, 104 P. 995; Adelstein v. Greenberg, 77 Cal.App. 548, 247 P. 520; Safeway Stores v. Buhlinger, 85 Cal.App. 717, 259 P. 1013.

[2, 3] There is substantial evidence in the record to support the court's finding that there was no implied covenant of individual lessees to continue active participation in the business for the term of the lease. And no express covenant to that effect appears in the lease.

As stated in Cousins Inv. Co. v. Hastings Clothing Co., 45 Cal.App.2d 141, 113 P.2d 878, implied covenants must arise from the language used in agreements, or must be indispensable to effectuate the intention of the parties.

Plaintiffs' contentions that the findings do not support the judgment, that the trial court failed to find upon a material issue, and that erroneous findings were made, have been checked with the record. The findings are sufficient, and cover the material issues.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; SCHAUER, J., dissenting.

104 Cal.App.2d 347

JONES v. HARRIS et al.

Civ. 4306.

District Court of Appeal, Fourth District, California.

May 21, 1951.

Action by Gladys Jones against Melvin W. Harris and Leo V. Auer for personal injuries sustained in automobile accident while riding as guest of Melvin W. Harris. The Superior Court, Tulare County, Frederick E. Stone, J., entered judgment in favor of Gladys Jones and Melvin W. Harris appealed. The District Court of Appeal, Mussell, J., held that a finding of wilful misconduct by automobile driver was supported by substantial evidence.

Judgment affirmed.

1. Appeal and error ⇐930(1), 989

Province of appellate court is to determine whether there is any substantial evidence, contradicted or uncontradicted, to support findings and judgment, and to indulge all intendments and reasonable inferences which favor sustaining findings of jury.

2. Automobiles ⇐244(20)

Where substantial evidence showed defendant, automobile driver, was driving at excessive rate of speed when passing heavy night traffic, was crowding white line, was requested to pull over by plaintiff, guest, when meeting automobile before accident, had ample space and time to avoid accident but ignored request by guest to pull over and deliberately continued toward oncoming automobile, evidence supported jury finding of willful misconduct of driver.

3. Automobiles ⇐181(1)

Willful misconduct is divided into two distinct lines of action, either of which will render automobile driver liable to his guest for its results, as follows: first, intentional doing of something with knowledge that serious injury is probable, as distinguished from possible, result; and second, intentional doing of act with wanton and reckless disregard of its possible result.

4. Automobiles ⇐247

Jury may properly find that injuries to automobile guest resulted from both intoxication and willful misconduct of driver and such verdicts are not necessarily inconsistent.

5. Automobiles ⇐181(1, 7)

Excessive speed of automobile, standing alone, did not constitute willful misconduct but excessive speed while passing heavy night traffic, refusal to slow down or pull over from center of road, failure to use opportunity to avoid accident, which

acts infer willful, wanton or reckless disregard for safety of guests, constituted willful misconduct on part of driver as to guest in automobile. Vehicle Code, § 403.

6. Appeal and error ⇐999(3)

Question of whether automobile driver's willful misconduct or his admitted intoxication was proximate cause of guest's injuries from automobile collision, while automobile was being driven at excessive speed, was question of fact for jury, whose determination was binding.

7. Trial ⇐295(3)

Where jury was properly instructed as to assumption of risk and contributory negligence, considering all instructions together, refusal to give contributory negligence instruction as to automobile guest in connection with driver's defense to liability based upon intoxication was not prejudicial error.

Maddox & Abercrombie, and Erling H. Kloster, all of Visalia, for appellant.

O. L. Duemler, Ward G. Rush, Tulare, and Leo v. Killion, San Francisco, for respondent.

MUSSELL, Justice.

Plaintiff, while riding as a guest in a Chevrolet automobile operated by defendant Harris, was severely injured when it collided with a Studebaker car operated by defendant Auer. The accident occurred at about 2:30 A. M., May 29, 1949, on U. S. Highway 99 about one mile south of Pixley. A jury returned a verdict in favor of plaintiff and defendant Harris appeals from the judgment which followed.

The arguments relied upon by appellant are (1) that as a matter of law there was no substantial evidence to support a verdict, based upon the alleged wilful misconduct of appellant or upon which the jury could have found that his alleged intoxication proximately resulted in plaintiff's injuries; and (2) that there was prejudicial error in the refusal to give an offered instruction as to contributory negligence as a defense to liability based on intoxication.

On May 28, 1949, at about 10:00 o'clock P. M., appellant called at a cafe in Tipton where plaintiff was employed as a cook and invited her to go with him to the Shamrock Cafe at Pixley, about five miles north of Tipton on U. S. Highway 99. Plaintiff accepted the invitation. They stopped at a cafe en route where each had a highball. Upon arriving at the Shamrock Cafe, Harris and plaintiff had another drink and danced together. Harris then resumed his duties as manager of the cafe and until about 2:00 A. M. assisted the bartender, mingled with the customers and had a few more drinks. The bar and cafe were crowded. Plaintiff saw Harris dancing at times and working behind the bar but did not see him take more than the one drink during the evening. Plaintiff danced, "sipped" a drink, played shuffleboard, and at about One A. M. told Harris that she was tired and would wait for him in his car. She was asleep in the automobile when, at about 2:00 A. M., after the cafe was closed, Harris, with Mr. and Mrs. Henderson, who worked in the cafe, came out of the cafe. The Hendersons seated themselves in the back seat of the automobile and with Harris at the wheel and plaintiff beside him in the front seat, they proceeded south on U. S. Highway 99. The accident occurred on this highway about one mile south of Pixley. At this point the highway runs generally north and south. It was straight and level and consisted of two lanes, each 9 feet wide with improved shoulders, each six feet wide. There was also 40 to 45 feet of smooth dirt immediately west of the west shoulder. At the time of the accident the northbound traffic was very heavy. Immediately prior to the collision defendant Auer, who was driving north in a Studebaker convertible, pulled out to his left across the white line into the southbound traffic lane and attempted to pass a truck and trailer traveling north in its proper traffic lane. When Auer pulled out he saw the lights of the Harris car coming toward him and estimated that it was between a half and three quarters of a mile away. He testified that as he was passing the truck he saw that he "wasn't going to be able to clear" be-

cause of the oncoming car; that "He (Harris) was coming at a terrific rate of speed and I didn't see my way clear, and there was cars in front of the truck and trailer, and I seen that, and I knew I couldn't make my way. So I swung over to the left real quick to avoid a head-on collision with Mr. Harris' car, and I applied the brakes a little bit to slow down and get off the highway so that Mr. Harris' car could pass."

Plaintiff was "drowsy" when Harris got into the car with her and did not then observe anything indicating that he was intoxicated. She testified that as they left Pixley, she observed a car coming towards them and that Harris was close to the white line; that "He was in his lane, and when this car came up it was awfully close, and I did make the remark to him 'Why don't you pull over a little bit Harris? You are crowding the white line' is what I said, I believe"; that Harris replied "The hell with you, I am driving this car"; that she then noticed that he was "pretty intoxicated". Harris was then driving about 60 miles an hour. Shortly thereafter plaintiff saw another car coming towards them around the north-bound traffic, trying to get around a truck. She testified that "As we got nearer and the car couldn't get by, couldn't get over in its own lane, the highway was plenty wide there for Harris to get over on the shoulder and even off the shoulder. I remarked to him, 'Harris, why don't you pull over and let that fellow get by?' or something to that effect. Because he had plenty of room to pull over on the shoulder or beyond"; that Harris said "To hell with the son of a bitch. I am on my side of the road"; that Harris didn't do anything with reference to changing the course of his car and that she heard him say: "Brace yourself. I am going to hit him"; that she did not remember anything that happened thereafter until after the accident.

The two cars came together in the center of the west shoulder of the highway about 12 feet west of the center line, and each was damaged at the right front end. There were skid marks on the west shoulder 39 feet in length made by the Auer car before the impact. It was off the roadway and almost at a stop at the time of the collision. Auer testified that when he turned off the paved portion of the highway, the Harris car was "a good city block away". A traffic officer found no skid marks made by the Harris car and that there was no physical evidence that it was on the shoulder until just at the point of impact. Harris testified that he applied his brakes just as Auer hit him.

Witnesses who observed Harris after the accident testified that he was intoxicated, and his blood analysis showed an alcoholic content of 2.0 milligrams per c. c. of blood. A physician testified that this test indicated that the person from whom the sample was taken was certainly intoxicated. In this connection, appellant admits in his opening brief that there was enough evidence for a jury reasonably to find that he was intoxicated.

[1, 2] Our province here is to determine whether there is any substantial evidence, contradicted or uncontradicted, to support the findings and judgment, and to indulge all intendments and reasonable inferences which favor sustaining the findings of the jury. Berniker v. Berniker, 30 Cal.2d 439, 444, 182 P.2d 557. We are asked to hold that as a matter of law there was no substantial evidence to support the verdict of the jury. This we cannot do. There was substantial evidence that Harris was driving at an excessive rate of speed when passing heavy oncoming night traffic; that he "crowded" the white line; that he was requested by plaintiff to pull over a "little bit" when meeting a car before the accident; that although there was ample space and opportunity for Harris to turn his car out of the path of the Auer convertible and avoid the accident, he refused to heed plaintiff's request that he pull over and let the Auer car by; that he deliberately continued southward heading straight toward Auer until it was too late to avoid the crash.

[3, 4] Wilful misconduct is divided into two distinct lines of action, either of which will render a driver liable to his guest for its results, as follows: first, " 'the inten-

tional doing of something * * * with a knowledge that serious injury is a *probable* (as distinguished from a possible) result' "; and second, " 'the intentional doing of an act with a wanton and reckless disregard of its *possible* result.' " Cope v. Davison, 30 Cal.2d 193, 198–199, 180 P.2d 873, 876, 171 A.L.R. 667. A jury may properly find that the injuries to a guest resulted from both the intoxication and wilful misconduct of the driver and such verdicts are not necessarily inconsistent. Pennix v. Winton, 61 Cal.App.2d 761, 766, 143 P.2d 940, 145 P.2d 561; Johnson v. Marquis, 93 Cal.App.2d 341, 350, 209 P.2d 63. The evidence supports a reasonable inference that Harris failed to apply his brakes or take appropriate action to avoid the collision, knowing that serious injury to his guest was a probable as well as a possible result.

As was said in Parsons v. Fuller, 8 Cal.2d 463, 468, 66 P.2d 430, 433: " 'To us it seems clear that one who, while driving an automobile, knowingly flirts with danger and, without necessity or emergency compelling him, "takes a chance" on killing or injuring himself and others, who may be so unfortunate as to be riding with him, is guilty of willful misconduct.' "

[5] Evidence of excessive speed of the Harris automobile, standing alone, does not constitute wilful misconduct under section 403 of the Vehicle Code, but as was said in Johnson v. Marquis, 93 Cal.App.2d 341, 351–352, 209 P.2d 63, 69: "* * * evidence of excessive speed under circumstances which infer wilful, wanton or reckless disregard for the safety of guests may constitute wilful misconduct which will support a judgment upon that issue."

Under the circumstances here shown a finding of wilful misconduct is supported by substantial evidence.

[6] The question of whether the wilful misconduct of Harris or his intoxication (which is admitted) was a proximate cause of plaintiff's injuries was one of fact for the jury, under the circumstances shown by the record, and its determination is binding upon us. Fennessey v. Pacific Gas & Electric Co., 20 Cal.2d 141, 145, 124 P.2d 51; Bunch v. Eason, 95 Cal.App.2d 845, 848, 214 P.2d 28.

[7] Appellant argues that the court erred in refusing to give the following instruction: "The rule of law just announced is not to be confused with the law of contributory negligence. Although a guest may not voluntarily assume the hazard of an intoxicated driver, she may commit some negligent act of her own or be guilty of some negligent omission, which contributes as a proximate cause to the injury. Such conduct, if in fact indulged in, also bars her from recovery from her host."

The contention is that this instruction should have been given in connection with appellant's defense to a liability based upon intoxication. However, in this connection, the court gave the following instruction: "When upon entering a vehicle to accept a ride as a guest, one knows, or by exercising ordinary care for her own concerns would know, that the one who is to operate the vehicle is intoxicated, the law holds that she assumes the hazard of her undertaking and, therefore, may not recover in the event of injury resulting from the driver's intoxication. The same effect under the law also follows when, after having entered a vehicle, a guest learns, or by exercising ordinary care would learn, that the driver is intoxicated, and the guest having a reasonable opportunity to alight, at a reasonably safe place, fails to do so, thus voluntarily accepts the risks incident to the driver's intoxication."

The jury was told in several other instructions that plaintiff would be barred from recovery if she committed "some negligent act of her own", or was guilty of "some negligent omission" which contributed "as a proximate cause to the injury". The jury was also instructed as to plaintiff's liability for contributory negligence and as to the definitions of negligence and contributory negligence. Upon reading all of the instructions and considering them together, we fail to find prejudicial error in the refusal of the offered instruction.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

GILL et al. v. CURTIS PUB. CO. et al.

Civ. 18091.

District Court of Appeal, Second District, Division 2, California.

May 18, 1951.

Rehearing Denied June 5, 1951.

Hearing Granted July 12, 1951.*

John W. Gill and Sheila Gill brought an action against Curtis Publishing Company, and others, for invasion of privacy. The Superior Court, Los Angeles County, Arnold Praeger, J., entered a judgment adverse to plaintiffs pursuant to defendants' motion for judgment on the pleadings and the plaintiffs appealed. The District Court of Appeal, Moore, P. J., held that the complaint stated a cause of action.

Judgment reversed.

1. Pleading ⇐343

A motion for judgment on pleadings is in nature of a general demurrer.

2. Pleading ⇐350(3)

On defendant's motion for judgment on pleadings sole question for decision is whether complaint states a cause of action.

3. Torts ⇐8

An invasion of the right of privacy gives rise to a cause of action in tort. Const. art. 1, § 1.

4. Torts ⇐8

In order for publication to constitute invasion of one's right of privacy it is neither essential that publication be libelous nor that plaintiff suffered special damages. Const. art. 1, § 1.

5. Torts ⇐8

One's right of privacy may be invaded without using his name. Const. art. 1, § 1.

6. Torts ⇐8

One's privacy will be protected against invasion by unnecessary publication of immoral acts of a person who has rehabilitated himself since his life of shame. Const. art. 1, § 1.

7. Torts ⇐8

A person's right of privacy is invaded by publication of his picture without permission. Const. art. 1, § 1.

8. Libel and slander ⇐6(1)

A person may be libeled in such fashion as to expose him to public ridicule.

9. Torts ⇐8

Where a person has placed himself in public eye as an actor or candidate for public office, or where one has become "newsworthy" and an object of legitimate public interest, his right of privacy is limited. Const. art. 1, § 1.

10. Torts ⇐8

A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to public is liable to another. Const. art. 1, § 1.

11. Torts ⇐8

Liability for invading a person's privacy exists only if defendant's conduct was such that defendant should have realized that it would offend persons of ordinary sensibilities. Const. art. 1, § 1.

12. Torts ⇐26(1)

Complaint filed by husband and wife and alleging plaintiffs' reputation for integrity, industry, decency and morality, and that an individual defendant photographed plaintiffs without plaintiffs' knowledge, and that photograph was used to illustrate magazine article published by corporate defendant and purporting to treat of various types of love, one of which was stated to be the wrong kind of love consisting wholly of sexual attraction, which type was allegedly attributed to plaintiffs, and that article was published in disregard of plaintiffs' rights and feelings and depicted plaintiffs as loose, dissolute and immoral persons, stated cause of action for invasion of plaintiffs' privacy. Const. art. 1, § 1.

13. Torts ⇐8

The alleged unauthorized use of photograph of plaintiff husband and wife to illustrate magazine article purporting to treat of various types of love, one of which was allegedly stated to be the wrong kind of love consisting wholly of sexual attraction, which type was allegedly attributed to plaintiffs, was not within exception to right of privacy that one who is in public eye or party to happening of legitimate

* Subsequent opinion 239 P.2d 630.

public interest may not assert his right of privacy. Const. art. 1, § 1.

14. Torts ⇐8

Husband and wife who owned ice cream concession in world famous market were not "newsworthy", and magazine article allegedly invading plaintiffs' privacy by using photographs of plaintiffs to illustrate magazine article purporting to treat of various types of love, one of which was allegedly stated to be wrong kind of love consisting wholly of sexual attraction, which type was allegedly attributed to plaintiffs, was not privileged as being in the public interest even though article was of general interest and informative in character. Const. art. 1, § 1.

15. Torts ⇐26(1)

Complaint for invasion of privacy which alleged that plaintiffs' photograph which was allegedly published with magazine article, and which constituted alleged invasion of plaintiffs' privacy, was published in disregard of rights and feelings of plaintiffs, and that plaintiffs were injured in their health, contained sufficient allegations as to damages. Const. art. 1, § 1.

16. Pleading ⇐42

The declarations of a pleading determined character of action and not designation of pleading by pleader.

17. Pleading ⇐18

Where title of complaint, together with facts pleaded, show an actionable invasion of privacy with sufficient clarity and certainty, complaint is adequate. Const. art. 1, § 1.

18. Pleading ⇐34(1)

Complaint is to be liberally construed in favor of pleader on a general demurrer.

Shacknove & Goldman, Los Angeles, Ben F. Goldman, Jr., Los Angeles, of counsel, for appellants.

MacDonald & Pettit and Thomas H. McGovern, all of Los Angeles, for respondents.

MOORE, Presiding Justice.

Appellants seek reversal of a judgment entered pursuant to respondents' motion for judgment on the pleadings. The complaint alleges an action for damages for invasion of privacy as follows: Plaintiffs are husband and wife; they own and operate a confectionery and ice cream concession in the world-famed Los Angeles Farmers' Market which business of plaintiffs is favorably and widely known; in laboring many years to build up such business plaintiffs have "established and maintained a reputation for industry, integrity, decency and morality both in the conduct of their aforesaid business and in their personal lives"; that defendant Henri Cartier-Bresson photographed plaintiffs at their place of business without their knowledge or consent; such photograph was used to illustrate an article entitled "Love" written by defendant Dahl; it appeared in the May, 1949, issue of the *Ladies Home Journal,* herein referred to as the *Journal,* a monthly publication of respondent Curtis Publishing Company; such article purported to treat of various types of love between human beings of the opposite sex, one of which is the "wrong kind of love" consisting "wholly of sexual attraction and nothing else"—a type attributed to plaintiffs; it was "published and distributed to the general public throughout the world * * * in utter disregard of the rights and feelings of plaintiffs" and depicted them as loose, dissolute, and immoral persons; it held plaintiffs up to "public scorn, ridicule, hatred, contempt and obloquy and did rob and deprive plaintiffs of the benefits of public confidence, respect and esteem and injure said plaintiffs in their business and social contacts and associations and in their reputations and health." A copy of the article and its illustration were incorporated in the complaint.

The answer admits publication of the article and photograph, but denies plaintiffs' other material allegations.

The photograph in question depicts two young people seated at a counter of what appears to be an eating establishment, the man with his arm around the girl. Under the picture appeared the caption, "Publiciz-

ed as glamorous, desirable, 'love at first sight' is a bad risk."

The article in the *Journal* was entitled "Love" and was concerned with the various types of love leading to marriage. Each type was broken down into percentages of sex attraction, affection and respect. The article treats at length the "wrong" type of love, classifying it into three sub-types, the third of which was described as "100 per cent intense sex attraction, affection and respect negligible." This classification was characterized as "the most dangerous of them all" and "an exact definition of the phrase 'love at first sight' which really means nothing more than 'instantaneous powerful sex attraction'."

[1, 2] A motion for judgment on the pleadings being in the nature of a general demurrer, MacIsaac v. Pozzo, 26 Cal.2d 809, 812–813, 161 P.2d 449; Grant v. Aerodraulics Company, 91 Cal.App.2d 68, 72, 204 P.2d 683, the sole question for decision is whether the complaint states a cause of action. That it does so will presently appear.

[3–8] The so-called right of privacy, though of comparatively recent origin, has been distinctly recognized in this state. An invasion thereof gives rise to a cause of action in tort. Kerby v. Hal Roach Studios, 53 Cal.App.2d 207, 210, 127 P.2d 577. It is defined to be the right to pursue and gain happiness, Const. Art. I, sec. 1, and to live one's life in seclusion free from undesired publicity and to be free from unnecessary attacks on one's character, social standing or reputation. Melvin v. Reid, 112 Cal.App. 285, 289, 297 P. 91. In the words of Judge Cooley, it is "the right to be let alone." In order to constitute an invasion of one's right of privacy it is neither essential that the publication be libelous, 41 Am.Jur. 925, nor that the plaintiff suffer special damages. Ibid. Also, one's right of privacy may be invaded without using his name. "Many might recognize the plaintiff's face without knowing her name, and those who did not know it might be led to infer that she had sanctioned the publication under an alias." Peck v. Tribune Co., 214 U.S. 185, 188, 29 S.Ct. 554, 555, 53 L.Ed. 960. One's privacy will be protected against invasion by the unnecessary publication of the immoral acts of a person who has rehabilitated himself since his life of shame. Such was the holding in Melvin v. Reid, supra, wherein the plaintiff's maiden name had been used in advertising a film based on incidents in her earlier life when as a prostitute she had been tried and acquitted on a murder charge, but in the eight years since such trial she had allegedly wholly rehabilitated herself and assumed a place in respectable society. If the privacy of Miss Melvin was entitled to protection against the derogatory motion picture that republished her past, surely the same doctrine will be applied to an obviously wanton act of a world famous publication that throws its glaring white light upon the privacy of appellants herein and attributes to them a looseness of moral concepts. Not only is a person's right of privacy invaded by the publication of his picture without permission, but he may be libeled by having his picture printed in such fashion as to expose him to public ridicule. Jackson v. Consumer Publications, 256 App.Div. 708, 11 N.Y.S.2d 462, 464; Peterson v. Rasmussen, 47 Cal.App. 694, 698, 191 P. 30; Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55.

[9–11] Of course, it is not every interference with one's privacy that is actionable. The protection is relative to the customs of the time and to the plaintiff's habits and occupation. Thus where a person has placed himself in the public eye as an actor or candidate for public office or where one has become "newsworthy" and an object of legitimate public interest, the right is considerably limited. See Rest. Torts, sec. 867, c. The rule is restated in the Law of Torts to be as follows: "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to another." Liability exists only if the defendant's conduct was such that he should have realized that it would offend persons of ordinary sensibilities. Rest. Torts, sec. 867, d.

An unwarranted invasion of a plaintiff's right has been found in countless factual

situations, but it is clear from a review of the decisions that it is extremely difficult to frame rules for a determination as to just when there has been an actionable violation of one's privacy. Every controversy must necessarily turn upon its own peculiar facts.

An examination of the decisions suggests a classification thereof into three groups. See Prosser on Torts, sec. 107. 1. Intrusion upon the plaintiff's privacy in the sense of solitude. Byfield v. Candler, 33 Ga.App. 275, 125 S.E. 905, defendant burst into plaintiff's stateroom on board a steamer; Rhodes v. Graham, 238 Ky. 225, 37 S.W.2d 46, a wiretapping situation. 2. Unauthorized use of plaintiff's name or photograph for a commercial use. This is the most frequent violation. Pavesich v. New England Life Insurance Co., 122 Ga. 190, 50 S.E. 68, 69 L.R.A. 101; Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S.W. 364, 34 L.R.A.,N.S., 1137; Flake v. Greensboro News Co., supra. 3. Publicity violating ordinary decencies. Douglas v. Stokes, 149 Ky. 506, 149 S.W. 849, 42 L.R.A.,N.S., 386, defendant published a photograph of plaintiff's deformed children; Brents v. Morgan, 221 Ky. 765, 299 S.W. 967, 55 A.L.R. 964, defendant published to the world that plaintiff had not paid a debt; Reed v. Washington Times, 55 Wash.L.R. D.C. 182, publication of stolen photograph of plaintiff in connection with a scandalous report of an attempted double suicide; Melvin v. Reid, supra; Kerby v. Hal Roach Studios, supra.

[12] Under the authority of either group 2 or 3 appellants' complaint alleges facts, which if established, show an unwarranted and unreasonable interference with appellants' interest in not having their likeness exhibited to the public in such a manner. Whether or not the photograph of the young couple be considered "complimentary," as respondents assert, from a scrutiny of the article together with the picture and its caption it cannot be said that it does not and could not offend persons of ordinary sensibilities. It is a reasonable and legitimate deduction from the publication that appellants as therein pictured represent persons who are guilty of this "wrong kind of love." The caption thereunder points out that "love at first sight is a bad risk." This type of love is said in the text to be "wrong" and "100 per cent intense sex attraction" thus manifestly tying in the picture with this feature of the article. One need not be hypersensitive to be offended or humiliated at being denominated in such a manner. As a matter of law, this court cannot say that a person of ordinary sensibilities would not be so disturbed. The reference and tie-in to the photograph may be said to be well-calculated to cause the pictured couple more than passing mental anguish. That is all that is required.

[13] Respondents besides contending that the article is not offensive as a matter of law rely upon other grounds for affirmance. It is insisted that appellants have waived their right to privacy. They rely upon the exception that one who is in the public eye or a party to a happening of legitimate general public interest may not assert this right of privacy. Numerous decisions are cited involving persons in public life, Cohen v. Marx, 94 Cal.App.2d 704, 211 P.2d 320, prizefighter; Pavesich v. New England Life Ins. Co., supra, candidate for public office; Sidis v. F-R Publishing Corp., 2 Cir., 113 F.2d 806, 138 A.L.R. 15, child prodigy; O'Brien v. Pabst Sales Co., 5 Cir., 124 F.2d 167, a football player; Koussevitzky v. Allen, Towne & Heath, Inc., 272 App.Div. 759, 69 N.Y.S.2d 432, orchestra conductor, wherein the courts have recognized a "waiver" of this right. Respondents seek to bring appellants within this exception by virtue of the allegations that they own and operate an ice cream concession in the world-famed Farmers' Market and that they were photographed at their place of business. It is argued that thousands of people daily visit the market and that its operations and the scenes thereof are matters of widespread public interest and that appellants are consequently public personages to the extent of their appearance at their place of business.

The statement of such argument spotlights its freedom from logical reasoning. It may be conceded that a photograph of appellants clearly placing them at their busi-

ness establishment might be published in connection with a legitimate news story of Farmers' Market operations without reasonably invading the privacy of appellants. But such use is a far cry from that of making it the illustration of an abhorrent type of love in a literary discussion of love patterns. There is no analogy of the facts at bar to those in the cited cases.

[14] Respondents contend also that one's photograph may be used to illustrate an article of educational or informative character without violating a right of privacy, thereby attempting to bring the situation at bar within the "public interest" exception, citing Sidis v. F-R Publishing Corporation, supra, 2 Cir., 113 F.2d 806, 807, 138 A.L.R. 15, which they discuss in detail. It involves an article in the New Yorker magazine in its "Where Are They Now" Department reporting the mode of living of the plaintiff who had been a child prodigy. Having at the age of 11 lectured to distinguished mathematicians and graduated from Harvard, but who after reaching early manhood had attempted to conceal his identity and lived a quiet, modest life as a bank clerk. The serenity of Sidis' life was disturbed and he suffered a great mental disturbance by reason of his extreme passion for privacy. However, it was held that the plaintiff was a "public figure" of general interest, "newsworthy," and consequently the article was privileged and not actionable even though he had attained this status without his consent.

Although this decision has been criticized, see 29 Cal. Law Rev. 87, and relief might well have been granted in this jurisdiction on the authority of the Melvin decision, in any event it is distinguishable from the case at bar in that appellants are not "newsworthy" individuals. The facts that the article itself is of general interest and informative in character do not justify the unauthorized use of appellants' photograph as an illustration of the arguments made by the author.

[15–17] Respondents' third contention is that the complaint fails for the reason that it does not actually allege an invasion of privacy or that plaintiffs suffered mental pain, anguish or distress as a result of the publication. It is true that appellants' complaint does not mention the term "privacy" itself other than in its caption. It is also elemental that it is the declarations of a pleading and not its designation by the pleader that determine the character of the action. Hutchason v. Marks, 54 Cal.App.2d 113, 114, 128 P.2d 573. However, it does not follow that the title is to be disregarded entirely, and when the title together with facts pleaded show an actionable invasion of privacy with sufficient clarity and certainty, the complaint is adequate. The complaint is consistent with a cause of action for invasion of privacy in that it does not purport to allege the falsity of the contents of the article or of the implications raised by the photograph's use therein.

[18] It is true also that the basis of an action for violation of the right of privacy is usually founded on damages to one's personal feelings, for purely mental harm as against the injury to reputation as in a defamation action. But it does not follow that recovery is limited to damages for purely mental disturbance. See 41 Am.Jur., Privacy, p. 934. Although appellants have not alleged with particularity injury to peace of mind or that they have suffered great mental pain, they have sufficiently expressed the idea of such mental anguish. In two paragraphs of the complaint it is alleged that respondents' acts were in "utter disregard of the rights and *feelings* of plaintiffs." Again there is an allegation that plaintiffs have been injured in their *health*. This is not a model pleading and often sounds in libel, as respondents contend, but in view of the rule that the complaint is to be liberally construed in favor of the pleader on a general demurrer, Gerritt v. Fullerton Union High School District, 24 Cal.App.2d 482, 486, 75 P.2d 627, the allegation as to damages is sufficient. In any event, such defects could have been readily cured by amendment had respondents demurred at the outset of the proceedings.

Judgment reversed.

McCOMB and WILSON, JJ., concur.

GILL et al. v. HEARST PUB. CO., Inc., et al.

Civ. 18092.

District Court of Appeal, Second District, Division 2, California.

May 18, 1951.

Rehearing Denied June 4, 1951.

Hearing Granted July 12, 1951.*

John W. Gill and Sheila Gill brought an action against Hearst Publishing Company, Inc., a Delaware corporation, and others, for invasion of privacy. The Superior Court, Los Angeles County, Arnold Praeger, J., entered a judgment adverse to plaintiffs and plaintiffs appealed. The District Court of Appeal, Moore, P. J., held that the publication of photographs of a young husband and wife seated at a lunch counter, informally dressed and in a romantic pose, the husband with his arm around his wife, was not an invasion of privacy of husband and wife for which recovery could be had by them.

Judgment affirmed.

Wilson, J., dissented.

Torts ⇐8

Publication of photograph of young husband and wife seated at a lunch counter, informally dressed and in a romantic pose, the husband with his arm around his wife, was not an invasion of privacy of husband and wife for which recovery could be had by them.

Shacknove & Goldman, Los Angeles, Ben F. Goldman, Jr., Los Angeles, of counsel, for appellants.

Flint & MacKay and Arch R. Tuthill, all of Los Angeles, for respondents.

MOORE, Presiding Justice.

The Gills, appellants herein, seek to recover against respondents Hearst Publishing Company and its alleged employee, photographer Cartier-Bresson, on the same invasion of right of privacy theory, but base their cause of action on the fact that the publication of the photograph in the Ladies Home Journal was with the "knowledge, permission and consent of the said defendants." This theory was advanced in an amended complaint, their first complaint, seeking damages for the picture's original appearance in a Hearst publication, Harper's Bazaar, having been dismissed because recovery was barred by the statute of limitations. A general demurrer was also sustained as to this second attempt.

However, appellants *do not* in this action *allege* that respondents authorized the use of the photograph specifically in connection with the article "Love." They do not allege, as was done in the companion case, Gill v. Curtis Pub. Co., Cal.App., 231 P.2d 565, that the invasion of privacy results from the offensive implications arising from the use of the picture and article together. On the contrary, the only allegations bearing on respondents' alleged wrongdoing are that they authorized publication of the picture and that said "photograph depicts said plaintiffs in an uncomplimentary manner and pose, which tends to hold said plaintiffs up to ridicule and contempt."

Therefore, as there is no allegation that respondents authorized or had any connection with the published article itself, the only question is whether the republication of the picture alone constitutes an invasion of appellants' right of privacy.

Bearing in mind the requirements for an actionable violation of one's right of privacy as declared in the Curtis decision, we conclude that the mere publication of the photograph only apart from the philosophic discussion does not here give rise to a cause of action. It cannot be said that any detriment is suffered by a person from the mere printing and display of his photograph when it does not show him in an uncomplimentary pose or tend to humiliate him or in any sense present him to his discredit or disadvantage.[1] The publication of a photograph should not be offensive to persons of ordinary sensibilities when it does no more than depict an attractive young couple seated at a lunch counter, informally dressed and in a ro-

1. "It is only the more flagrant breaches of decency and propriety that could in practice be reached." Warren and Brandeis, 4 Harvard Law Review 216.

* Subsequent opinion 239 P.2d 636.

mantic pose, the man with his arm around the girl. Where the intrusion does not go so far as to be beyond the limits of decency, no liability accrues. Rest., Torts, sec. 867, d; see illustration 5; also see Roberson v. Rochester Folding-Box Company, 171 N. Y. 538, 64 N.E. 442, 59 L.R. A. 478.

Judgment affirmed.

McCOMB, J., concurs.

WILSON, Justice.

I dissent.

The majority opinion discloses a fundamental misconception of the law relating to the right of privacy. The pursuit and obtaining of happiness is one of the inalienable rights granted by section 1 of article I of the Constitution of California. Melvin v. Reid, 112 Cal.App. 285, 291, 297 P. 91. The right of privacy is a personal right as distinguished from a property right. Every person is entitled, if he so desires, to live in seclusion, isolation and solitude, free from intrusion into his private life. If his serenity of mind is disturbed by such intrusion, if he is agitated or disquieted by the publication in a newspaper or magazine of his picture, even though it be a complimentary likeness, he is entitled to redress.

The common law is not rigid, inflexible, immobile. To meet new needs of society it enlarges and advances with the times and with changes in economic thinking, social concepts and political philosophy. With the publication in 1890 of an article entitled "The Right to Privacy" by Brandeis and Warren, 4 Harvard L. Rev. 193, the courts began to recognize the need for the abandonment of previously expressed rejections of the doctrine of the right of privacy and to acknowledge the existence of such right as a principle of law and to avow the violation of such right to be an actionable tort. Such acknowledgment and avowal were based on the existence and extension of common law principles to meet present day social and commercial needs. The right of privacy has never been declared to be an absolute right applicable to all persons in all circumstances. When one emerges from the cocoon of obscurity by reason of having become a public character, such as an officeholder, a public entertainer, a sports personage, or by other means, his absolute right is surrendered. He is then subject to being publicized in newspapers and magazines although he is still protected from unnecessary and unwarranted invasion of his private life and affairs.

Even one who has become a public figure in one way or another is entitled to protection from unwarranted and unauthorized publicity. Kerby v. Hal Roach Studios, 53 Cal.App.2d 207, 210, 127 P.2d 577; Sinclair v. Postal Tel. & Cable Co., Sup., 72 N.Y.S.2d 841, 842; Franklin v. Columbia Pictures Corp., 246 App.Div. 35, 284 N.Y. S. 96; affirmed 271 N.Y. 554, 2 N.E.2d 691; Redmond v. Columbia Pictures Corp., 277 N.Y. 707, 14 N.E.2d 636; Mau v. Rio Grande Oil, Inc., D.C., 28 F.Supp. 845, 846.

The right of privacy or, as many courts have expressed it, the right to be let alone, has been recognized in California. Melvin v. Reid, supra; Kerby v. Hal Roach Studios, Inc., 53 Cal.App.2d 207, 210, 127 P.2d 577; Metter v. Los Angeles Examiner, 35 Cal.App.2d 304, 310, 95 P.2d 491. In an annotation, 138 A.L.R. 28 (1942) it is said that "the preponderance of authority supports the view that, independently of the common rights of property, contract, reputation, and physical integrity, there is a legal right called the right of privacy, the invasion of which gives rise to a cause of action." In a subsequent annotation, 14 A.L.R.2d 753 (1950) the author says that the later cases support the statement in 138 A.L.R. 28 and that "in those jurisdictions where the matter has been decided, the weight of authority recognizes a separate and independent right of privacy." An examination of the cases cited in the above mentioned annotations, in the annotation in 168 A.L.R. beginning on page 446, and in 41 Am.Jur. p. 940, sec. 21, demonstrates that the overwhelming weight of authority sustains the right of a person who has lived an uneventful life and who has not become a public character or achieved notoriety to be entitled to redress if his right of privacy is violated.

The decision in the instant case is inconsistent with the opinion in Gill v. Curtis Publishing Company, Cal.App., 231 P.2d 565, in which all members of the court are in accord in expressly holding that plaintiffs are not public personages, are not newsworthy individuals, and have not in any manner or to any extent waived their right of privacy by reason of their operation of an ice cream concession in the Farmers' Market. The discussion in that opinion of the discourse on "Love" which appeared in the Ladies' Home Journal in connection with plaintiffs' picture cannot be construed to mean that the publication of the picture without such discourse would not give rise to an action by plaintiffs. The reading matter accompanying the photograph must have magnified the mental pain and anguish suffered by plaintiffs and therefore would entitled them to damages in a larger amount than the mere publication of their picture. The difference between the two publications is one of degree only.

The citation of Roberson v. Rochester Folding-Box Co., 171 N.Y. 538, 64 N.E. 442, 59 L.R.A. 478, is unfortunate and futile. Only four of the seven justices concurred in the decision, three dissenting. The majority of the court there denied the existence of the right of privacy and refused relief to plaintiff, forsooth, because no *property* right had been invaded although plaintiff's picture had been used for advertising purposes without her consent or authority. Her *personal* rights were given no consideration. The court also expressed concern that the sustaining of the plaintiff's action would necessarily open up a vast field of litigation, the inference being that so many lawsuits would ensue the courts would be overcrowded. The decision was so severly criticized in an editorial in the New York Times that a member of the court, forsaking judicial convention and doffing judicial robes, came to the defense of the decision by the unusual method of publishing an article in a law review. O'Brien, The Law of Privacy, 2 Columbia L.Rev. 437, Nov. 1902. The author predicted that should the Legislature enact a statute creating such right it would be compelled to repeal it at the next session. The prophecy did not become a reality. Within five months after the publication of the article the Legislature adopted a statute giving a right of action to one whose name or portrait should be used for advertising purposes without his consent. Laws of New York 1903, ch. 132, p. 308, enacted April 6, 1903. The law is still in effect. In the annotations above referred to it will be found that the theory of the Roberson case has been rejected and repudiated by a great majority of the courts in which the same question has arisen, although without the benefit of statutes covering the subject.

There is a private domain that belongs to every individual which the public may not invade.

The announcement of the majority of this court that no detriment is suffered by a person from the mere publication of his photograph when it does not show him in an uncomplimentary pose or tend to humiliate him, is not in accord with the great weight of authority. If a person has a passion for obscurity and seclusion and if the public display of his likeness is repugnant to him, there is no justification for the statement that he does not suffer detriment or mental hurt by reason of such publication. The appearance of their photograph in the pose described in the majority opinion no doubt was offensive to plaintiffs; in fact, they allege in their complaint that it subjected them "to humiliation, annoyance, and disgrace and exposed them to public contempt and ridicule." Without doubt a man has a right to caress his wife even in a public place, and a photograph, surreptitiously taken, of them in such pose and published in a magazine having a world-wide circulation furnishes a basis for an action for damages. This court is without power to determine the state of their feelings or the agitation of their minds before any evidence is introduced, and it is likewise without power to bar them from a trial wherein a jury may determine whether and to what extent they have been damaged.

The argument that a ruling contrary to that of the majority of this court would lead to hundreds of actions for damages should a newspaper or a magazine publish pictures of crowds on the street viewing a parade or in a football stadium has no validity. Persons who voluntarily appear in such places may expect to be photographed, along with others in the assemblage, as a matter of public interest. Such a situation is a far cry from the clandestine selection of the likeness of a single individual and publicizing it without his consent. However, the appearance of a person in a public place does not entitle another to use such person's picture without consent. In Kunz v. Allen, 102 Kan. 883, 172 P. 532, L.R.A.1918D, 1151, the plaintiff's photograph was taken while she was shopping in a department store. The use of her likeness in an advertisement of the store was held to be actionable.

Although plaintiffs' action against defendants for the publication of their picture in Harper's Bazaar was barred by the statute of limitations when the action was commenced it is not barred as to the republication of the photograph in the Ladies' Home Journal if the allegations in the amended complaint are true. Plaintiffs allege that the picture "was republished with the knowledge, permission and consent of the said defendants in the May, 1949, issue of the 'Ladies' Home Journal,' published in April, 1949; and credit for said publication in the aforesaid 'Ladies' Home Journal' was given to and required by" defendants.

A person is liable for the repetition and circulation of prohibited matter when he has expressly authorized its use and distribution, Wayne Works v. Hicks Body Co., 115 Ind.App. 10, 55 N.E.2d 382, 386, or when he has republished or recirculated the objectionable article after the statute of limitations has run as to the original publication. Winrod v. McFadden Publications, Inc., D.C., 62 F.Supp. 249, 252.

I would reverse the judgment with directions to overrule the demurrer and permit defendants to answer if they so desire.

Rehearing denied; WILSON, J., dissenting.

104 Cal.App.2d 257

PEOPLE v. MERRILL.

Cr. 2731.

District Court of Appeal, First District, Division 1, California.

May 17, 1951.

Leonard Merrill was convicted in the Superior Court in and for the City and County of San Francisco, Twain Michelsen, J., for rape with force and violence, and he appealed. The District Court of Appeal, Bray, J., held that prosecutrix' testimony was not inherently improbable and that evidence that prosecutrix had been in a number of bars in a city's tenderloin district, unescorted, ordering drinks, since the alleged attack, was not admissible to impeach her testimony on cross-examination that she had never ordered drinks in any bar or to prove her unchastity.

Judgment affirmed.

1. Criminal law ⇐1159(4)

In prosecution for rape with force and violence, prosecutrix' testimony that defendant seized her throat, hit her repeatedly, thrust his finger in her eye and threatened to push her eyes out before she realized that he would attack her, and that she was afraid to scream after attack began, was not inherently improbable.

2. Rape ⇐9, 14

In prosecution for rape with force and violence, proof of prosecutrix' vehement exertion is unnecessary to show her resistance, and finding that she did not consent to intercourse follows from finding by trier of facts that her resistance was overcome by force or that she desisted from struggle with defendant because of fear induced by his application of force.

3. Criminal law ⇐1159(4)

The reviewing court may not reverse judgment of conviction merely because complaining witness' testimony discloses unusual circumstances, but to justify reversal on ground of improbability of such testimony, it must be so inherently improbable as to leave court no recourse, without self-stultification, except to reverse judgment.

4. Criminal law ⇐1159(4)

Improbability of testimony relied on by prosecution authorizes reversal of judgment of conviction only where such testimony is so inherently improbable as to amount to no evidence at all.

5. Criminal law ⇐1159(4)

Contradictions or inconsistencies in testimony of witness for prosecution do not render it inherently improbable within rule authorizing reversal of conviction on such ground.

6. Criminal law ⇐1160

Incompatibility and discrepancies in testimony and witness' uncertainties in giving testimony, as well as contradictions in evidence, are matters solely for consideration by trier of facts in first instance and by trial judge on motion for new trial, and such matters cannot be considered by appellate court, if jury's findings are supported by substantial evidence.

7. Witnesses ⇐383

In prosecution for rape, evidence that prosecutrix had been in number of bars in city's tenderloin district, unescorted, and ordering drinks, since alleged attack, was inadmissible to impeach her testimony on cross-examination that she never had ordered a drink of liquor in any bar, as fact that she ordered drinks could not have been proved independently on issues involved.

8. Witnesses ⇐383

Evidence that witness gave false testimony as to matter which cannot be proved independently in case involved is not within proper scope of impeachment.

9. Rape ⇐40(1)

In prosecution for rape by force and violence, proof of prosecutrix' unchastity is admissible.

10. Rape ⇐40(1)

In prosecution for forcible rape, defendant's evidence that prosecutrix had been in a number of bars in city's tenderloin district, unescorted, and ordering drinks, since alleged attack, was inadmissible as immaterial, even if fact that she frequented bars were evidence of her unchastity.

11. Rape ⇐40(1)

In prosecution for forcible rape, evidence that prosecutrix frequented bars is not admissible as tending to prove her unchastity, in view of fact that women now patronize bars as freely as men.

12. Criminal law ⇐304(1)

The District Court of Appeal may take judicial knowledge of customs and ordinary affairs of life.

13. Rape ⇐40(1)
Witnesses ⇐340(3), 344(2)

In prosecution for forcible rape, evidence of prosecutrix' unchastity is admissible on question of her consent to intercourse, but evidence of her moral delinquency is not admissible as affecting her general credibility as witness.

14. Criminal law ⇐419(3)

In prosecution for rape, testimony solicited by defendant that witness told defendant and his wife that prosecutrix had sworn to warrant for defendant's arrest before defendant made telephone call, in which he asked prosecutrix whether she had sworn out such a warrant, would have been admissible, under exception to hearsay rule, for purpose of showing that defendant did not make such call because of his consciousness of guilt, as prosecution contended, but because of information given him by such witness.

15. Criminal law ⇐1186(4)

In prosecution for rape, error in excluding testimony, solicited by defendant, that witness told defendant that prosecutrix had sworn to warrant for his arrest before he made telephone call, in which he asked prosecutrix whether she had sworn out such a warrant, was not prejudicial error warranting reversal of conviction, in view of overwhelming proof of defendant's guilt. Const. art. 6, § 4½.

16. Criminal law ⇐982

In prosecution for rape, prosecutrix' testimony that defendant struck her, placed his thumb in her eye, and threatened to push her eyes out unless she yielded, established sufficient torture to bring case within statute prohibiting probation of one convicted of crime in perpetration of which he

willfully inflicted great bodily injury or torture. Pen Code, § 1203.

17. Criminal law ⇐1158(1)

Whether one convicted of forcible rape willfully inflicted great bodily injury or torture on prosecutrix in perpetration of crime, so as to preclude granting of probation, was fact question for trial court. Pen. Code, § 1203.

18. Criminal law ⇐939(1)

In prosecution for rape, affidavits of defendant's attorney and another that woman residing at same place as defendant informed affiants that she was asleep in front room with only light wall between her and front door but was not awakened, when police officer, according to his testimony, rang bell and knocked on door without response, though defendant claimed to have been at home at such time after alleged attack in prosecutrix' apartment, that defendant was at home on that night, and that woman had so informed police inspector about a week before trial, were insufficient to entitle defendant to new trial on ground of newly discovered evidence after conviction, in absence of showing in either affidavit as to why such evidence could not have been discovered sooner and produced at trial in exercise of due diligence.

19. Criminal law ⇐958(6)

Affidavits as to statements to affiants by others after criminal trial, wherein they were not called as witnesses, were insufficient to justify granting of new trial to defendant on ground of newly discovered evidence after his conviction, as affidavits were hearsay and merely set forth affiants' conclusions as to what persons making statements would testify, in absence of statement by any of them that she would testify as indicated, though they refused to give affidavits to defendant's attorneys as to what their testimony might be, since defendant could have subpoenaed them to hearing of motion for new trial.

20. Criminal law ⇐958(4)

Refusal of proposed witnesses, named in affidavits supporting defendant's motion for new trial on ground of newly discovered evidence after conviction of crime, to make affidavits as to what their testimony might be, and defendant's failure to subpoena them, supported trial court's refusal to grant new trial on ground that such evidence was speculative and conjectural.

21. Criminal law ⇐956(4)

Affidavits made on information and belief as to facts which have transpired are hearsay and must be disregarded.

22. Criminal law ⇐938(1)

A motion for new trial on ground of newly discovered evidence is looked on with distrust and disfavor, and much must be left to trial court's discretion in granting or denying motion.

23. Criminal law ⇐1156(1)

An appellate court should not interfere with trial court's refusal of new trial after conviction of crime except on clear showing of abuse of trial court's discretion.

24. Criminal law ⇐706

A deputy district attorney in charge of criminal trial was not guilty of misconduct in introducing in evidence a police officer's testimony as to having rung door bell at defendant's home without eliciting any response despite fact stated in affidavits supporting defendant's motion for new trial on ground of newly discovered evidence that police inspector was told that there were three people in house who could have heard bell had it been rung, in absence of record showing that attorney had such information from inspector.

25. Criminal law ⇐1130(2)

The appellate court, on appeal from conviction of crime, will not consider charge of district attorney's misconduct, based on comments in his argument to jury, where appellant does not point out comments objected to.

26. Criminal law ⇐720(6)

Counsel may draw reasonable inferences from evidence in course of his argument to jury.

27. Criminal law ⇐720(7)

In prosecution for rape, district attorney was not guilty of misconduct in commenting, during argument to jury, that defendant's "interminable" cross-examination of prosecutrix was attempt to see which

way evidence would go and then make election whether to claim that she consented to intercourse or that defendant was not present at time of alleged attack, where cross-examination gave rise to inference along lines of such comment.

28. Criminal law ⇐1035(3), 1037(1)

A claim of district attorney's or trial judge's misconduct will not ordinarily be considered on appeal from conviction, unless appellant promptly called trial court's attention to alleged impropriety and assigned misconduct thereon, as trial court should be given opportunity to correct irregularity or to prevent any prejudicial effect thereof, if possible.

29. Criminal law ⇐656(2)

In prosecution for rape, trial judge was not guilty of misconduct in frequently interrupting testimony, particularly on long cross-examination of prosecutrix, where all interruptions were in interests of clarity, with possible exceptions of one or two attributable to misunderstanding of question by court, and cross-examination, with questions concerning right of assault intermingled with questions concerning other occasions, justified court's action in requiring that occasions inquired about be clear to witness and jury.

Wm. E. Kidd, San Francisco, Charles O. Morgan, Jr., San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., David K. Lener, Deputy Atty. Gen., for respondent.

BRAY, Justice.

From a conviction of rape with force and violence and an order denying his motion for a new trial, defendant appealed.

Questions Presented:

1. Was the prosecutrix' testimony inherently improbable?
2. Error in exclusion of testimony?
3. Error in denying probation?
4. Error in denying new trial?
5. Misconduct of district attorney?
6. Misconduct of judge?

1. Prosecutrix' Testimony.

Mary, aged 28, met defendant, aged 32, in September, 1949, at a garage where she kept her car and where he was employed. She saw and talked to him there frequently late at night when she came in with her car. She went out with him not over six times. She loaned him some money and on January 11, 1950, loaned him an additional sum. On April 20, 1950, he phoned her and asked her to meet him at a place called Steve's Club, stating that he would make a payment on what he owed her. After a few drinks they left and went to Mary's apartment. While Mary was seated on his lap defendant told her that due to an accident his testicles were damaged and he did not know whether or not he could have intercourse; that if they got married probably the only way they could have children would be through artificial semination. Mary went into the bathroom, and returning, found defendant lying face down on the davenport. She suggested that he leave. He said he wanted to stay all night. She told him no one could do that except her husband if she ever had one. He wanted her to undress. She refused. He then grabbed her arm, and hit her in the face. She started to scream. He grabbed her by the throat, shutting off the air so she could not breathe. He told her if she did not keep still that he would strangle her. He kept hitting her, pulled her on to the davenport, pressed his thumb into her eye, and stated that if she did not lie still and keep quiet he would push her eyes clear through her head. He then raped her.

Within an hour Mary phoned the police and reported the attack. Policemen came to her apartment and then took her to the emergency hospital. At approximately 2:10 a. m. she was examined there by a doctor, who found redness in the pelvic region, a discharge present, a fresh laceration and bleeding of the hymen. There was a discolored area on her left upper eyelid; her neck showed some redness of the skin. The policemen testified to this same condition of the eye and neck. The doctor was of the opinion that Mary had not had sexual intercourse prior to this occasion. A specimen from the vaginal contents was taken

and submitted to an expert who testified that it contained sperm.

Another expert testified that discolorations on the dress, slip and pants which Mary testified she was wearing at the time of the attack were human blood. Photographs taken the next morning were introduced in evidence, showing Mary's black eye, marks on her right shoulder and arm and on her chin and neck.

Defendant testified, in effect, to first meeting Mary at the garage and then to what amounted to a pursuit of him by Mary night after night when she came to the garage, culminating on one occasion in a sex experience with her in the storeroom of the garage, in which, however, he claimed there was no penetration (possibly because the condition of Mary's hymen the night of the assault would be difficult to reconcile with a completed act on the first occasion). Mary denied this incident in toto. On the night in question, when he called her to discuss his indebtedness to her, she insisted on meeting him at Steve's Bar. He accompanied her to the front door of her apartment house and left her there. He denied being in her apartment and all of the circumstances of the rape. He claimed that as she went in the door, he left, walked to the car line, waited for and boarded a street car, arriving home about ten minutes to 1:00 a.m. He immediately went to bed, remaining there until late in the morning. A police officer testified that accompanied by another officer he arrived at defendant's address at approximately 2:30 that morning to ascertain if defendant lived there "but we received no response to the doorbell nor to a knock on the door."

Defendant contends that because Mary was angry at him for not repaying the money he had borrowed, she planned to get him into her apartment and then threaten him with a charge of rape, and when he failed to come in, she arranged to produce the evidence required to establish the fact. If this were true, she had to work rather fast to get someone to have intercourse with her between about 12 o'clock when defendant claims to have left her, and 1:30 to 1:45 when the radio car operator received the police call to go to her apartment.

A letter she wrote to defendant's wife in February (defendant left the state in January and did not return until sometime in March) indicates that at that time she was quite bitter towards him. It tended to contradict her statement that she thought defendant was divorced.

[1–6] The claim of improbability is based mainly upon the fact that after defendant talked lewdly to her and attempted to get her to agree to intercourse, Mary made no attempt to run away or arouse the neighbors in the adjoining apartments, and that after he started to attack her she did not cry out. Her testimony clearly shows that until he actually seized her she did not realize that he would attack her. Before she realized what was occurring he seized her throat, threatened her and hit her repeatedly, and also thrust his finger in her eye and threatened to push her eyes out. While she could have screamed, it is evident that she was afraid to. There was nothing inherently improbable in her story. "Proof of her vehement exertion was not necessary to show her resistance. When attacked by a rapist it is primarily for the woman to decide to what extent she can with safety resist. People v. Lay, 66 Cal. App.2d 889, 892, 893, 153 P.2d 379. Where a trier of the facts decides that a prosecutrix's resistance was overcome by force or that she desisted in her struggle with the rapist by reason of her fear induced by his application of force, the finding necessarily follows that she did not consent to the intercourse." People v. Calliham, 81 Cal. App.2d 928, 931, 185 P.2d 342, 344. Stress is laid on the fact that he told her that he was not sure he was virile, and it is claimed that it is inherently improbable that a man seeking intercourse would make such a statement. "The reviewing court may not reverse a judgment of conviction merely because the testimony of the complaining witness discloses circumstances which are unusual. To justify a reversal upon the ground specified by appellant it must hold that the testimony of the complaining witness is 'so inherently improbable as to leave the court no recourse, without self-stultification, except to reverse the judgment.' People v. Moreno, 26 Cal.App.2d 334, 336,

79 P.2d 390, 392. We find nothing inherently improbable in the testimony of the complaining witness in this case." People v. Stephens, 66 Cal.App.2d 755, 757, 152 P.2d 1019, 1020. Likewise, defendant argues that the girdle worn by Mary would have prevented the accomplishment of the act. There is nothing in the evidence to support this conclusion. Nor is there anything inherently improbable in her testimony concerning defendant's statements. Most of defendant's arguments completely overlook the fact that the condition of Mary's hymen when examined that morning demonstrates that someone had intercourse with her, and her bruised condition demonstrates that force was used. Moreover, "It is only where the testimony relied upon by the prosecution is so inherently improbable as to amount to no evidence at all that an appellate court is authorized to reverse a judgment (People v. Stephens, 66 Cal.App.2d 755, 757, 152 P.2d 1019; People v. Moreno, 26 Cal.App.2d 334, 336, 79 P.2d 390), and contradictions or inconsistencies in the testimony of a witness do not render it inherently improbable within this rule." People v. Phillips, 76 Cal.App.2d 515, 520, 173 P.2d 392, 395. There were some minor discrepancies in her testimony and some exaggerations. However, as said in people v. Carlisle, 66 Cal.App.2d 874, 876, 153 P.2d 401, "Incompatibility and discrepancies in testimony, if any; the uncertainties of a witness in giving testimony, as well as contradictions in the evidence, are matters solely for the consideration of the trier of fact in the first instance and for the consideration of the trial judge on a motion for a new trial. Such matters cannot be considered by us if, as in the instant case, there is substantial evidence to support the findings of the jury. (People v. Pianezzi, supra [42 Cal.App.2d 265, 108 P.2d 732]."

2. Exclusion of Testimony.

[7, 8] On cross-examination Mary testified that the drinks she had that night at Steve's Club were ordered for her by defendant and were four in number. Defendant then asked: "There were no other drinks ordered for you or by you during the time Mr. Merrill was out of the bar? A. I have never in my life ordered a drink in any bar of liquor." Later on, defendant asked if Steve's Bar was the only bar she had been in; if she had not been in there the day before the trial started, and if within the last twelve months she had not been in certain Eddy Street bars. The court sustained objections to these questions as not material. Defendant then offered to prove that since the date of the alleged attack she had been in a number of bars in San Francisco's tenderloin district, unescorted, ordering drinks. The court sustained an objection to the offer of such evidence. Defendant contends he was thereby erroneously restricted in his cross-examination of prosecutrix in that such evidence was admissible in impeachment of her statement that she had never in her life ordered a drink in a bar and also that it would tend to prove her unchastity. It is not "within the proper scope of impeachment to show that a witness has given false testimony as to a matter which could not be proved independently in the case." People v. Wells, 33 Cal.2d 330, 340, 202 P.2d 53, 59. Evidence that Mary ordered drinks could not have been proved independently on the issues involved in this case.

[9–12] Defendant contends that this evidence was admissible on another ground, namely, to prove unchastity. Proof of unchastity is admissible in a case where the charge of rape is by force and violence. Assuming that frequenting bars would be evidence of unchastity, it does not appear how frequenting bars after the attack would be material. These questions and the offer of proof were directed towards Mary's actions subsequent to the attack. Obviously her acts in this respect subsequent to the attack would not be material. But a more important answer to the contention is that mere frequenting of bars does not tend to prove unchastity. Defendant relies principally on the case of People v. Biescar, 97 Cal.App. 205, 275 P. 851, where the court said "the prosecutrix in a rape case may be subjected to an unusually thorough, searching, and protracted cross-examination", 97 Cal.App. at page 217, 275 P. at page 856. This case is not authority for the contention

that mere presence in bars is evidence of a woman's unchastity. In the instant case defendant was permitted to, and did, conduct an usually thorough, searching and protracted cross-examination of Mary. In these days when women patronize bars as freely as men, the language of People v. Mangum, 31 Cal.App.2d 374, 88 P.2d 207, is peculiarly appropriate. There, in distinguishing earlier cases which seemed to hold that drinking by women in bars, or their presence there, indicated their unchastity, the court said, 31 Cal.App.2d at page 382, 88 P.2d at page 211: " * * * we are permitted to take judicial knowledge of customs and the ordinary affairs of life. It must be conceded that habits and social customs have altered since the origin of the rule mentioned, so that, in many respects, its application, as set forth in the earlier cases, would be a grotesque anachronism." The court there held that the prosecutrix could not be asked if frequently she had been intoxicated in public bars.

[13] The court did not err in refusing to allow the questions concerning Mary's presence in bars subsequent to the attack. "In this state, in cases of this character the rule is that evidence of the unchastity of the prosecutrix is admissible as bearing on the question of consent, but evidence of her moral delinquency is inadmissible as affecting her general credibility as a witness." People v. Murphy, 53 Cal.App. 474, 481, 200 P. 484, 488.

[14, 15] A more serious situation arises concerning the exclusion of the testimony of the witness Patricia McCrea. Mary testified that on May 2d (about twelve days after the attack) defendant phoned and asked her if she had sworn out a warrant for his arrest on a charge the name of which he did not want to use as it was a bad word—"You know what I mean." He then attempted to persuade her not to go on with the matter but to see his lawyer. Defendant admitted making the phone call but stated that he told her that he had heard that she was trying to get him on this charge and asked if it were true. He claimed she replied that there was nothing to what he had heard. Thus, there was a direct conflict between the two versions of this conversation. The prosecution obviously offered Mary's version of it to show a consciousness of guilt on the part of defendant. Defendant's version was to explain the call as being based on information given him, rather than on a consciousness of guilt. To corroborate his claim of source of knowledge defendant produced Mrs. McCrea, a cousin of his wife's, and attempted to obtain from her testimony to the effect that prior to his phone call she told defendant and his wife that Mary had sworn to a warrant for his arrest. Apparently that is what defendant expected Mrs. McCrea to testify to, although there is no definite offer or proof to indicate just what Mrs. McCrea would testify. However, in the discussion between court and counsel it is apparent that defendant wanted some information from the witness which would tend to offset the consciousness of guilt deducible from Mary's version of the phone call. Plaintiff objected and the court sustained objections on the ground of hearsay to the only questions asked of Mrs. McCrea, namely, did she give the Merrills some information about a rape case and where did she get the information she gave the Merrills? While, strictly speaking, the testimony solicited would be hearsay, it was necessarily of a type to which the hearsay rule could not apply. As the prosecution introduced the phone call on the theory that defendant was conscious of his guilt and because of such consciousness phoned Mary and tried to persuade her not to proceed, defendant had the right to show, if he could, that his call did not come from consciousness of guilt but from information given him by another, and then to corroborate his testimony by that other. Therefore the evidence should have been admitted. In view, however, of the overwhelming proof of defendant's guilt, the error, under section 4½ of article VI of the Constitution was not prejudicial. The incident of the phone call was merely cumulative. In spite of defendant's contention that Mary's story was inherently improbable, and of a few slight contradictions in it, a reading of her testimony and particularly the exceeding detailed and protracted cross-examination of her, supports the conclusion that reasonably the jury could have done noth-

ing other than convict. Defendant's own story is the more improbable of the two. Defendant presented a picture of Mary as a woman who had pursued him night after night, allowed certain intimacies, and on one occasion had been the aggressor in a sex experience. Such a situation is irreconcilable with his claim of leaving her at the front door of her apartment building on the night when, almost immediately thereafter, she is raped.

3. Denial of Probation.

[16] At the time of the hearing and denial of the motion for new trial defendant moved for probation. The court denied the motion, stating that it had no authority to grant it, apparently referring to section 1203 of the Penal Code which prohibits probation to one who in the perpetration of the crime wilfully inflicted great bodily injury or torture. However, there was considerable discussion as to granting of probation which was not reported, so it is not clear that probation was denied solely on this ground. Later, on hearing the presentence report of the probation officer, the court stated that it was convinced "an element of torture was used upon the victim" and then stated that defendant was not eligible for probation. It then stated, among other of its reasons for denying defendant a county jail sentence only, that Mary "was grievously injured, physically—undoubtedly mentally too." Defendant contends that the evidence does not support a finding of great bodily injury or torture and hence the court erred in assuming that it had no power to grant probation. (If it was acting in any degree in the exercise of its discretion, its denial of probation was amply justified.) Assuming, however, that the court denied probation solely on the ground of lack of power, the injuries testified to by Mary, supported by the bruise marks on her body and particularly the gouging of her eye, are sufficient evidence to justify a finding of great bodily injury and torture. Defendant contends that these injuries were no more than those necessary to constitute the force and violence required to prove the charge, and not the great bodily injury or torture mentioned in the probation section. However, here there was more than just force or violence. When the defendant struck Mary and placed his thumb in her eye, and threatened to continue to do so unless she yielded, there was sufficient torture to bring the case within the inhibition of the statute.

[17] Moreover, the court heard Mary's testimony and that of the doctor as to her injuries, and saw the photographs of the marks. As said in People v. Harshaw, 71 Cal.App.2d 146, 161 P.2d 978, where the trial court refused to grant probation on the ground that a deadly weapon had been used, the question was one of fact for the trial court. "Each case is to be adjudged by its own facts, and, in the instant case, the trial judge who heard the case has determined that it is not a case in which probation should be granted." People v. Darrow, 212 Cal. 167, 186, 298 P. 1, 9.

4. Denial of New Trial.

[18] There is no basis for the contention that defendant was entitled to a new trial. In fact, the affidavits filed on the motion and upon which defendant relies show no newly discovered admissible evidence, nor any reason why the inadmissible evidence referred to in the affidavits was not available at the time of trial. The affidavits were by defendant's attorney and one Maguire to the effect that subsequent to the trial they interviewed a Mrs. Panch who resided at the same place as defendant, and were informed by her that on the morning of the assault at the time when the police officer claimed to have rung the doorbell and knocked, she was asleep in the front room with only a light wall between her and the front door, and was not awakened. She said she would have heard the bell had it been rung as she was a light sleeper; the bell was a loud one, and she was anxious about her son when he was not home; moreover, that on that night and every night thereafter for about twelve nights, defendant was at home; that Mrs. Panch and Mrs. Drady, Mrs. Panch's sister-in-law, stated that a police officer, Inspector Breen, had called upon them about a week before the trial and they had informed him of this fact and also that

Mrs. Drady had stated that both her sister and her son were at defendant's home the morning of the assault. (The affidavit does not state whether or not the latter claimed not to have heard the bell.)

There is no showing in either affidavit why the evidence could not have been produced at the trial. If defendant did not know before the trial, he there learned that the police officers claimed to have gone to his home. It would have been a simple matter for defendant's counsel to inquire of Mrs. Panch if she had heard the officers. Thus the first requirement of a showing to obtain a new trial was not met. As said in People v. Coleman, 83 Cal.App.2d 812, 817, 189 P.2d 845, 847, "* * * no satisfactory showing was made as to why in the exercise of due diligence it could not have been discovered sooner and presented at the trial."

[19–23] Moreover, the affidavits were hearsay. There is no statement from any of the persons referred to that she would testify as indicated. The affidavits merely set forth the deponent's conclusions as to what she would testify. People v. Thompson, 5 Cal.App.2d 655, 43 P.2d 600, holds that affidavits which set forth only conclusions of the affiant are not sufficient to justify the granting of a new trial. The fact that the alleged witnesses refused to give defendant's attorneys affidavits is no reason for considering their conclusions as to what their testimony might be. Defendant could have subpoenaed them to the hearing of the motion for new trial. The refusal of the proposed witnesses to make affidavits and the failure of defendant to subpoena them supports the court's refusal to grant a new trial on the grounds that the alleged evidence was "speculative" and "conjectural." These affidavits are of the kind condemned in Riviello v. Journeymen Barbers etc., Union, 88 Cal.App.2d 499, at page 503, 199 P.2d 400, at page 403, where this court said: "It is well settled that affidavits made upon information and belief as to facts that have transpired are hearsay and must be disregarded." Testimony of affiants as to what Mrs. Panch and Mrs. Drady told them would not be competent evidence; hence their affidavits did not constitute competent evidence and could not be considered. See Gay v. Torrance, 145 Cal. 144, 78 P. 540. "A motion for a new trial based upon the claim of newly discovered evidence is universally looked upon with distrust and disfavor (citations) and much must be left to the discretion of the trial court in granting or denying a motion for a new trial on that ground or any other ground. Where the trial court refuses to grant a new trial, an appellate court should not interfere except upon a clear showing of an abuse of discretion by the trial court. (Citations.)" People v. Mandell, 48 Cal.App.2d 806, 818, 120 P.2d 921, 927. We find no showing of an abuse of discretion in the present case.

5. Alleged Misconduct of the District Attorney.

[24] This claim is based upon the statement in the above-mentioned affidavits that Inspector Breen was told that there were three people in the house who could have heard the bell had it been rung. It is then assumed that the deputy district attorney in charge of the trial had learned of this fact from Inspector Breen, and in spite of it, introduced in evidence the testimony of the officer who claimed to have rung the bell. There is nothing in the record to substantiate the claim that the deputy had this information. We have no way of knowing if it was the fact. The refusal of the women to make affidavits is significant. The hearsay affidavit of counsel does not establish it. Again, had the deputy known it, he may have had reasons for doubting its credibility.

[25–28] The second charge of misconduct is based upon certain comments made by the district attorney in his argument. Defendant has not pointed out the comment to which he objects. Because of this failure we could decline to consider the matter. People v. Hadley, 175 Cal. 118, 165 P. 442. However, so that counsel's dereliction will not react upon the defendant, we have examined the record. We assume it is when the district attorney said in discussing defendant's "interminable" cross-examination of Mary, "It was an attempt to see which way the evidence would go,

and then make an election, whether or not to claim, 'Yes, I was there, but it was done by consent,' or to say, as he did say, 'I wasn't there.'" No objection to this statement was made at the trial. Defendant contends that because at the time of his arrest defendant claimed he was not in the apartment, and because defendant had intimated in his examination of the jurors he might have inconsistent defenses, this statement was misconduct. We are unable to follow the logic, if any, of this contention. Moreover, it was justified by the type of cross-examination. We have read it. It is extremely lengthy, and gives the impression that the cross-examiner was trying to show (1) that Mary had not had intercourse with anyone that night; (2) that if she had, it was with her consent; (3) that if she had, it was not with defendant. Even though defendant when first arrested stated that he had not been in Mary's apartment, and defendant, in examining jurors on their voir dire, intimated that an alibi was to be the defense, the cross-examination gave rise to an inference along the lines of the district attorney's comment. "Reasonable inferences may be drawn from the evidence by counsel in the course of argument." People v. Hoyt, 20 Cal.2d 306, 318, 125 P.2d 29, 35. We see no misconduct of the district attorney in commenting on the cross-examination. Again there was no objection to it. "* * * it has long been the rule in this court that a claim of misconduct on the part of the district attorney or the trial judge will not ordinarily be considered on appeal, unless the complaining party has promptly called the attention of the court to the alleged impropriety and assigned misconduct thereon. (Citations.) The reason for this rule is that the court should be given the opportunity to correct the irregularity or to prevent any prejudicial effect, if that be possible." People v. MacDonald, 167 Cal. 545, 551, 140 P. 256, 259. Defendant contends it was the type of comment which is referred to in the MacDonald case as follows, 167 Cal. at page 551, 140 P. at page 259: "There may, of course, be cases in which the act done or remark made is of such a character that a harmful result could not be obviated by any retraction or instruction. In such cases the misconduct will furnish ground for reversal, even though the court may have taken immediate steps to correct any impression improperly conveyed to the jury. People v. Derwae, 155 Cal. 592, 102 P. 266. For like reasons, the want of an assignment of misconduct should not affect appellant's rights, where such assignment could not have led to the curing of the harm done."

The following language from People v. Albright, 87 Cal.App.2d 222, 225, 196 P.2d 800, 802, applies here: "In the present case an objection and assignment of misconduct could have cured any error, if error occurred." The comment, if not well founded, "could have been reframed or eliminated and a proper cautionary instruction given to the jury." It obviously was not of such type, and as above stated, there was justification for it.

6. Action of the Judge.

[29] While defendant makes no specific assignments of misconduct (here again we call counsel's attention to the rule that we are not required to consider objections so presented, People v. Hadley, supra, 175 Cal. 118, 165 P. 442, he contends that there were too many interruptions by the court, particularly of the cross-examination of Mary, and that in the latter case, it gave the witness time to "consider how best to answer." We have examined the record, and while there were many interruptions by the court, with possibly the exception of one or two instances which could be attributed to a misunderstanding of the question by the court, they were all in the interests of clarity. The almost interminable cross-examination, with questions concerning the night of the assault, intermingled with questions concerning other occasions, justified the action of the court in requiring that it be clear to the witness and to the jury which occasions were being inquired about.

The judgment and order are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

CITY AND COUNTY OF SAN FRANCISCO et al. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

Civ. 14442.

District Court of Appeal, First District, Division 2, California.

May 22, 1951.

Hearing Granted July 19, 1951.*

Original proceeding by City and County of San Francisco, a municipal corporation, George J. Christopher, and others, as and constituting the Board of Supervisors of the City and County of San Francisco, Francis P. Walsh, and others, as and constituting the Civil Service Commission of said City and County and others against the Superior Court of the State of California, in and for the City and County of San Francisco for a peremptory writ to prohibit enforcement of an order for inspection of documents entered by the Superior Court. The District Court of Appeal, Goodell, J., held that under San Francisco Charter provision that Civil Service Commission should conduct investigation and survey of wages paid in private employment for like service and working conditions or in other governmental organizations in state for purpose of fixing compensation of municipal employees and that Commission should set forth in official records of its proceedings all of the data thus obtained. Commission could not give, nor could employers who gave information to Commission rely on, any pledge of nondisclosure by Commission since such pledges were wholly ultra vires.

Alternative writ discharged and petition for peremptory writ of prohibition denied.

1. Prohibition ⇐10(1)

Writ of prohibition lies to prevent exercise of any unauthorized power in a case or proceeding in which subordinate tribunal has jurisdiction, no less than when entire cause is without its jurisdiction.

2. Municipal corporations ⇐216(1)

Civil Service Commissions possess such powers as are directly given by charter creating them and such as are necessarily implied from prerogatives conferred.

3. Evidence ⇐83(2)

Under 1943 Amendment to San Francisco Charter directing Civil Service Commission to make comprehensive survey of wages paid in private employment for like service and working conditions for purpose of fixing compensation of municipal employees, and providing that Commission should set forth in official records of its proceedings all of the data thus obtained, if, before 1943 Amendment, and while nondisclosure of information obtained by Commission went unchallenged, it could be assumed that employers were entitled to presume that pledges of nondisclosure were made in regular course of official duty, then when official records language was written into charter such presumption could no longer be relied on. St.1943, p. 3128, § 151.

4. Municipal corporations ⇐60

Exercise of powers by city officers, in excess of their authority, for a great length of time, will raise no presumption of a grant to city of such powers.

5. Municipal corporations ⇐216(1)

Fact that for several years previous to amendment of San Francisco Charter which directed Civil Service Commission to make comprehensive survey of wages paid in private employment for like service and working conditions for purpose of fixing compensation of municipal employees and that Commission set forth in official record of its proceedings all the data thus obtained, information so obtained from private employers was not disclosed and that such practice continued after amendment to charter did not warrant any presumption that such practice had a legal basis or tend to build up any foundation of legality. St. 1943, p. 3128, § 151.

6. Statutes ⇐185

Whatever is necessarily implied in a statute is as much a part of it as that which is expressed, unless repelled by positive language in act or by its general scope.

7. Statutes ⇐185

Where a statute gives a power, everything necessary to make it effectual is implied, and where law requires a thing to be done, it impliedly authorizes performance of whatever may be necessary to that end.

* Subsequent opinion 238 P.2d 581.

8. Municipal corporations ⇐216(1)

Under San Francisco Charter provision directing Civil Service Commission to make comprehensive survey of wages paid in private employment for like services and working conditions for purpose of fixing compensation of municipal employees and directing Commission to set forth in official records of its proceedings all data thus obtained, no implied power was left in Civil Service Commission to make any non-disclosure pledge or commitment to persons from whom information was obtained, and such pledges were ultra vires acts of Commission. Code Civ.Proc. §§ 1000, 1881, subd. 5, 1892, 1893; St.1943, p. 3128, § 151.

9. Estoppel ⇐62(5)

Where San Francisco Charter provision directed Civil Service Commission to make comprehensive survey of wages paid in private employment for like services and working conditions for purpose of fixing compensation of municipal employees and directed Commission to set forth in official record of its proceedings all data thus obtained, Commission's ultra vires acts in pledging non-disclosure of information obtained did not estop Commission from disclosing information. Code Civ.Proc. §§ 1000, 1881, subd. 5, 1892, 1893; St.1943, p. 3128, § 151.

10. Estoppel ⇐62(1)

Estoppel does not operate where act or contract relied on to create estoppel is outside corporate powers of governmental agencies or officials.

11. Municipal corporations ⇐57

A municipal corporation can exercise only such powers as have been conferred on it in its charter, or by some general law, and any person, in dealing with it, is charged with a knowledge of every limitation on its power to contract a liability.

Dion R. Holm, City Atty., City & County of San Francisco, Norman S. Wolff, Deputy City Atty., San Francisco, for petitioners.

Frank J. Hennessy, U. S. Atty., Northern Dist. of California, San Francisco, William S. Tyson, Sol., Bessie Margolin, Asst. Sol., and Kay Kimmell, Atty., Washington, D. C., Kenneth C. Robertson, Regional Atty., James F. Scott, Senior Atty., U. S. Dept. of Labor, San Francisco, amici curiae on behalf of the Secretary of Labor, U. S. Dept. of Labor, in support of the contentions of petitioners.

Fred N. Howser and Edmund G. Brown, Attys. Gen. of the State, Hartwell H. Linney, Chief Asst. Atty. Gen., Wilmer W. Morse, and James E. Sabine, Deputy Attys. Gen., amici curiae on behalf of the State Personnel Board of the State in support of petitioners.

Sullivan, Roche, Johnson & Farraher, and Long & Levit, San Francisco, amici curiae on behalf of certain private employers in support of petitioners.

Milton Marks, Milton Marks, Jr., San Francisco, for respondent.

GOODELL, Justice.

Petitioners seek a peremptory writ to prohibit the enforcement of an order for the inspection of documents.

Section 151 of the San Francisco Charter, as amended in 1943, St.1943, P. 3128, provides for the compensation of municipal employees as follows: "The compensations fixed as herein provided shall be in accord with the generally prevailing rates of wages for like service and working conditions in private employment or in other comparable governmental organizations in this state; * * *. The proposed schedules of compensation or any amendments thereto shall be recommended by the civil service commission solely on the basis of facts and data obtained in a comprehensive investigation and survey concerning wages paid in private employment for like service and working conditions or in other governmental organizations in this state. *The commission shall set forth in the official records of its proceedings all of the data thus obtained* and on the basis of such data the commission shall set forth in its official records an order making its findings as to what is the generally prevailing rate of pay for each class of employment in the municipal service as herein provided, and shall recommend a rate of pay for

each such classification in accordance therewith." (Emphasis added.)

Late in 1948 the Commission made such an investigation and survey and on January 15, 1949, sent to the Supervisors its compilation, analysis, report, findings and recommendations. After public hearings the Salary Standardization Ordinance was adopted on July 1, 1949 for the fiscal year 1949-50.

About 500 municipal employees were dissatisfied with the rates fixed by the ordinance, and on September 1, 1949 they (on their own behalf and for others similarly situated) commenced an action in the Superior Court (Davenport and others against the present petitioners) wherein they alleged that the Commission and the Supervisors had "disregarded the generally prevailing rates of wages for like services and working conditions in private employment or in other comparable government organizations in this State and that the wages established thereby were not in accord with the rates of wages required by said Section 151 of said Charter," and prayed that the court rectify the same.

Shortly before that case was to go to trial the plaintiffs therein moved under § 1000, Code Civ.Proc. for the inspection of all documents in the possession of the Commission as a result of the survey. The City strenuously resisted the motion, claiming that among such documents there were many of a highly confidential nature which had been obtained from business organizations under a pledge of nondisclosure and which were not official records. The opposition to the motion was, in the last analysis, to the disclosure of the identity of such organizations. The court granted the motion and authorized the copying and photographing of the documents.

When the Commission entered upon the survey it wrote to approximately 192 business organizations as follows: "We again solicit your cooperation and assistance in this wage survey. We have a complete file of salary information given by you last fall and we would like to bring this information up to date. As we have explained to you heretofore, *the source of all information supplied by you will be held in confidence. The wage scales paid by your firm and other data submitted by you will not be identified except by a code known only to the commission and staff.*" (Emphasis added.)

The petition alleges that the information was furnished and that "said private employers regard, treat and consider all of said data and facts as valuable business and trade secrets and maintain and assert in good faith that the disclosure of their identity in connection therewith would result in irreparable injury to them in competition with their competitors and in connection with their personnel within their respective organizations and would be productive of dissatisfactions and controversies, foment discord, and create many difficulties not only between said employers and employees, but also between and among the employees themselves."

As soon as the order was made the Commission informed the 192 employers who, it is alleged, immediately protested and objected to the disclosure. Over 40 of them have appeared herein as amici curiae on the petitioners' side. Moreover it is alleged that some of the employers have declared that the Commission will be held liable for damages, if any, arising from the disclosure.

[1] Abelleira v. District Court of Appeal, 17 Cal.2d 280, 290–291, 109 P.2d 942, 132 A.L.R. 715, holds, inter alia, that the writ of prohibition lies to prevent the exercise of any *unauthorized power* in a case or proceeding in which the subordinate tribunal has jurisdiction, no less than when the entire cause is without its jurisdiction.

Petitioners contend that the order was made in the exercise of an *unauthorized power* because the documents had been obtained under a pledge of nondisclosure and hence were privileged communications, protected by § 1881, subd. 5, Code Civ.Proc., which reads: "A public officer can not be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure."

Respondent points to the following language added to § 151 of the charter by the 1943 amendment: "The commission shall set forth in the official records of its proceedings all of the data thus obtained * * *" and contends that in the face of such language the Commission could not give, nor could the employers rely on, any pledge of nondisclosure, but that such pledges were wholly ultra vires.

The record shows that the practice of obtaining information from large business organizations under pledge of nondisclosure was of long standing. As enacted in 1932, § 151, provided that the compensation of municipal employees should "be not higher than prevailing rates for like service and working conditions in private employment or in other comparable governmental organizations in this state." St. 1931, p. 3066. In ascertaining such rates the Commission conducted surveys wherein it interviewed many business organizations. These organizations were hesitant about supplying such information, and the assistance of the Chamber of Commerce had to be enlisted before they did so. Despite the 1943 amendment the practice of giving the pledges continued through 1948.

Petitioners contend that "While the Charter required all figures and amounts as to compensation and details as to the nature of jobs and working conditions to be set forth, it did not expressly require disclosure of identity of source of such information and construing it in accordance with the object to be achieved, necessarily excludes same."

The Charter requires *all* data to be set forth. Petitioners say that "the word 'all' must always be given a reasonable construction keeping in mind the object and purpose of the legislation in question;" that "the 'rule of reason' governs the construction of all laws," and that "Every statute * * * should be construed with reference to its purpose and the objects intended to be accomplished by it * * * (23 Cal.Jur. p. 764, § 138)." From these premises they argue that as the object of § 151 is to secure fair and adequate compensation for municipal employees, and as the ascertainment of salaries and working conditions prevailing among business organizations is indispensable thereto, it follows that "it was implicit in said provision that said Commission had the power to solicit such information in official confidence and thereafter it was bound by public duty and governmental honor to preserve such pledge inviolate."

To adopt that argument would compel a holding that the Commission has the discretion to decide by rule or otherwise which part of the salary survey data shall become an official record and which part shall be held in confidence.

[2] The long line of civil service cases starting in 1911 with Cook v. Civil Service Commission, 160 Cal. 598, 117 P. 662, 663, hold that such commissions possess such powers as are directly given by the charter creating them and such as are necessarily implied from the prerogatives conferred. There, after conducting an examination from which issued a list of candidates eligible for promotion the Commission vacated the examination and set aside the eligible list. The court said: "There was no grant of power directly given by the charter, or necessarily implied from the prerogatives conferred, which enabled the commission properly to set aside its own action after it had declared a list of eligibles * * *. It follows that *the board acted beyond its authority* * * *." (Emphasis added.)

Petitioners of course concede that Civil Service Commissions have but limited powers, but they rely on Livingstone v. MacGillivray, 1 Cal.2d 546, 36 P.2d 622; Haub v. Tuttle, 80 Cal.App. 561, 251 P. 925, and Handlon v. Wolff, 72 Cal.App.2d 53, 164 P.2d 46, as supporting their claim that the Commission had ample implied powers. In the Livingstone case the court held, 1 Cal. 2d at page 549, 36 P.2d at page 623: "The civil service board assumed to try and determine this issue of fraud. The city charter does not confer upon the board such jurisdiction. The power of the board being special and limited, no legal presumptions or intendments may be indulged to uphold its order. Garvin v. Chambers, 195 Cal. 212, 223, 232 P. 696."

Haub v. Tuttle was doubtless cited by petitioners because of the general language therein, taken from Pratt v. Rosenthal, 181 Cal. 158, 183 P. 542, to the effect that in conducting examinations Civil Service Commissions have a wide discretion and that courts should let administrative boards and officers work out their problems with as little judicial interference as possible. But the opinion also says 80 Cal.App. at page 568, 251 P. at page 927: "If in framing the charter it was intended that promotions should depend, in whole or in part, on competitive examinations, provisions from which such inference might be drawn would, doubtless, have been incorporated in section 106 * * *." To paraphrase: If it had been intended to exclude any part of the data from the official records, all that the draftsmen of § 151 had to do was say so. The court also said 80 Cal.App. at page 569, 251 P. at page 928: "The language used in the forepart of said section 106 * * * reasonably construed, means that it may in accordance with section 104 provide rules and regulations for promotion; and that being so, the nature of those rules and regulations are left necessarily to the discretion of said commission, *providing they do not have the manifest effect of nullifying the fundamental principle which said section 106 declares shall be followed in determining eligibility for promotion.*" (Emphasis added.)

Handlon v. Wolff simply involved the right of the former claim agent of the Market Street Railway Co. to be blanketed in under § 125 of the San Francisco charter to a comparable position with the city. The present petitioner-Commission was mandated to place him in such position. The court at 72 Cal.App.2d page 59, 164 P.2d at page 49, said: "If Handlon had a right to the position of claims agent it was *beyond the power of the commission* to take that right away. Viner v. Civil Service Comm., 59 Cal.App.2d 458, 139 P.2d 88." (Emphasis added.)

None of the three cases just discussed aids the petitioners in any way.

Bruce v. Civil Service Board, 6 Cal.App. 2d 633, 637, 45 P.2d 419, 421, a case very much in point, holds that "Rules adopted by a commission have the force of law *if they are within the powers conferred upon the commission by the charter.* Haub v. Tuttle, 80 Cal.App. 561, 251 P. 925. A rule within the scope of its application has the force and dignity of a law, but since the board owes its existence to the organic instrument *it cannot, under the guise of exercising a rule-making authority, alter the instrument which has created it.*" (Emphasis added.) To the same effect are Viner v. Civil Service Comm., 59 Cal.App. 2d 458, 465, 139 P.2d 88, and Wheeler v. City of Santa Ana, 81 Cal.App.2d 811, 816, 185 P.2d 373.

A rule which attempted to provide that a *part* of the data (for instance, as in this case, the identity of organizations supplying information) need *not* be set forth, but should be withheld as a confidential communication, would "have the manifest effect of nullifying the fundamental principle" (Haub v. Tuttle, supra) declared in § 151 and constitute "an unwarranted addition thereto". Bruce case, supra, 6 Cal. App.2d at page 640, 45 P.2d at page 423. If the Commission could not do this by rule it could not do it at all.

Respondent argues that the language of the 1943 amendment put everybody on notice that thenceforth nothing connected with the salary surveys could be held in confidence.

While petitioners concede that everybody is presumed to know the law, they argue that the employers are entitled to presume "That official duty has been regularly performed" § 1963, subd. 15, Code Civ.Proc., and that the Commission properly construed and acted under § 151. In this connection they say: "the undisputed fact is that for years it had been the standard practice of said Commission to solicit and receive such information in official confidence and during all these years and until just now that standard practice has been recognized and followed without question by anybody. Through these previous years the private employers have been given the promise by said officials in the administration of said law and in the performance of their duties that their identity would not be disclosed, and that promise has been fully

kept. As it was therefore implicit in the law itself and so construed and administered by the officials charged with its enforcement, from the time that it was originally enacted, that the identity of the employers in connection with the specific data furnished would be held in official confidence, said employers had every reason to indulge in the presumption that said officials were duly acting in performance of their public duty—as indeed they were."

The first answer to this argument is that it fails to take into account the addition in 1943 of the requirement that all data shall be set forth. From 1932 to 1943 the "standard practice" of pledging nondisclosure had grown up, during which period § 151 said nothing about "official records." Whether, with the charter thus silent, the Commission then had the power to make the pledges, is now an academic question. However, it cannot be gainsaid that the new language radically changed the whole complexion of § 151. Despite that change the same practice continued for the five years 1943–48 until challenged in the Davenport litigation.

[3] If, before the 1943 amendment, and while nondisclosure went unchallenged, it may be assumed for present purposes that the employers were entitled to presume that the pledges were made in the regular course of official duty then by parity of reasoning when the "official records" language was written into § 151 such presumption could no longer be relied on.

[4, 5] The second answer is that the unquestioned recognition of the so-called "standard practice" by everybody over a long period could not have warranted any presumption that such practice had a legal basis or tended to build up any foundation of legality. A somewhat similar situation was presented in Haub v. Tuttle, supra, 80 Cal.App. 561, 569, 251 P. 925, 927, where the court said: "The fact that said commission has operated for a number of years under the interpretation appellants are contending for here cannot be held to affect the present legal situation, for the reason that the exercise of powers by city officers, in excess of their authority, for a great length of time, will raise no presumption of a grant to the city of such powers. Vernon Irr. Co. v. City of Los Angeles, 106 Cal. 237, 39 P. 762. To the same effect is the case of City of Corona v. Merriam, 20 Cal.App. 231, 128 P. 769." Followed in Wheeler v. City of Santa Ana, supra.

The third answer is addressed to petitioners' contention that nondisclosure is sanctioned by the implications to be drawn from the language of § 151.

[6, 7] It is settled law that "Whatever is necessarily implied in a statute is as much a part of it as that which is expressed, *unless repelled by positive language in the act or by its general scope.*" (23 Cal. Jur. p. 739; emphasis added.) It is also settled that "where a statute gives a power, everything necessary to make it effectual is implied; and where the law requires a thing to be done, it impliedly authorizes the performance of whatever may be necessary to that end" (Id.).

Petitioners argue that a comprehensive salary survey cannot be made or municipal salaries fixed without the co-operation of the employers, and as such co-operation cannot be obtained without nondisclosure, it must follow that, if § 151 is to have any potency, the power to promise and to enforce nondisclosure must be implied. However, there is no language in § 151 even squinting at nondisclosure. On the other hand its explicit and mandatory language ("shall set forth in the official records") means disclosure and nothing else.

Therefore the implication "that said Commission had the power to solicit such information in official confidence" would collide head-on with the explicit provisions of the section *instead of effectuating and furthering them.* To again quote Haub v. Tuttle, such implication would "have the manifest effect of nullifying the fundamental principle" which the explicit language declares.

As was said in Marshall v. Williams, 85 Cal.App. 507, 513, 259 P. 970, 972, "To our minds the civil service provisions are plainly expressed, and the intent of the framers of the charter is clear, and there is little or no room for interpretation. Under these

circumstances, courts have no power to ignore express provisions of an act and by any forced or unreasonable construction defeat the clearly expressed intention of the lawmaking power."

[8] To summarize: the explicit "official records" language left no implied power in the Commission to make any pledge or commitment the effect of which would be to keep any part of such data from becoming an official record, open to the inspection of any citizen, § 1032, Pol.Code; §§ 1892–3, Code Civ.Proc. It follows that such pledge (at least after the 1943 amendment) was an *ultra vires* act of the Commission, and that any communication obtained under such pledge could not become a *communication made to a public officer in official confidence.* § 1881, subd. 5, Code Civ.Proc. Hence the order of inspection was not made in the exercise of an "unauthorized power" (Abelleira case, supra) or in excess of jurisdiction.

Petitioners rely on Franchise Tax Board etc. v. The Superior Court of Sacramento County, 36 Cal.2d 538, 225 P.2d 905, which has several points in common with this case. There, too, the motion was made under § 1000, and the Board brought a proceeding in prohibition to prevent the enforcement of the order granting it. There, too, the Board disclosed most of the material sought, but refused to disclose the identity of the taxpayers, just as here the Commission withheld the identity of the employers. However § 35 of the Franchise Tax Act explicitly provides that it shall be unlawful to divulge any information concerning a tax return. That positive prohibition sharply differentiates the two cases. It is true that there § 1881(5) was relied on by the Board, as well as § 35 of the act, but in the opinion § 1881(5) is given but scant attention and it is clear that the decision turned largely, if not entirely on § 35 of the act.

Petitioners place strong reliance on the case of Runyon v. Board of Prison Terms and Paroles etc., 26 Cal.App.2d 183, 79 P.2d 101. The distinction between that case and this appears in the opinion itself, where the court, in denying the right of inspection, says: "The mandamus proceeding * * * involved the question of whether letters and other communications and documents which are sent voluntarily by various individuals to the * * * board * * * *but which are not required by law to be sent to said board, nor to be filed as official records in the office thereof*, are open to the inspection of any citizen of the state under the provisions of section 1032 of the Political Code" (emphasis added). There can be no question as to the soundness of that decision, but it has no bearing here because of the "official records" language present in this case but absent from that.

Petitioners rely also on the case of Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 53 S.Ct. 350, 77 L.Ed. 796, but, for the reasons just given respecting the Runyon case and other reasons, it is not in point.

Petitioners, relying on such cases as Shell Oil Co. v. Superior Court, 109 Cal. App. 75, 292 P. 531; Kullman, Salz & Co. v. Superior Court, 15 Cal.App. 276, 114 P. 589 and Funkenstein v. Superior Court, 23 Cal.App. 663, 139 P. 101, contend that the order of inspection was based on a dragnet motion and was too broad and sweeping. At the hearing of the motion the testimony of the Commission's secretary showed that he had disclosed to respondent's counsel "every piece of information, every record, every document * * * except one thing. Although we have given him the names of the firms who cooperated under the survey, and supplied data, we have not given to him the code identifying those firms * * * [we have] made it possible for him to copy them or photograph them * * * except that one item of information." When asked by the City Attorney why that was withheld he answered: "Because in obtaining the information we had promised the employers that the source of the individual data, or the specific data, would not be made public; and secondly, we know if we make the information public, the firms will not hereafter cooperate with us, and we will

not be able to carry on a comprehensive survey in the future."

It thus appears that when the motion was presented and submitted there was but one narrow issue before the court, and on that issue the Commission and its secretary steadfastly refused, on principle, and because of their pledged word, to yield. The situation was totally unlike that presented in the cases cited, or similar ones. Moreover, if we are correct in holding that all data were official records, the Davenport plaintiffs were not confined as *litigants* to § 1000, but as *citizens* were entitled to inspect and copy all the data as authorized by § 1032, Pol.Code and §§ 1892–3, Code Civ.Proc.

In all this discussion we have assumed *for present purposes* that on the motion for inspection the court was entitled to consider § 1881(5), Code Civ.Proc., notwithstanding that section is found in the subdivision of the code dealing with "Witnesses". Our conclusion that § 1881(5) authorizes no confidential immunity in the circumstances of this particular case is not to be taken as a holding, one way or the other, on the procedural question just stated.

It has been contended by petitioners that documents might well be in the possession of public officers or agencies without necessarily becoming public or official records because of such custody. Nothing said herein casts any doubt on that rule. The instant case deals only with the specific situation presented by this record.

[9, 10] Two insurance companies who furnished information under pledge of nondisclosure have filed an amicus curiae brief dealing solely with the question of estoppel. Therein they contend that "The doctrine of equitable estoppel applies against a municipal corporation and its officers as to promises made and acts done within the scope of their respective authority." This is a fair and candid statement since it goes no further than to assert that an estoppel might arise out of intra vires acts and conduct. The Commission's acts, however, were ultra vires, and estoppel does not operate "where the act or contract relied on to create the estoppel is outside the corporate powers of the governmental agencies or officials [citations]" (Wheeler v. City of Santa Ana, supra, 81 Cal.App.2d 811, 817, 185 P.2d 373). See, also, Chas. R. McCormick Lumber Co. v. Highland School Dist., 26 Cal.App. 641, 147 P. 1183.

"As in the case of the state, estoppel may not be invoked against a county or municipal corporation except in rare cases where justice and right require it. The doctrine is invoked generally in cases of informality, and irregularity on the part of authorized agents, although it is not applicable to validate unauthorized acts of public servants" (10 Cal.Jur. pp. 651–2). In 18 Cal.Jur. p. 799 it is said: "Obviously an act of a municipality in excess of its powers is void. Want of power is always a defense to a municipal corporation, and no estoppel, by conduct or by ratification, to raise the defense can be urged against such a corporation. *If the rule were otherwise, the corporation, by ratification, could validate an act, void as being ultra vires, and no limit could be set to its powers.*" (Emphasis added.)

In the interest of clarity it should be said that the petitioners are not seeking to escape or avoid any obligation or liability, such as is almost invariably the case when estoppel is invoked. On the contrary they are urging as forcefully as they can, that the municipality is bound legally and "by public duty and governmental honor" to preserve the Commission's pledges inviolate.

The recent case of County of San Diego v. California Water And Tel. Co., 30 Cal. 2d 817, 186 P.2d 124, 175 A.L.R. 747 contains a full discussion of the subject.

In Sacramento and San Joaquin Drainage District v. Riley, 194 Cal. 624, 638, 229 P. 957, 962, it was said: "It should go without saying that the only reliance which persons who performed work for the state or any subordinate statutory agency thereof can have is upon the language and proper interpretation of the statute under which their work is performed, and the obligation in their favor arises, and that *they can*

acquire no rights by way of estoppel, either from their own mistaken interpretation of such statute or statutes or from the acts or statements of those officials or agencies of the state who are engaged in the exercise of its delegated police *power,* and whose power to bind the state is defined by the acts under which they function * * * as to the land owners, also, their rights and interests in the premises are regulated by the statute, and *not by any mistaken interpretation of it by themselves, or by any or all of the members of the* reclamation *board.*" (Emphasis added.)

We are of course mindful of the probability that as a consequence of this decision there will be no further co-operation from most if not all of the 192 employers. Such an outcome, it is repeatedly argued, will harm the municipal employees themselves, since it will cut off the sources of information designed to assist in their salary increases. If so, § 151 might have to be again amended. This, however, is a legislative problem. In Egan v. City and County of San Francisco, 165 Cal. 576, 580, 133 P. 294, 295, the court said: "But, *however worthy the motive, however advantageous* to the public *the result sought to be attained,* it must always be remembered that municipal corporations are public bodies of limited powers, and that the validity of their acts must be judged by an examination of the charter or law defining their powers, *rather than by a view of the purposes or results of those acts.*" (Emphasis added.) See, also, Estate of Sahlender, 89 Cal.App.2d 329, 345–346, 201 P.2d 69.

[11] When the decision of a case results, as this does, in a holding that a pledge given by a public officer cannot be kept—*despite the steadfast purpose of the officer to keep and perform it to the letter*—a grave and serious problem is presented, one full of moral questions as well as legal ones. No court or judge would reach such a decision unless compelled to do so by clear and unquestioned authority. Such leading cases as Von Schmidt v. Widber, 105 Cal. 151, 38 P. 682 and Foxen v. City of Santa Barbara, 166 Cal. 77, 134 P. 1142 have been repeatedly followed by the courts of this state. They not only lay down definitely and clearly the rules respecting the powers of municipal corporations but they contain statements which make our duty clear in the instant case. In Von Schmidt v. Widber, 105 Cal. at page 157, 38 P. at page 684, the court said: "The rule is so familiar as to be trite that a municipal corporation can exercise only such powers as have been conferred upon it in its charter, or by some general law, and that *any person, in dealing with it, is charged with a knowledge of every limitation upon its power to contract a liability.*" (Emphasis added.) And in the Foxen case, 166 Cal. at page 82, 134 P. at page 1144, this was said: "Plaintiff was charged with knowledge that the persons who employed him were acting beyond their authority. 'It is a general and fundamental principle of law,' said Judge Dillon, 'that *all* persons contracting with a municipal corporation must *at their peril inquire into the power* of the corporation or of its officers to make the contract; and a contract beyond the scope of the corporate power is void, although it be under the seal of the corporation. This principle is more strictly applied, and properly so, than in the law of private corporations. So, also, those *dealing with the agent of a municipal corporation* are likewise bound to ascertain the nature and extent of his authority.' 1 Dillon Mun. Corp. (4th Ed.) § 447." (The emphasis is the court's, not ours.)

"In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained thereon, not to insert what has been omitted, or to omit what has been inserted; * * *." § 1858, Code Civ.Proc.

The application of that rule, and the one just discussed that every person dealing with a municipal corporation is charged at his peril with knowledge of every limitation upon its power to contract a liability, bar the petitioners from successfully invoking herein the several points respecting unlawful searches and seizures, and kindred questions urged in the briefs. We

are constrained to hold that after the 1943 amendment the Commission had no power to make, and the employers no right to rely on, any pledge of nondisclosure.

The alternative writ is discharged, and the petition for a peremptory writ of prohibition is denied.

NOURSE, P. J., and DOOLING, J., concur.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation, petitioner, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, and Lile T. Jacks, one of the Judges thereof, respondents.

Civ. 14443.

District Court of Appeal, First District, Division 2, California.

May 22, 1951.

Hearing Granted July 19, 1951.

Knight, Boland & Riordan, F. Eldred Boland and John H. Riordan, San Francisco, for petitioners.

Milton Marks, Milton Marks, Jr., San Francisco, for respondent.

GOODELL, Justice.

The petition "for writ of prohibition or other appropriate writ" was filed herein with that in City and County of San Francisco, v. Superior Court, in and for City and County of San Francisco, No. 14,442, Cal.App., 231 P.2d 583.

The petitioner alleges that it is a life insurance corporation with an office in San Francisco employing upwards of 1,000 persons. It is one of the amici curiae in the companion case and its interest in both cases arises from the fact that it is one of the 192 firms and corporations who co-operated with the Civil Service Commission of San Francisco by supplying data and information under pledge of nondisclosure as discussed in our opinion in 14,442.

The allegations of Metropolitan's petition are substantially the same as those in the petition in 14,442. There are variations, of course, but Metropolitan's grievance is essentially the same as that of the other amici curiae whose contentions, along with those of the City and County, the Supervisors, the Commissioners and the Secretrary of the Commission, have been fully considered and discussed in our other opinion.

Its counsel states that Metropolitan's case is typical of the positions of the 192 employers.

For the reasons and upon the authorities appearing in our opinion in 14,442 this day filed, the alternative writ is discharged, and the petition for a peremptory writ of prohibition is denied.

NOURSE, P. J., and DOOLING, J., concur.

104 Cal.App.2d Supp. 861

PEOPLE v. COAHRAN.

No. 164249.

Appellate Department, Superior Court, San Diego County, California.

April 30, 1951.

Wilbur R. Coahran was charged in the Municipal Court of the City of San Diego with violating the Health and Safety Code. The Municipal Court of the City of San Diego, A. F. Molina, J., entered an order discharging the defendant, on ground that he had not had a speedy trial, and the People of the State of California appealed. The Superior Court, Appellate Department, Burch, J., held that defendant was not estopped to object that he was denied a speedy trial.

Affirmed.

1. Criminal law ⇐1141(1, 2)

On appeal, all intendments are in favor of the regularity of the action of the trial court, and error will not be presumed, but must affirmatively appear.

2. Criminal law ⇐573, 1148

Question whether defendant has been denied a speedy trial, as guaranteed by the constitution, is within sound discretion of trial court, and trial court's determination will be reversed on appeal only on an affirmative showing of abuse of discretion.

3. Criminal law ⇐576(5)

Where defendant, who was charged with violation of Health and Safety Code, and who was not represented by counsel, was arraigned on December 29, and pleaded not guilty, and trial was set for February 8, 1951, and neither the state of court's calendar, nor the business of the district attorney was such as to make the delay necessary, trial court, on motion by defendant to dismiss for want of speedy trial, was justified in holding that defendant was not estopped to complain of denial of speedy trial, because defendant made no objection to date set for trial when he was arraigned. Health and Safety Code, § 29020; Pen. Code, § 1382.

4. Criminal law ⇐1144(7)

On appeal by the state from order of trial court granting motion of defendant to dismiss prosecution for want of speedy trial, Superior Court, Appellate Division, would presume that trial court gave due consideration to any evidence introduced in opposition to motion, including asserted presumption of regularity.

5. Criminal law ⇐1158(1)

When two or more inferences can reasonably be deduced from conflicting evidence in criminal prosecution, court on appeal is not authorized to substitute its decisions for those of trier of the fact, and such rule is applicable when it is sought by testimony to overcome a presumption.

James Don Keller, Dist. Atty., H. D. Cornell, Deputy Dist. Atty., and Clifford L. Duke, Jr., Deputy Dist. Atty., all of San Diego, for appellant.

Edgar B. Hervey, San Diego, for respondent.

BURCH, Judge.

The question raised by this appeal may be stated: In passing upon a motion to dismiss for want of a speedy trial, is the trier of fact bound by the rule on appeal that in the absence of objection at the setting the defendant is deemed to have waived his constitutional right to a speedy trial.

Defendant was charged in Municipal Court with the violation of Health and Safety Code, Section 29020 by a complaint filed December 28, 1950. He was promptly arraigned December 29, 1950, plead not guilty, demanded a jury trial, and the trial was then set for February 8, 1951.

At the time of trial defendant moved to dismiss the charges against him, which motion was granted by the court for want of a speedy trial, and the People appeal.

Upon the hearing of the motion it was made to appear to the trial court that at arraignment the defendant was without counsel; that defendant was advised of his constitutional right to a jury trial but not of his constitutional right to a speedy trial; that the business of the court and of counsel for the People was not such as to have required such delay as occurred, and no cause was shown by counsel for the People as to why the trial of defendant had not been had earlier.

It is contended on this appeal that because the defendant, when arraigned, made no objection to the date set for trial, that the defendant is thereafter estopped to complain. In support thereof the People cite People v. Rongo, 169 Cal. 71, 145 P. 1017; People v. Douglass, 100 Cal. 1, 34 P. 490, 491; People v. Crittenden, 93 Cal.App. 2d Supp. 871, 209 P.2d 161, and People v. Lind, 68 Cal.App. 575, 229 P. 990.

In the Rongo case trial proceeded after the statutory period of sixty days. Defendant had pending a motion to dismiss upon which there had been no hearing or ruling.

After conviction without a ruling or a renewal on his motion, the Supreme Court found no error.

[1] In the Douglass case the rule in these cases and the reasons for it are stated: "Conceding, then, as held in People v. Morino [85 Cal. 515, 24 P. 892], that the burden was upon the prosecution to show good cause for holding the defendant without trial for a longer time than that named in the statute, and that in the absence of such showing the court had no discretion in the matter, but was imperatively required to grant the defendant's motion, still the rule is settled by decisions of this court, found in nearly every volume of our reports, that on appeal all intendments are in favor of the regularity of the action of the court below, and that error will never be presumed, but must affirmatively appear."

Such is the rule on appeal, and there must be an affirmative showing of error to overcome the presumption to the contrary. It is the duty of this court to apply the presumption to the ruling appealed from, in the absence of an affirmative showing of error.

The record shows affirmatively that defendant was not represented by counsel; was not advised of his constitutional right to a speedy trial; that he was held under the charge without trial when neither the state of the court's calendar nor the business of the district attorney was such as to make the delay necessary. There was before the court the stipulation that the defendant had not "waived his rights to a speedy trial, as he had not been advised of his right to a speedy trial, but remained mute." All of this was evidence before the court, to be considered in ruling on the motion. People v. George, 91 Cal.App.2d 537, 541, 205 P.2d 464.

[2, 3] Penal Code, Section 1382 furnishes a standard of a speedy trial in felony cases (60 days) and in misdemeanors in Justice's Courts (30 days). No statute undertakes to define the constitutional speedy trial in the Municipal Court, nor is it necessary in this case that we should undertake to do so. Without a constitutional or statutory definition of what is a speedy trial, it must be left to the sound discretion of the trial court, which will be reversed only on an affirmative showing of abuse of discretion. For the purpose of this case we may adopt the rule that what constitutes a speedy trial must be determined by the trial court in the light of all the circumstances. Certainly no abuse of discretion appears. People v. Godlewski, 22 Cal.2d 677, 682, 140 P.2d 381. In the last cited case it is stated in the syllabus: "Const., art. I, § 13, guaranteeing a speedy trial, establishes a fundamental right and is self-executing. The enactments of the Legislature with respect to a speedy trial and the time within which a trial must be had are supplementary to and a construction of the Constitution * * *."

[4, 5] In support of the ruling we will presume that the court gave due consideration to any evidence to the contrary, including therein the asserted presumption of regularity of setting. See Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529. When two or more inferences can reasonably be deduced from conflicting evidence, the court on appeal is not authorized to substitute its deductions for those of the trier of fact. "This rule is applicable when it is sought by testimony to overcome a presumption." Halloran v. Isaacson, 95 Cal. App.2d 357, 366, 213 P.2d 19, 25.

In the several other cases cited by the People the intendments and presumptions were employed to support the ruling of the court below. It does not appear they have been invoked to reverse a ruling supported by substantial evidence.

The order is affirmed.

TURRENTINE, P. J., and GLEN, J., concur.

104 Cal.App.2d 494

SANTA BARBARA LODGE NO. 605, LOYAL ORDER OF MOOSE v. PENZNER.
Civ. 18261.

District Court of Appeal, Second District, Division 2, California.
May 29, 1951.

Action by Santa Barbara Lodge No. 605, Loyal Order of Moose, a corporation, against William L. Penzner, for specific performance of a contract to sell realty or for damages in the event defendant could not fulfil the terms. The Superior Court, Santa Barbara County, Ernest D. Wagner, J., made an order granting defendant's motion for a change of venue, and plaintiff appealed. The District Court of Appeal, Wilson, J., held that the county in which the realty was situated was the county in which the case should be tried.

Order reversed.

Venue ⇐5(1)

In action for specific performance of contract for sale of realty or for damages in event defendant could not fulfill terms, county in which realty was situated, rather than county of defendant's residence, was proper place for trial. Code Civ.Proc. § 392.

McGee & De Loreto, Santa Barbara, for appellant.

Schauer, Ryon & McMahon Santa Barbara, and Guy E. Ward, Beverly Hills, for respondent.

WILSON, Justice.

This action was commenced in Santa Barbara County for the specific performance of a contract for the sale of real property in that county, or for damages in the event defendant should be unable to fulfill the terms of the contract.

Defendant's motion for change of venue to Los Angeles County on the ground that he is a resident of the latter county was granted and plaintiff has appealed from the order.

The county in which the real property is situated is the county in which the case should be tried. Code Civ.Proc. sec. 392; Kopke v. Carlson, 98 Cal.App. 155, 157, 276 P. 606; McFarland v. Martin, 144 Cal. 771, 774, 78 P. 239.

Order reversed.

MOORE, P. J., and McCOMB, J., concur.

104 Cal.App.2d 291

SHIVELL et ux. v. HURD et al.
No. Civ. 17943.

District Court of Appeal, Second District, Division 1, California.
May 17, 1951.

Arthur Shivell, and another, brought action for damages against John Hurd, Harriett Hurd, his wife, and others, and plaintiffs secured judgment in 1940. On March 15, 1950, plaintiffs moved for issuance of execution on judgment. The Superior Court of Los Angeles County, William B. McKesson, J., entered order directing issuance of writ of execution pursuant to provisions of section 685 of the Code of Civil Procedure, and the named defendants appealed. The District Court of Appeal, White, P. J., held that though five years had elapsed from entry of judgment, granting of motion for issuance of execution was not an abuse of discretion.

Order affirmed.

1. Execution ⇐73

A judgment creditor seeking to enforce a judgment more than five years after its entry must show that he exercised reasonable diligence to enforce his judgment during the statutory period in which he might have obtained a writ of execution as a matter of right. Code Civ.Proc. § 685.

2. Appeal and error ⇐983(3)
Execution ⇐73

Whether a judgment creditor has exercised the reasonable diligence to enforce his judgment during five year period in which he might have obtained a writ of execution as a matter of right, necessary to enforce a judgment more than five years after its entry, is for trial court to determine in its discretion, and its decision upon conflicting affidavits will not be disturbed. Code Civ.Proc. § 685.

3. Execution ⇐73

Where judgment debtors' real property owned prior to 1940 judgment and purchased for less than $3,000 was subject to encumbrance of $4,025 and homestead exemption, but judgment creditors' affidavit showed that property in 1950 was reasonably worth more than amount of exemptions, and also showed efforts to discover assets by private investigations and supplementary proceedings, the affidavit adequately showed due diligence, because trial court could have concluded that value of property prior to 1950 over and above exemptions did not warrant execution, and therefore, granting of judgment creditors' motion for execution more than five years after entry of judgment was not an abuse of discretion. Code Civ.Proc. § 685.

Bodkin, Breslin & Luddy and S. V. O. Prichard, all of Los Angeles, for appellants.

Arthur Shivell, in pro. per.

WHITE, Presiding Justice.

Plaintiffs and respondents secured a judgment in 1940 in the Superior Court of Los Angeles County, in the sum of $1,250, for damages to their home and for personal injuries resulting from acts of the defendants, appellants herein, who, by the erection of artificial barriers across a natural watercourse on their property, caused storm water, earth and debris to be carried upon the property of plaintiffs, which property was located on a slope below the property occupied by defendants and appellants. The judgment was not paid, and on March 15, 1950, plaintiffs moved the court, upon notice, for the issuance of an execution despite the lapse of more than five years, pursuant to the provisions of section 685 of the Code of Civil Procedure, supporting said motion by an affidavit of plaintiff Arthur Shivell. Defendants opposed the motion by a counter-affidavit of defendant John Hurd. This appeal is from the order of the court directing that execution issue.

[1, 2] It is contended by appellants that "upon the basis of the facts which were presented, the trial court in granting the issuance of a writ of execution herein abused sound judicial discretion." The applicable rule is that a judgment creditor seeking to enforce a judgment more than five years after its entry must show that he exercised reasonable diligence to enforce his judgment during the statutory period in which he might have obtained a writ of execution as a matter of right; and whether he exercised such diligence is for the trial court to determine in its discretion, and its decision upon conflicting affidavits will not be disturbed. John P. Mills Organization v. Shawmut Corp., 29 Cal.2d 863, 864, 865, 179 P.2d 570, and cases cited.

The affidavit of plaintiff Arthur Shivell was to the effect that since the retirement of his attorney, Charles L. Bogue, in 1942, affiant in person and through his agents searched diligently but without success for assets of defendants; that a supplemental examination of the judgment debtor John Hurd in June, 1942, disclosed no assets upon which to levy; that the said John Hurd had stated to affiant that he was "judgment proof". "That affiant has made or caused to be made diligent search for stocks, bonds and savings or bank accounts and for earnings of defendants exceeding the amounts ruled upon in supplementary proceedings to-wit: In November, 1943; July, 1944; July, 1945; May, 1946; September, 1947 and October, 1949." It was further averred that the services of collection agencies and credit bureaus dis-

closed that personal property of defendants was continuously kept subject to chattel mortgages; that Motor Vehicle Department records, examined in 1945, 1947 and 1949, disclosed no automobile registered to defendants "having an equity sufficient to satisfy said judgment or any portion thereof." Plaintiff also caused examinations to be made of Los Angeles County assessment rolls in 1942, 1945, 1946, 1947 and 1949. In June, 1948, Mutual Credit Bureau, of the city of Los Angeles, reported to affiant that "defendants appeared to have no assets which could be reached to satisfy the said judgment or any portion thereof."

Plaintiff Arthur Shivell further stated in his affidavit:

"That judgment debtors now reside at and own the property at 2220 Ronda Vista Ave., * * * *that said property is homesteaded in the name of Harriett Hurd,* a defendant herein. That plaintiff on or about January 20, 1950 has had an appraisal made of the said property by a competent appraiser. Plaintiff is informed and believes and upon that ground alleges that the said property is reasonably worth the sum of $10,000.00 over and above the amount of exemptions of defendants, to-wit: The sum of $20,000.00. * * *." (Emphasis added.)

Appellants' argument is to the effect that plaintiffs failed to exercise due diligence in that they did not attempt to levy upon the real property above described at an earlier date, although they knew that it was owned by the defendants or one of them ever since the commencement of the action. Attacking the sufficiency of the affidavit of Arthur Shivell, appellants point out that there is no allegation as to when the property was first homesteaded or that prior to January, 1950, it was of such little value that the existence of the homestead would preclude collection; that plaintiffs should have inquired periodically as to the value of the property. "For aught that appears by the present record," it is argued, "the property in 1942 when the writ of execution was procured was entirely free, both from a homestead and from any encumbrance."

Defendant John Hurd in his counter-affidavit averred that his wife had owned the property in question for more than fourteen years, which fact was known to plaintiffs; that plaintiff's allegations concerning the value of the property were false in that the purchase price thereof was less than $3,000; that its assessed value for the fiscal year 1949–1950 was $2,950: *"the said property is subject to a homestead claimed by my wife and which is recorded and which I am informed amounts to $7,500.00; the said property is also subject to a deed of trust with an unpaid balance of at least $4,025.00."* (Emphasis added.)

It is immediately apparent that in granting the motion for issuance of execution, upon the record before it, the trial court cannot be held to have abused a sound judicial discretion. Defendant John Hurd by his own affidavit has admitted that the property was subject to a homestead and to an encumbrance of $4,025, and further, that the property was originally purchased for less than $3,000. It could well be concluded from the facts admitted that only the phenomenal increase in property values in recent years renders practical the levy of an execution at the present time. The counter-affidavit of defendant John Hurd is significant in what it fails to state—the dates of recordation of the declaration of homestead and the encumbrance on the property, as well as when it might have become of such value as to warrant the levy of an execution in the hope of realizing something above the amounts of the homestead and the encumbrance. Plaintiffs' affidavit, on the other hand, recites facts showing continuous and diligent efforts to discover assets, by private investigations and by supplementary proceedings. The only reasonable assumption, and one which the trial court was entitled to make upon the record before it, is that until the present time the value of the property over and above the homestead exemption and the encumbrance did not warrant a diligent and discerning judgment creditor in subjecting it to execution.

[3] An adequate showing of diligence having been made, and no facts appearing from which it should be concluded in the exercise of a sound discretion, that the judgment should not be carried into execution, Butcher v. Brouwer, 21 Cal.2d 354, 358, 132 P.2d 205; John P. Mills Organization v. Shawmut Corp., supra, the conclusion of the trial court will not be disturbed.

The order appealed from is affirmed.

DORAN and DRAPEAU, JJ., concur.

37 Cal.2d 345

DRIBIN v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

L. A. 21731.

Supreme Court of California, in Bank.

May 29, 1951.

Mandamus proceeding by Louis Dribin against the Superior Court of the State of California, in and for the County of Los Angeles, to require the Superior Court to restore to the trial calendar and proceed with the trial of a divorce suit brought by Louis Dribin on ground of incurable insanity. The Supreme Court, Schauer, J., held that a husband whose wife is confined outside the State of California cannot obtain divorce on ground of incurable insanity of wife in view of statutory requirement of proof of confinement of insane spouse in California institution for three-year period before divorce will be granted on such ground.

Peremptory writ denied.

Edmonds, Traynor and Spence, JJ., dissented in part.

1. Constitutional law ⇐208(3)
Divorce ⇐4

The statute providing that plaintiff seeking divorce on ground of incurable insanity of spouse must allege and prove that plaintiff has reasonable ability to support insane spouse for remainder of insane spouse's life expectancy or that insane spouse has sufficient property to provide for support for remainder of life expectancy is unconstitutional as creating arbitrary and unreasonable class discrimination between persons of different financial resources. Civ.Code, § 108.

2. Statutes ⇐64(2)

Unconstitutional portion of statute authorizing divorce for incurable insanity of spouse, which portion makes allegation and proof of financial ability to support spouse a condition precedent to obtaining a divorce for incurable insanity of spouse, does not render remainder of statute unconstitutional. Civ.Code, § 108.

3. Divorce ⇐1

The power of state Legislature with regard to divorce is supreme except as limited by the Constitution.

4. Divorce ⇐11

The state, because of its interest in maintaining the marital relationship, unless good cause for dissolution of relationship exists, is interested party to divorce action.

5. Constitutional law ⇐70(1)

Wide discretion is vested in the Legislature in making a classification, and the decision of the Legislature as to what is sufficient distinction to warrant classification will not be overthrown by the courts unless it is palpably arbitrary and beyond rational doubt erroneous.

6. Constitutional law ⇐48

Every presumption is in favor of validity of statute.

7. Constitutional law ⇐208(1)

A distinction in legislation is not arbitrary if any set of facts reasonably can be conceived that would sustain the distinction.

8. Constitutional law ⇐48

The existence of facts supporting the legislative judgment is to be presumed, and the burden of overcoming the presumption of constitutionality is cast upon the assailant.

9. Constitutional law ⇐208(1)

A legislative classification is reasonable if the classification has a substantial relation to a legitimate object to be accomplished.

10. Constitutional law ⇐70(3)

Whether Legislature has adopted the wisest and most suitable means of accomplishing its objects is of no concern to court considering constitutionality of statute.

11. Constitutional law ⇐208(3)
Divorce ⇐4

The statutory requirement of proof of confinement of insane spouse in California institution for three year period before divorce will be granted on ground of incurable insanity is not unconstitutional as a classification discriminating between incurably insane persons confined in California and similarly ill persons confined in some other jurisdiction. Civ.Code, § 108.

12. Insane persons ⇐46

The insane are subject to control on the part of the state, both for their protection and for the protection of others.

13. Divorce ⇐23

A husband whose wife is confined outside State of California cannot obtain divorce on ground of incurable insanity of wife, in view of statutory requirement of proof of confinement of insane spouse in California institution for a three-year period before divorce will be granted on such ground. Civ.Code, §§ 92, subd. 7, 108; Welfare and Institutions Code, §§ 5040, 5041, 5047–5155.

Sam Houston Allen, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

SCHAUER, Justice.

Petitioner seeks by mandamus[1] to require the superior court in the County of Los Angeles to restore to the trial calendar, and proceed with the trial of, a divorce suit brought by him on the ground of incurable insanity (Civ.Code, §§ 92, 108[2]). It appears from the allegations of the mandamus petition that petitioner is unable to satisfy certain of the statutory prerequisites to the granting of a divorce on that ground, and that if such prerequisites are constitutionally valid the relief he seeks should be denied.

Petitioner alleges in his mandamus petition that in October, 1949, he filed (presumably in the superior court in Los Angeles) a divorce complaint "against Esther Dribin, by and through her General Guardian." In the divorce complaint he alleged, among other things, his residence in the county and state for more than a year preceding filing of the complaint; that he and defendant intermarried in December, 1941, in Illinois, and thereafter separated; that in May, 1944, defendant, "upon petition of her mother, was adjudged insane in the Probate Court of the County of Hennepin, State of Minnesota, and was by that * * court * * * committed to the State Hospital for the insane in the State of Minnesota in accordance with the laws of that state"; that defendant had then been, and continued to the date of trial of the divorce action to be, incurably insane; that one Ruth Tanick is defendant's general

1. By petition first filed in the District Court of Appeal, Second Appellate District, and by that court denied without opinion on August 21, 1950.

2. Section 92: "Divorces may be granted for any of the following causes: * * * Seven. Incurable insanity."

Section 108: "A divorce may be granted on the grounds of incurable insanity only upon proof that the insane spouse has been confined to an institution under the provisions of Chapter 1 [i. e., §§ 5000–5160], Part 1, Division 6 of the Welfare and Institutions Code or under the provisions of Section 1026 of the Penal Code or Chapter 6, Title 10, Part 2 of the Penal Code, for a period of at least three continuous years immediately preceding the filing of the action and upon the testimony of a member of the medical staff of said institution that such spouse is incurably insane.

"*Duty to support.* No decree granted on this ground shall relieve the spouse granted the divorce of any obligation imposed by law as a result of the marriage for the support of the spouse against whom the divorce is granted. It shall be alleged in the complaint and proved at the trial of the cause either that there is reasonable ability to support the insane spouse for the remainder of the life expectancy or that such insane spouse has property sufficient to provide support for the remainder of the life expectancy, and the court shall make such order for support, or require a bond therefor, as the circumstances require.

"*Service of summons, etc.* If the insane spouse has a general guardian or guardian of his person, other than the spouse bringing the action, the complaint and summons shall be served upon such guardian and he shall defend and protect the interests of the insane spouse. If the insane spouse has no general guardian or no guardian of his person, or if the spouse bringing the action is the general guardian or guardian of his person, the court shall appoint a guardian ad litem, who may be the district attorney or the county counsel, if any, to defend and protect the interests of the insane spouse."

guardian, appointed as such by the Minnesota court in November, 1945.

Petitioner further alleges that "pursuant to an order of the Respondent Court herein" a copy of the summons and complaint in the divorce action was served upon the general guardian, by publication; defendant defaulted; and the trial was set for August 4, 1950. At the trial petitioner offered in evidence "a copy of a deposition of the Superintendent of Rochester State Hospital in * * * Minnesota * * * in which deposition the said Superintendent set forth that the defendant * * * was an inmate of said Rochester State Hospital and had been continuously since on or about January 5, 1945, and that in his opinion the defendant was incurably insane." At this point the trial court ruled that the divorce complaint "was insufficient in that it did not comply with the provisions" of the second paragraph of section 108 of the Civil Code, which require an allegation "either that there is reasonable ability to support the insane spouse for the remainder of the life expectancy or that such insane spouse has property sufficient to provide support for" that period; the court then ordered the cause off calendar "until such time as the plaintiff should amend the said complaint to include the said allegations." Petitioner then alleges that he has "no property or estate whatsoever," is therefore unable to "comply with the conditions imposed upon him" by the trial court, and seeks mandamus on the ground that the statutory provision requiring proof of ability to support the insane spouse (1) is unconstitutional in that it deprives him of due process and equal protection of the law, and (2) has no applicability to a nonresident insane spouse.

The County Counsel, in his brief filed in opposition to the petition for mandamus, urges that the divorce complaint was clearly insufficient in that it alleges confinement of the defendant spouse *outside* the State of California, whereas section 108 of the Civil Code in its first paragraph requires proof of confinement *in* this State for the statutory three-year period.

1. Proof of Ability to Support.

[1] We are of the view that petitioner is correct in his contention that the statutory requirement of allegation and proof of ability or ownership of property sufficient to support the insane spouse for the remainder of the life expectancy creates an arbitrary and unreasonable class discrimination between those of different financial resources, and it was so held in Morganti v. Morganti (1950), 99 Cal.App. 2d 512, 222 P.2d 78. In that case, Mr. Justice Peek, authoring the opinion of the District Court of Appeal, quoted the statement in Takahashi v. Fish and Game Comm. (1947), 30 Cal.2d 719,[3] 727, 185 P.2d 805, that "the classification shall not be arbitrary, but must be based upon some difference in the classes having a substantial relation to a legitimate object to be accomplished," and enunciated the following conclusions: "It would seem apparent that the purposes of section 108 are (1) to provide the manner of proof where the ground for divorce is the incurable insanity of the defendant spouse, and (2) to provide a means of securing continuing financial support for the insane spouse. Applying the 'substantial relation' test enunciated in Takahashi v. Fish and Game Comm., supra, to the present case, it cannot be said that the financial status of the parties bears any more relation to the first object of section 108 stated above than does the race of the applicant bear to the issuance of a marriage license. (See Perez v. Sharp [1948], 32 Cal.2d 711, 198 P.2d 17.)

"Furthermore proof of financial *li*ability as set forth in the second sentence of the second paragraph of said section becomes wholly superfluous to the attainment of the second object thereof, since by reason of the specific terms of the preceding sentence no decree granted on the ground of incurable insanity can relieve a spouse of 'any obligation imposed by law as a result of the marriage for the support' of the insane

3. Reversed in 1948 (334 U.S. 410, 68 S. Ct. 1138, 92 L.Ed. 1478) on the ground that the classification there involved was unconstitutionally discriminatory.

spouse. (See Civ.Code, § 155, and Welf. & Inst.Code, §§ 5077, 5105.6.) It follows that the requirement contained in section 108 of the Civil Code, that it must be alleged in the complaint and proved at the trial that there is either reasonable ability to support the insane spouse or that such insane spouse has property sufficient to provide support, constitutes a classification based on financial ability which is without reasonable relation to either of the legislative objects of (1) providing a manner of proof w[h]ere the ground for divorce is incurable insanity, or (2) securing financial support for the insane spouse, and that such classification is, in effect, an arbitrary denial of equal protection and is, therefore, invalid."

It has been suggested that such a holding is inconsistent with the views which we expressed in Escobedo v. State of California (1950), 35 Cal.2d 870, 879, 222 P.2d 1. In that case we upheld a statute requiring the Motor Vehicle Department to suspend the petitioner's license to operate an automobile upon finding that after being involved in an accident causing substantial damage to person or property he had failed to meet the financial security requirements imposed by the Vehicle Code. It seems obvious that the Escobedo case is not authority for the proposition that every classification based on financial ability is necessarily reasonable and constitutionally valid. Upholding the requirement that the operator of an automobile, after he has been involved in a highway accident, furnish reasonable security for the damages his negligence appears to have caused or suffer suspension of his operator's license, is not the equivalent of holding (in effect) that the right to divorce (or to marry) may be limited to those who can purchase an adequate life-annuity for a spouse.

Furthermore, the Escobedo decision is based in part on the existence of "a compelling public interest" in promoting safety on the highways. Negligent use of the highways is discouraged by penalizing such use and by imposing responsibility for damage thereby inflicted on other persons or to their property. (See Escobedo v. State of California [1950], supra, at page 876 of 35 Cal.2d at page 1 of 222 P.2d; Watson v. Motor Vehicle Dept. 1931), 212 Cal. 279, 287, 298 P. 481.) But denial of divorce for failure to possess wealth sufficient to support an insane spouse for life cannot be upheld as a penalty nor does it tend to protect the public against negligent use of a dangerous instrumentality. No compelling necessity has been found by the Legislature or suggested to us for generally denying divorce to the poor and making it available to the wealthy. Here the state has guarded against financial dependency of the insane spouse by providing that the divorce of an insane spouse does not relieve the other spouse of "any obligation imposed by law as a result of the marriage for the support" of the insane spouse.[4] As declared in the Morganti case, in view of such provision, the additional requirement of proof of possession of financial ability appears arbitrary, and quite obviously would sometimes, for no compelling reason, deny divorce to the poor while granting it to the more wealthy. Since full liability for support perdures, after divorce as during the marriage, and since the court can exact security as in any case according to the means of the spouse securing the decree, the only basis left for the classification is wealth as against poverty. In this application it is not a valid classification.

[2] It is further held in the Morganti case that the objects of section 108 "are in no way thwarted or frustrated by the deletion of the invalid requirement," that such requirement is therefore severable, and that the balance of the section may be given effect and a divorce granted on the ground of incurable insanity without proof of financial responsibility. We are satisfied that the quoted discussion and holding of the District Court of Appeal adequately and correctly dispose of the problem there considered. Insofar as the following cases appear to be inconsistent with Morganti v. Morganti, such cases are hereby disap-

4. It may be noted that petitioner in the instant case expressly states that he has no quarrel with this provision of section 108.

proved: Tripoli v. Crivello (1948), 88 Cal. App.2d 760, 199 P.2d 726; Wirz v. Wirz (1950), 96 Cal.App.2d 171, 214 P.2d 839, 15 A.L.R.2d 1129.

2. Proof of Confinement in California

[3, 4] Insanity is not generally recognized in any of the states of the United States as a ground for divorce unless made so by statute. By the year 1949 twenty-six states and territories of the United States had adopted such a statute (see 22 So.Cal. Law Rev. 494; 35 Cal.Law Rev. 104; Vernier, American Family Laws [1932], p. 60; 27 C.J.S., Divorce, p. 593, § 49; 17 Am.Jur. 228, § 152); but, assertedly, "for humanitarian reasons, the statutes making postnuptial insanity ground for divorce seem to have been subjected to a strict construction." (113 A.L.R. 1254; cf. Dodrer v. Dodrer [1944], 183 Md. 413, 37 A.2d 919, 922, holding that placement in a private home but under supervision of state hospital met statutory requirement of confinement "in an insane asylum, hospital, or other similar institution," contra, see Finkelstein v. Finkelstein [1948], 88 Cal. App.2d 4, 198 P.2d 98.) The rule is well established that the power of the state Legislature with regard to divorce is supreme except as limited by the Constitution (9 Cal.Jur. 627–628, sec. 4), and it is also generally held that the state, because of its interest in maintaining the marital relationship, "unless good cause for its dissolution exists, is an interested party" to a divorce action (id., p. 634, § 9).

The question is thus again presented: Is the classification discriminating, for purposes of divorce, between "incurably insane" persons confined within this state and similarly ill persons confined in some other jurisdiction "based upon some difference in the classes having a substantial relation to a legitimate object to be accomplished?"; i. e. the proof or determination of the existence of such "incurable insanity" as will entitle the complaining spouse to a divorce upon that ground. Petitioner urges that "there would seem to be no logical reason for such discrimination"; that the discrimination for all practical purposes amounts to discrimination on the basis of state citizenship.

[5–10] The following pertinent principles are well established: "Wide discretion is vested in the Legislature in making the classification and every presumption is in favor of the validity of the statute; the decision of the Legislature as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary and beyond rational doubt erroneous. [Citations]. A distinction in legislation is not arbitrary if any set of facts reasonably can be conceived that would sustain it." (Sacramento Municipal Utility Dist. v. Pacific Gas & Elec. Co. [1942], 20 Cal.2d 684, 693, 128 P.2d 529; see also In re Herrera [1943], 23 Cal.2d 206, 212, 143 P.2d 345; Reclamation District No. 1500 v. Riley [1923], 192 Cal. 147, 156, 218 P. 762.) "The existence of facts supporting the legislative judgment is to be presumed and the burden of overcoming the presumption of constitutionality is cast upon the assailant." (Takahashi v. Fish and Game Comm. [1947], supra, 30 Cal.2d 719, 728, 185 P.2d 805, Id., 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478; People v. Western Fruit Growers [1943], 22 Cal.2d 494, 507, 140 P.2d 13; see also in re Fuller [1940], 15 Cal.2d 425, 437, 102 P.2d 321; California Physicians' Service v. Garrison [1946], 28 Cal.2d 790, 803, 172 P.2d 4, 167 A.L.R. 306.) The classification should be reasonable; i. e. "have a substantial relation to a legitimate object to be accomplished * * * [I]t is not our concern whether the Legislature has adopted what we might think to be the wisest and most suitable means of accomplishing its objects. [Citations.]" (Lelande v. Lowery [1945], 26 Cal.2d 224, 232, 234, 157 P.2d 639, 175 A.L.R. 1109.)

[11, 12] Applying these principles to the statute here attacked, we think it cannot be held that as a matter of law the Legislature has imposed a wholly arbitrary requirement upon those seeking a divorce on the ground of insanity. It is elementary that "The insane have always been regarded as subject to control on the part of the state, both for their protection and for the protection of others." (14 Cal.Jur. 341–342, sec. 6.) The legal concept of "insanity" may well vary considerably in the

different jurisdictions and in different applications of the term (see, e. g., 29 Va.Law Rev. 775; 44 C.J.S., Insane Persons, § 2, pp. 5–18 in which it is pointed out (p. 9) that "'insanity' is a broad, comprehensive, and generic term, of ambiguous import, for all unsound and deranged conditions of the mind"). In this state a definition of such concept in respect to civil proceedings has been expressly set forth in sections 5040 and 5041 of the Welfare and Institutions Code, and in addition that code (see §§ 5047–5155) throws about an alleged insane or incompetent person various safeguards by way of notice, service of process, hearings, evidence, jury trial, etc., before an adjudication of insanity and commitment therefor may be made. (See also 14 Cal. Jur. 341–375.) The Legislature in requiring proof of confinement in California may have had in mind that the same safeguards might not be afforded before adjudication and confinement in other jurisdictions.

Other states [5] have been similarly explicit in specifying the conditions or the evidence upon which divorce may be granted on the ground of insanity (see 29 Va. Law Rev. 802–805). Thus "confinement" in various designated institutions for stated periods of time—usually five years—has been required in some twelve states, while others provide only that there must have been an adjudication of insanity plus elapsed periods of time of varying lengths. Some states have required examination by three physicians, specialists in the field, and agreement as to the incurability of the insanity, while others have specified examination by from one physician to five persons, including the state psychiatrist and one physician. No case has been discovered in which any of such requirements has been held unconstitutional.

[13] We are of the view that the Legislature has acted within its constitutional power in limiting divorce on the ground of incurable insanity to cases wherein the insane spouse is actually domiciled in this state by requiring proof of confinement in this state for the statutory three-year period, and that inasmuch as petitioner affirmatively alleges on the face of his complaint facts showing his inability to produce such proof it follows that he is not entitled to the relief he seeks.

The alternative writ heretofore issued is discharged, and the peremptory writ is denied.

GIBSON, C. J., and SHENK and CARTER, JJ., concur.

EDMONDS, Justice (concurring and dissenting).

I concur in the conclusion that section 108 of the Civil Code limits the right to a divorce upon the ground of incurable insanity to those persons whose spouses have been confined to an institution in this state for the statutory period. But I do not agree that the requirement as to proof of ability to support is unconstitutional.

In Escobedo v. State of California, 35 Cal.2d 870, 879, 222 P.2d 1, 6, the petitioner was deprived of his license to operate an automobile because he failed to meet the demand for financial security specified by the Vehicle Code. The statute was challenged upon the ground, among others, that it violates constitutional guarantees because those who are financially able to carry insurance or post security are favored as against those who cannot do so.

In rejecting this contention, the court held: "Financial responsibility laws such as this do not unconstitutionally discriminate against the poor. * * * The fal-

5. Utah formerly denied divorce where the insane spouse was outside Utah and could not be personally served within the state (Schafer v. Ritchie [1916], 49 Utah 111, 162 P. 618), but the rule was changed by amendment, and constructive service is now permitted in such cases (Utah Code, 1943, 40–3–1 [Ann. sec. 13]; 35 Cal.Law Rev. 106). Idaho, from 1895 to 1903, required confinement within the state but thereafter permitted divorce where confinement was in Idaho or in a sister state or territory (Gorges v. Gorges [1926], 42 Idaho 357, 245 P. 691, 693).

lacy of the argument that the law favored the rich over the poor [as stated in Watson v. Division of Motor Vehicles, 212 Cal. 279, 298 P. 481] 'lies in the failure to distinguish between equality of opportunity and ability to take advantage of the opportunity which is offered to all. The equality of the Constitution is the equality of right, and not of enjoyment.'" It was also said in the Watson case: "So long as the statute does not permit one [with certain financial ability] to exercise the privilege while refusing it to another of like qualifications, under like conditions and circumstances, it is unobjectionable upon this ground." 212 Cal. at page 284, 298 P.2d at page 483.

Although the statute concerning support prevents equality of enjoyment, it is nevertheless constitutional if its provisions bear any reasonable relation to the purpose of the enactment. Otherwise stated, the question is whether the classification is a natural one; is the classification reasonably related to the end in view? Power Mfg. Co. v. Saunders, 274 U.S. 490, 47 S.Ct. 678, 71 L.Ed. 1165. When considering this question, the courts should approach with caution. They "* * * have nothing to do with the wisdom, policy, or expediency of the law, for the power to make the law carries with it the power to judge of its necessity, expediency, and justice, and, primarily at least, of the reasonableness of the means and methods used to accomplish the end sought to be obtained." Watson v. Division of Motor Vehicles, supra, 212 Cal. at pages 285–286, 298 P.2d at page 484. A canon of constitutional construction is that a statute is constitutional if there is any reasonable basis for its enactment.

One of the declared purposes of section 108 as stated in the majority opinion, is "'* * * to provide a means of securing continuing financial support for the insane spouse.'" One means chosen by the Legislature to accomplish this purpose is the requirement laid upon the party seeking a divorce upon the ground of incurable insanity to plead and prove (1) that he has the reasonable ability to support the insane spouse for the remainder of the life expectancy, or (2) the insane spouse has sufficient property for that purpose. Certainly, there is a natural and reasonable relation between the means and the end.

Paraphrasing the reasoning of a key sentence in the Escobedo case, "Those divorced by their indigent spouses may be indigent also, and as little able, as the divorcing spouses to bear the cost of their support." Under such circumstances, the insane spouse, like the person injured in an automobile accident, may become a public charge. If a divorce is granted on the ground of insanity, the plaintiff will be free to remarry and incur the burden of supporting another spouse in addition to the continuing duty to support the insane person who has been cast off. Obviously the ability to fulfill the duty toward the insane person may be, and under ordinary circumstances will be, decreased by permitting a divorce. However, the wisdom of the enactment is not a question for the courts; they cannot properly be concerned with the policy or expediency of the law.

The statute attacked by Dribin gives to every person married to an insane spouse the right to secure a divorce upon the ground of that insanity under certain specified conditions applicable alike to all such persons. Everyone whose spouse is incurably insane and is confined under the conditions stated by the Legislature has the requisite "equality of opportunity", the test laid down in the Escobedo case. That Dribin has not the "ability to take advantage of the opportunity which is offered to all" does not make the law unconstitutional. The "equality of right" which Escobedo had, in common with all other operators of motor vehicles, was the right to estabish his financial responsibility in some manner authorized by the Vehicle Code. That he did not have the ability to enjoy that right did not, it was held, affect the constitutionality of the provisions of the Vehicle Code, which were upheld. For the same reason, in my opinion, section 108 of the Civil Code is not unconstitutional insofar as it requires proof of financial responsibility.

TRAYNOR and SPENCE, JJ., concur.

37 Cal.2d 274

BROKAW v. BLACK-FOXE MILITARY INSTITUTE et al. (two cases).

L. A. 21508.

Supreme Court of California, in Bank.

May 25, 1951.

Robert Brokaw, a minor by Martha Mears Brokaw, his guardian ad litem, brought action against Black-Foxe Military Institute, Hollywood Commercial Buildings, Incorporated, a corporation, and others to recover for injuries sustained in collision of automobile in which plaintiff was riding and a truck, and Robert Brokaw, a minor by Martha Mears Brokaw, his guardian ad litem, and Martha Mears Brokaw brought action against Black-Foxe Military Institute, Hollywood Commercial Buildings, Incorporated, a corporation, to recover on theory that defendants were negligent in permitting plaintiff to leave school premises or were negligent in failure to supervise plaintiff. The Superior Court of Los Angeles County, Thomas J. Cunningham, J., rendered judgment against Hollywood Commercial Buildings, Incorporated, and it appealed. The Supreme Court, Carter, J., held that evidence sustained finding that driver of automobile was acting as agent for the appellant at time of the accident, so as to render the appellant liable.

Judgment affirmed.

Schauer, J., dissented.

Prior opinion, 216 P.2d 53.

1. Principal and agent ⇐24

The existence of agency is generally a question of fact.

2. Automobiles ⇐244(26)

Evidence was sufficient to sustain finding of jury that at time of automobile accident in which student at military school was injured, driver of automobile was agent of school, so as to render school liable, though driver was not at the time on regular duty as part-time member of school staff.

3. Automobiles ⇐244(20, 36)

In actions by minor student and his mother against corporation operating school, driver and owner of automobile in which minor was riding, and truck driver to recover for minor's injuries, evidence sustained finding that driver of automobile which ran into rear of truck parked partially on highway, was negligent in failing to keep a proper lookout ahead or in traveling too closely behind truck, and that such negligence was a proximate cause of the accident.

4. Trial ⇐328

Where recovery was sought against both principal and agent for injuries sustained because of negligent operation of automobile by agent, and verdict was only against principal, verdict against principal was not required to be set aside on ground that jury exonerated agent and that principal's liability was required to rest on doctrine of respondeat superior, since verdict was tantamount to no verdict with respect to agent.

5. Trial ⇐328

A verdict against one of two defendants but which is silent as to the other defendant, is not a verdict in favor of the latter but is merely a failure of part of jury to find on all of the issues.

6. Trial ⇐328

Silence of verdict as to one defendant results in no verdict as to him unless instructions to jury show a contrary meaning.

7. Appeal and error ⇐928(1), 930(4)

Where instructions and forms of verdict given to jury were not in the record, Supreme Court on appeal must presume that they were proper, and that, under issues so presented, a proper verdict was returned.

8. Trial ⇐345

Any error in form of verdict is waived by failure to object to the form of the verdict.

9. Appeal and error ⇐928(1), 930(1)

Where instructions and forms of verdict given to jury were not in the record, and appellant objected to form of verdict, trial court's conclusion was required to be given great weight on appeal, since trial court knew the jury instructions and trial proceedings.

Tripp & Callaway and Hulen C. Callaway, all of Los Angeles, for appellant.

Robert J. Sullivan and Lewis L. Clarke, Jr., Beverly Hills, for respondents.

CARTER, Justice.

Defendant Hollywood Commercial Buildings, Incorporated, doing business as Black-Foxe Military Institute (hereinafter termed the school), appeals from a judgment on a jury verdict assessing damages against it for personal injuries suffered by a student of the school.

The injuries arose out of a collision which occurred off the school grounds between an automobile driven by one Elvin Martin, in which the student was riding, and a truck. Two related but separate actions were filed and were consolidated for trial. The first action, brought by the student, Robert Brokaw, a minor, through his guardian ad litem, was based on a charge of negligent driving, and named as defendants, the driver of the truck, the driver of the automobile, the owner of the automobile, and (on a master-servant theory) the school. In the second action, the student (by his guardian ad litem) and his mother sued the school on the theory of negligence in allowing the student to leave the school premises, or negligent failure to supervise. A motion for nonsuit was granted in favor of the truck driver, without objection by plaintiffs. The jury made a special finding that Martin, the driver of the automobile in which the student was riding, was acting as agent of the school and in the course and scope of his authority at the time of the accident. A consolidated (single) verdict for $10,000 against the school was rendered in favor of the student and his mother. No verdict was rendered either for or against Martin. As ground for reversal the school (hereinafter sometimes termed defendant) urges that the evidence wholly fails to support a finding that any negligence chargeable to it contributed proximately to the student's injuries. It urges that it was not negligent in permitting Robert to leave the school grounds with Martin, and that if it was, such negligence was not the proximate cause of the accident. That contention need not be discussed as we believe the judgment may be supported on the theory that Robert was injured as the result of Martin's negligence in the operation of the car and that he was acting within the scope of his employment by the school at the time of the accident. In that connection it is asserted that Martin was not negligent and he was not the agent of the school.

It was an established practice of the school to conduct organized outings on Saturdays for the boys, which they were free to attend or not, at they wished. The boys did not pay a special transportation charge for the school's station wagons ordinarily used on the outings, but did have to pay for any amusements or refreshments from their own spending money. Martin was a young college student just under twenty-one years of age who worked part-time at the school; one of his duties was to take the students on certain of the Saturday outings. He also acted as teacher and counselor, and as dormitory and athletic supervisor. On the Saturday of the accident he had been off duty, but shortly before noon had come to the school in an automobile owned by his father to pick up some belongings. On that day Robert and certain other boys had not gone on the school's regular organized outing to Long Beach because they lacked spending money. When Martin learned of this he offered to lend them spending money, take them to his mother's home in Whittier for lunch, and then take them to Long Beach to join the other boys. They went with Martin to the officer in charge, who was the only person authorized under the school rules to permit them to leave the school grounds, and secured permission to go with Martin by the specified route. The boys did not pay Martin for their transportation and did not discuss the matter. En route to Whittier in the automobile owned by Martin's father the collision took place.

[1, 2] Turning to the school's contention that the evidence does not support the jury finding that Martin was the school's agent at the time of the collision, it appears that Lt. Redmond was in charge at the school when the request was made of him by Martin and the boys that the boys be permitted to go with Martin to his home

and then to the place of the regular Saturday outing. Redmond testified that he was the officer in charge on that day; that a young student like Robert is not allowed to leave the grounds unless he is "in the charge of a responsible person"; as to what transpired when the arrangement was made with Martin he said: "I know Mr. Martin said something about it to me and mentioned he was going to his mother's at Whittier and have lunch, and was from there going to Long Beach and would have the children back that evening. I am not too positive, but I am quite sure that I did request him to be back by 8:00 o'clock or before because they were leaving in the morning. I felt a day's outing was sufficient without staying out too late." He knew Martin as a colleague at the school. There had been a regular scheduled trip for the boys that day for an "outing." Although Martin did not take the boys on the instant Saturday outing, it was one of his duties on every other Saturday. The foregoing is sufficient from which the jury could have inferred that Martin was the agent of the school in taking the boys on that occasion. True, it was not a regular scheduled outing, but it was in lieu thereof. When Redmond permitted Martin to take the boys it may be inferred, he being an instructor at the school, that he was authorized as such employee to do so. The school refers to testimony that the trip had no connection with the school activities (probably the conclusion of the witnesses); that he received no pay for it; that he was not on duty at the time; that he was on a trip of his own; that he was driving his own car, and the like. That creates nothing more than a conflict in the evidence. While it may be that an inference might flow therefrom that Martin was acting merely as a matter of accommodation, that does not require a reversal, as the existence of agency is generally a question of fact, and "Whether he was such agent was an issue sharply contested at the trial, and was to be determined by the court upon a consideration of the entire evidence respecting the course pursued by him during the negotiations, rather than upon any specific testimony by him or by the defendant as to the fact [of agency]; and the inference which the trial court might reasonably make from such evidence is entitled to the same consideration as its finding of a fact upon contradictory evidence." Willey v. Clements, 146 Cal. 91, 96, 79 P. 850, 851. See, also, Ferroni v. Pacific Finance Corp., 21 Cal.2d 773, 135 P.2d 569; 1 Cal.Jur. 696–697, 865. Hathaway v. Siskiyou etc. School Dist., 66 Cal.App.2d 103, 151 P.2d 861, cited by the school is clearly distinguishable. There the issue was whether a school pupil was the agent of the school, when by permission of the school principal, she was absent from school to advertise a non-school carnival. Here Martin was an employee of the school and it was in general line of duty to take boys on outings and he was authorized to take them on the fateful trip.

[3] There is substantial evidence of Martin's negligence in driving the car, and that such negligence was a proximate cause of the accident. Cruz A. Uribe was driving a truck upgrade east on Fourth Street, in Los Angeles, at 20 miles per hour. The engine was missing and he pulled next to the curb in the extreme right lane and drove half the length of his truck off of Fourth Street through an opening in the curb and stopped. Martin was also driving east on Fourth Street in the same traffic lane to the rear of the truck. According to Martin, he was travelling 25 to 30 miles per hour, and the truck was going slower and stopped when Martin's car was several car lengths behind it. Martin's car ran into the truck. He admitted that he was going too fast to stop. While he was approaching the truck he was explaining and pointing out to the boys a bridge which was there being constructed and telling them to look at it. There is evidence that Martin's car did not slow down prior to the impact. The jury could have concluded that Martin was not keeping a proper lookout ahead or was travelling too closely behind the truck.

[4, 5] It is claimed that the jury exonerated Martin, and therefore, the verdict against the school cannot stand, as its liability must rest upon the doctrine of respondeat superior. See Bradley v. Rosenthal, 154 Cal. 420, 97 P. 875; Fimple v.

Southern Pacific Co., 38 Cal.App. 727, 177 P. 871. It does not appear, however, that there was a verdict for Martin. The jury's verdict was for Robert and his mother and against the school. That is tantamount to no verdict with respect to Martin. It may occur, as it did here, that in an action against several defendants, including a master and his servant, the jury may return a verdict against the master and remain silent as to the servant. In such a case the failure to find as to the servant is not an exoneration of him, thus relieving the master of liability where the cause of action is based upon the doctrine of respondeat superior. It is merely an incomplete verdict in that it fails to dispose of the liability of all of the parties defendant. In this connection, it is said in Irelan-Yuba etc. Min. Co. v. Pacific Gas & Electric, 18 Cal.2d 557, 570, 116 P.2d 611, 619, "It is well settled that a verdict against one of two defendants but which is silent as to the other defendant is not a verdict in favor of the latter but is merely a failure on the part of the jury to find upon all of the issues." That has been held to be the rule in many cases. Fennessey v. Pacific Gas & Elec. Co., 10 Cal.2d 538, 76 P.2d 104; Benson v. Southern Pacific Co., 177 Cal. 777, 171 P. 948; Rankin v. Central Pacific R. R. Co., 73 Cal. 93, 15 P. 57; Benjamin v. Stewart, 61 Cal. 605; Lloyd v. Boulevard Express, 79 Cal.App. 406, 249 P. 837; Keller v. Smith, 130 Cal.App. 128, 19 P.2d 541; Broome v. Kern Valley Packing Co., 6 Cal.App.2d 256, 44 P.2d 430.

[6–8] It is suggested, however, that the above rule is subject to the qualifications that the verdict must be construed with reference to the pleadings, evidence and instructions to the jury, and that as the first action, based on the theory of respondeat superior and the negligence of Martin, the servant, had only Robert as the plaintiff, and the second, based on the theory of negligence in supervision, had as plaintiffs both Robert and his mother, the jury, in finding for both the student and his mother, must have based its verdict on the latter theory. The rule is, however, that the silence as to one defendant stands as no verdict as to him unless the instructions to the jury show a contrary meaning. It has been held that the pleadings and evidence must also be examined. See Fennessey v. Pacific Gas & Elec. Co., supra; Irelan-Yuba etc. Min. Co. v. Pacific G. & E., supra. But here the instructions and forms of verdict given to the jury are not in the record. We must presume, therefore, that they were proper, and under the issues so presented, a proper verdict was returned. Snodgrass v. Hand, 220 Cal. 446, 31 P.2d 198. It must be observed in this connection, and also in connection with the form of verdict in favor of Robert and his mother, that the first action, the one based on respondeat superior and the negligence of Martin, while the mother was not named formally as a party, she appeared formally therein as the guardian ad litem of Robert, and she alleged therein, that as such guardian, she incurred hospital and medical expenses, and in the prayer, such expenses are claimed. The same was done in the second action, based on lack of supervision by the school, except she appears formally as plaintiff. In either case, she, for herself, was not entitled to recover any more than those expenses. The only reasonable conclusion is, therefore, that the jury, in returning a verdict in favor of both her and her son, included her merely because of such medical expenses. We cannot presume error in the verdict by speculating that both were included in the verdict because both were formally named in the second action and that it was predicated upon the theory of that action. We cannot suppose that the jury indulged in any such fine spun legal theories or even knew that the mother was a formal party in one action and not the other. On the contrary, not having the instructions or forms of verdict before us, we must assume that she was treated by them as a plaintiff in both actions, and that the jury was told that she was entitled to hospital expenses incurred on behalf of Robert, if Martin was negligent in driving the car, and that such a verdict was proper. Insofar as the verdict might be questioned for failing to segregate the amount awarded to the mother for medical expenses from that awarded to Robert for personal injuries, it does not appear that any objection was made to the form of verdict; it was, therefore, waived.

Brown v. Reagan, 10 Cal.2d 519, 75 P.2d 1063.

[9] Moreover, throughout the trial the mother was treated as a plaintiff without regard to which action was involved. The actions were tried as one action. Defendants' counsel in his motion for a nonsuit referred to the two actions as one in which two causes of action were stated, one on each theory—respondeat superior and negligence in supervision. Certainly that is tantamount to treating the mother as a plaintiff under both theories or actions. Furthermore, a motion for a new trial was made on the same ground (impropriety of the verdict) and was denied. The trial court's conclusion, knowing the jury instructions and the trial proceedings, must be given great weight. See Snodgrass v. Hand, 220 Cal. 446, 31 P.2d 198.

The judgment is affirmed.

SHENK, EDMONDS, TRAYNOR, and SPENCE, JJ., concur.

SCHAUER, Justice.

I dissent. It appears to me that on the record in this case the verdict cannot be sustained upon any theory of liability, and that the judgment should be reversed.

As related in the opinion prepared by Mr. Justice Carter, two actions were filed. In the first action (No. 528375) the student as the sole party plaintiff sued the school *and* Martin (the driver of the automobile in which the student was riding when injured). In the second action (No. 540614) the student *and* his mother, as parties plaintiffs, sued the *school only* (on the theory of negligence or breach of contract in letting the student leave the school premises). The jury returned a verdict in favor of the student *and* his mother against the school *only*. This verdict fits precisely the pleadings of the second action; as to the parties plaintiffs and as to the party defendant in that action it resolves all the issues. It does not fit and does not appear to be responsive to the pleadings, parties or issues of the first action. It seems to me that the only reasonable conclusion is that the verdict is based solely on the theory of the second action (No. 540614).

I think that on close analysis even the argument in Justice Carter's opinion tends to support the above stated view rather than the conclusion reached by him. He says (after mentioning the cases holding that the pleadings and evidence must be examined, as well as the instructions to the jury, in determining the significance of a verdict as to one defendant and its silence as to another): "But here the instructions and forms of verdict given to the jury are not in the record. We must presume, therefore, that they were proper, and under the issues so presented, a proper verdict was returned. (Snodgrass v. Hand, 220 Cal. 446, 31 P.2d 198.)" Applying that quoted principle to the case here we should presume that "under the issues so presented, a proper verdict was returned." The verdict which the jury returned is legally "proper" in respect to the parties and the issues of the second action; it is in favor of the two plaintiffs named in that action and against the sole defendant. It is my firm conviction that the evidence (which it would serve no useful purpose to elaborate here) is not sufficient to support a verdict in that action; it wholly fails to establish the breach of any duty owed by defendants.

Moreover, the superior court clerk's file in these cases has been forwarded to this court. Further supporting the view I have just expressed is the fact that the following instruction was given:

"If you find from the evidence that all of the defendants in this action were guilty of negligence which proximately cause the injuries received by the plaintiff Robert Brokaw then your verdict must be for the plaintiffs against all of said defendants."

If we are to presume that the jury followed the instruction—and we certainly have no right to presume otherwise—it seems to me that we must conclude that the jury did not find Martin guilty of negligence and could not have found Black-Foxe guilty of negligence on the theory of respondeat superior because of any act or omission of Martin's.

Even if this court could assume that by consolidating the actions for trial it was intended to so amend the pleadings as to include the mother as a party plaintiff in the first action (No. 528375), and that the failure to find against Martin has no significance, the most that can be said in favor of plaintiffs-respondents is that it is impossible to tell, then, upon which theory the verdict is based; and since the evidence is insufficient to support a verdict based upon the theory advanced in the second action (No. 540614), the judgment cannot be sustained. I would therefore reverse it.

37 Cal.2d 307

GREENE v. SUPERIOR COURT IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO.

S. F. 18236.

Supreme Court of California, in Bank.

May 25, 1951.

Rehearing Denied June 18, 1951.

Luther Greene, petitioner, brought original prohibition proceedings against the Superior Court of the State of California, in and for the City and County of San Francisco, respondent. The Supreme Court, Traynor, J., held that the respondent had no jurisdiction to appoint a guardian of the persons of the minor children of the petitioner because of continuing jurisdiction of Santa Barbara court which had previously entered a divorce decree dealing with custody of those children.

Peremptory writ issued.

Spence and Shenk, JJ., dissented.

1. Appeal and error ⇐94
Prohibition ⇐3(3)

Where wife secured divorce from husband in Santa Barbara County and she was awarded custody of the children subject to visitation rights by husband, and thereafter divorced wife moved to San Francisco County and filed a petition in that county for letters of guardianship of the children, and divorced husband objected to jurisdiction of San Francisco court, order overruling divorced husband's objections to jurisdiction was not appealable, and therefore petition for writ of prohibition was the proper proceeding for questioning jurisdiction of San Francisco court, since remedy of divorced husband by appeal from any order of San Francisco court after hearing on merits was not adequate. Probate Code, § 1630; Code Civ. Proc. § 963.

2. Guardian and ward ⇐8

Ordinarily the superior court of the county of the residence or temporary domicile of a minor has jurisdiction to appoint a guardian. Probate Code, § 1440.

3. Courts ⇐475(1)

When two or more courts have concurrent jurisdiction, court first assuming jurisdiction retains it to exclusion of all other courts in which the action might have been initiated.

4. Courts ⇐475(15)

Where wife secured divorce from husband in Santa Barbara County and she was awarded custody of the children subject to visitation rights by husband, and thereafter divorced wife moved to San Francisco County and filed a petition in that county for letters of guardianship of the children, San Francisco Court had no jurisdiction to appoint a guardian because of continuing jurisdiction of Santa Barbara court.

Canfield & Westwick and John A. Westwick, all of Santa Barbara, for petitioner.

Sullivan, Roche, Johnson & Farraher, San Francisco, Heaney, Price, Postel & Parma and George Chadwick Jr., San Francisco, for respondent.

TRAYNOR, Justice.

Petitioner and Ellen Chamberlain Greene were married on August 28, 1940. There are two children of the marriage, Ellen C. Greene and Luther M. Greene, aged seven and five, respectively. On July 3, 1945, in Santa Barbara, California, petitioner and his wife entered into a separation agreement by which she received custody of the children subject to peti-

tioner's right to have them visit him at reasonable times and for reasonable periods aggregating four months each year. On the same day, Ellen Greene secured an interlocutory decree of divorce from petitioner in the Superior Court of the County of Santa Barbara. The court approved the separation agreement and incorporated it into the decree. It awarded custody of the children to Ellen Greene subject to petitioner's visitation rights, "as provided in said agreement so above ratified and confirmed." The final decree was entered on July 5, 1946, and on the same day Ellen Greene married Joseph Martin, Jr. She and her husband and the children then moved to San Francisco and have resided there continuously until the present time.

On February 24, 1950, Ellen Martin filed a petition for letters of guardianship of the children in the Superior Court of the City and County of San Francisco. In her petition, she alleged that she had been awarded custody of the children by the decree of the Santa Barbara court, subject to petitioner's visitation rights, that the children had been permitted to visit petitioner in compliance with that decree, that their manner of living during such visits "is inconsistent with their normal routine of life and * * * is detrimental to the welfare of said minors," and that the "circumstances and conditions of said minors, as well as those of petitioner herein (mother of said minors), and of Luther Greene (the father of said minors), have been changed and altered since said July 3, 1945." She prayed for appointment as guardian of the persons and estates of the children and for an order "awarding to her the custody and control of said minor children, and each of them; and that, in said order, their said father, Luther Greene, be * * * accorded the right to have said minors visit and reside with him during one month of each of said summer school vacations. * * *"

Petitioner was personally served in the matter and filed an answer and objection to the petition, denying most of the material allegations thereof and asserted as an affirmative defense that only the Santa Barbara court had jurisdiction to modify the provisions of its custody award and that the San Francisco court was therefore without jurisdiction to entertain the petition. Concurrently with the filing of his answer, petitioner filed a petition for modification of the final decree of divorce in the Superior Court of the County of Santa Barbara. In the petition, filed March 28, 1950, he prayed for an order awarding him "the care, custody and control of such said minor children during all of their summer school vacations and at reasonable times during their other school holidays, and * * * that the Petitioner herein have joint supervision of the care, welfare and education of the such said children." On May 1, 1950, at an oral hearing before the San Francisco court, petitioner objected to the jurisdiction of that court to hear and determine the petition of Ellen Martin insofar as it pertained to the guardianship of the children's persons. No objection was made to the court's jurisdiction to appoint a guardian of their estates. The objections were overruled by an order entered May 10, 1950, and petitioner now applies for a writ of prohibition to restrain the court from proceeding further in connection with the petition of Ellen Martin for letters of guardianship.

[1] The order overruling petitioner's objections to the jurisdiction of the San Francisco court is not appealable. Probate Code, § 1630; Code Civ.Proc. § 963. His remedy by appeal from any order the court may enter after a hearing on the merits of Ellen Martin's petition is not adequate. "[T]o compel petitioner to submit to an unwarranted retrial of the cause, and then appeal from the judgment if adverse to it, would not afford speedy or adequate relief." Tomales Bay Oyster Corp. v. Superior Court, 35 Cal.2d 389, 392, 217 P.2d 968, 970. A petition for writ of prohibition is therefore a proper proceeding for questioning the jurisdiction of the San Francisco court.

[2, 3] Ordinarily the superior court of the county of a minor's residence or temporary domicile has jurisdiction to appoint a guardian. Probate Code, § 1440. Petitioner contends, however, that it has no

jurisdiction when the superior court of another county has made an award of custody of the minor in a divorce decree. He relies on the rule that when two or more courts in this state have concurrent jurisdiction, the court first assuming jurisdiction retains it to the exclusion of all other courts in which the action might have been initiated. Browne v. Superior Court, 16 Cal.2d 593, 597–598, 107 P.2d 1, 131 A.L.R. 276; Myers v. Superior Court, 75 Cal.App.2d 925, 929, 172 P.2d 84; Gorman v. Superior Court, 23 Cal. App.2d 173, 177, 72 P.2d 774. It is therefore necessary to determine how far the rule applies to the jurisdiction of the superior court over the custody of minors in divorce or guardianship proceedings.

The rule making exclusive the jurisdiction first acquired is particularly apposite to prevent unseemly conflict between courts that might arise if they were free to make contradictory custody awards at the same time. See, Milani v. Superior Court, 61 Cal.App.2d 463, 466–467, 143 P.2d 402, 935; cf., Toucey v. New York Life Ins. Co., 314 U.S. 118, 134–136, 62 S.Ct. 139, 86 L.Ed. 100. Even when one court has appointed a guardian and modification of the right to custody is thereafter sought in the court of another county, it has generally been held in the interests of orderly administration of justice that no other court has jurisdiction in *habeas corpus* or guardianship proceedings to interfere with the guardian's custody so long as the guardianship continues. Browne v. Superior Court, 16 Cal.2d 593, 597–598, 107 P.2d 1, 131 A.L.R. 276; Murphy v. Superior Court, 84 Cal. 592, 596, 24 P. 310; Guardianship of Danneker, 67 Cal. 643, 645, 8 P. 514; Ex parte Miller, 109 Cal. 643, 646, 42 P. 428; In re, Guardianship of Kimball, 80 Cal.App.2d 884, 887, 182 P.2d 612; Milani v. Superior Court, 61 Cal.App.2d 463, 466–467, 143 P.2d 402; In re, Guardianship of Sturges, 30 Cal.App.2d 477, 501, 86 P.2d 905.

"The jurisdiction of the court in this respect is a continuing one, and though no motion, petition or other such incidental proceeding may be pending at any particular time, the court still has jurisdiction over the guardianship. No other court, we believe, has power to interfere with that continuing control over the guardian * * *." Browne v. Superior Court, 16 Cal.2d 593, 598, 107 P.2d 1, 3, 131 A.L.R. 276.

[4] We find no reason to hold that the continuing jurisdiction of the divorce court over its custody awards is not also exclusive. "A decree awarding custody to a parent claiming adversely to the other parent differs only in formal respects from a decree appointing one parent guardian of the person of the child. The effect in either case is to confer upon the party appointed the care and custody of the child." Titcomb v. Superior Court, 220 Cal. 34, 41, 29 P.2d 206, 210; see also, In re Guardianship of Cameron, 66 Cal.App. 2d 884, 887, 153 P.2d 385; In re, Guardianship of Phillips, 60 Cal.App.2d 832, 836, 141 P.2d 773; Smith v. Smith, 31 Cal.App. 2d 272, 276, 87 P.2d 863; 37 Cal.L.Rev. 455, 470, 473.

The reasons for not recognizing a continuing exclusive jurisdiction when the original custody decree has been entered in the court of another state do not apply when the original decree has been entered in this state. If the child is present or domiciled in California it is essential for the protection of his welfare that the courts of this state have jurisdiction over his custody. Sampsell v. Superior Court, 32 Cal.2d 763, 778, 197 P.2d 739. There must be some court with authority to protect the child's interest in the state where he is. When the original decree has been entered in this state, however, there will always be a local court with power to act. If change of residence within the state makes it desirable that the court of another county have jurisdiction to modify the decree, the objective may be attained by a change of venue. Cooney v. Cooney, 25 Cal.2d 202, 206–207, 153 P.2d 334. If it is still necessary or convenient that a guardian be appointed, despite the custody award, see, Probate Code § 1440; In re Guardianship of Phillips, 27 Cal.2d 384, 388, 164 P.2d 481, conflict in jurisdiction may be avoided by bringing proceedings in the court having juris-

diction over the original custody decree. In re Coughlin's Guardianship, 101 Cal.App.2d 727, 226 P.2d 46; In re Guardianship of Denny, 97 Cal.App.2d 763, 765, 218 P.2d 792; see also, In re Johnson's Estate, 101 Cal.App. 110, 120, 281 P. 435.

It has been recognized that "to avoid interminable and vexatious litigation it is generally required that before modification or vacation of * * * a [custody] decree 'there must be a change of circumstances arising after the original decree is entered, or at least a showing that the facts were unknown to the party urging them at the time of the prior order * * *.'" Sampsell v. Superior Court, 32 Cal.2d 763, 779, 197 P.2d 739, 750. Similarly, the avoidance of such litigation is facilitated by holding that only one court within this state may provide for the custody of minors in divorce or guardianship proceedings. Otherwise a parent having the immediate control of a minor might move from county to county, instituting guardianship proceedings, in search of a court that will alter the custody provisions of a divorce decree.

We have concluded that because of the continuing jurisdiction of the Santa Barbara court over the custody decree, the San Francisco court has no jurisdiction to appoint a guardian of the persons of Ellen C. Greene and Luther M. Greene. Insofar as the cases of Collins v. Superior Court, 52 Cal.App. 579, 199 P. 352, In re Guardianship of Kerr, 29 Cal.App.2d 439, 85 P.2d 145, Smith v. Smith, 31 Cal.App.2d 272, 87 P.2d 863, In re Guardianship of Burket, 58 Cal.App.2d 726, 137 P.2d 475, and In re Guardianship of Phillips, 60 Cal.App.2d 832, 141 P.2d 773, are inconsistent with the decision herein, they are disapproved.

Let the peremptory writ issue as prayed.

GIBSON, C. J., and EDMONDS, CARTER, and SCHAUER, JJ., concur.

SPENCE, Justice (dissenting).

I dissent as I find no justification for declaring, as does the majority opinion, that "the San Francisco court has no jurisdiction to appoint a guardian of the persons of Ellen C. Greene and Luther M. Greene." Such jurisdiction is clearly conferred upon that court by the provisions of section 1440 of the Probate Code, and every case which has dealt with the subject has held that such jurisdiction is not affected by the existence of a prior decree in a divorce action awarding custody of the minors. In re Guardianship of Phillips, 60 Cal.App.2d 832, 141 P.2d 773; In re Guardianship of Burket, 58 Cal.App.2d 726, 137 P.2d 475; In re Guardianship of Kerr, 29 Cal.App.2d 439, 85 P.2d 145; Collins v. Superior Court, 52 Cal.App. 579, 199 P. 352. I therefore cannot agree with the conclusion reached in the majority opinion or join in the disapproval of the foregoing authorities.

Furthermore, in 1945, this court unanimously affirmed an order appointing a guardian of the person of a minor despite the existence in another county of a prior divorce decree awarding custody of said minor. In re Guardianship of Phillips, 27 Cal.2d 384, 164 P.2d 481. In that case, some of the authorities above mentioned were cited with approval; and if the majority now feel that said authorities should be disapproved, it necessarily follows that the last cited case should be overruled.

The fundamental fallacy underlying the reasoning of the majority opinion is found in its treatment of a divorce decree awarding to a parent the custody of a minor as the precise equivalent of a decree appointing a guardian of the person of a minor in a guardianship proceeding. It seems clear that these decrees should not be so treated. While it is true that both proceedings deal generally with the right to custody, they are quite different in several particulars, only the most important of which need be mentioned. A divorce decree awarding custody of a minor is one entered in an action in which only the parents may appear as parties. On the other hand, a decree appointing a guardian of the person is one entered in a proceeding in which any interested person may appear, and which proceeding may in fact be instituted by the minor himself, if fourteen years of age, or by any "relative or other person on behalf of the minor".

Probate Code, § 1440. Notice of such proceeding must be given "to such relatives of the minor residing in the state as the court or judge deems proper", and notice must be given to the parents in the absence of proof "that their addresses are unknown, or that, for other reason, such notice cannot be given." Probate Code, § 1441. Thus, the parents may or may not appear in such proceeding, and if they do appear, an adversary proceeding may develop in which some third person may be appointed guardian rather than the parent or parents of the minor. It therefore appears that the guardianship proceeding is the broader proceeding in which all interested persons may be heard in support of their conflicting claims; and it further appears from the authorities above cited that section 138 of the Civil Code is merely a convenient and temporary substitute, permitting the award of custody in a divorce action, until such time as it may be determined in a guardianship proceeding that it is "necessary or convenient" to appoint a guardian. Probate Code, § 1440.

It is no answer here to point out that no person other than the parents has appeared, up to the present time, in the guardianship proceeding. The sections relating to the guardianship do not require the filing of an answer, or of a second petition, in order to enable the probate court to hear conflicting claims and to award custody to some person other than a parent who may be the petitioner. If the probate court here is given the opportunity to hear the guardianship proceeding on the merits, it might be made to appear at that time that neither parent should be appointed as guardian, and that some third person should be so appointed. That question, however, is one to be determined by the probate court in the exercise of the jurisdiction conferred upon it by section 1440 of the Probate Code.

The holding of the majority opinion presumably would deny jurisdiction over a guardianship proceeding to any court, other than the court in which the divorce decree was entered, at least during the time that both parents are still living. Thus, if a divorce decree awarding custody of a minor had been granted to one of the minor's parents in the superior court in Del Norte County, and thereafter all interested persons had established their domicile in San Diego County and had lived there for many years preceding the final abandonment of the minor by his parents in the latter county, then neither the superior court in San Diego County, nor any court of this state other than the superior court of Del Norte County, would have jurisdiction to entertain a guardianship proceeding which might be instituted by the minor or some other person during the lifetime of the parents. It seems clear that the superior court of San Diego County should be held to have jurisdiction under such circumstances; and, in my opinion, it seems equally clear that the superior court of the City and County of San Francisco should be held to have jurisdiction here. In fact, the court located in the county "in which a minor resides or is temporarily domiciled" appears to be the only court which has jurisdiction to appoint a guardian. Probate Code, sec. 1440; 13 Cal.Jur. 147.

If the writ should be denied, as I believe it should be, and all of the facts are presented on the hearing of the guardianship proceeding on the merits, then, as pointed out in Re Guardianship of Phillips, supra, 60 Cal.App.2d 832, at page 836, 141 P.2d 773, at page 775, "* * * it will be appropriate for the superior court in San Francisco, in the exercise of its jurisdiction, to determine among other things whether under all the circumstances 'it appears necessary or convenient' to appoint a guardian of the person of said minor. Probate Code, sec. 1440."

In my opinion the petition for a writ of prohibition should be denied.

SHENK, J., concurs.

Rehearing denied; SHENK and SPENCE, JJ., dissenting.

37 Cal.2d 335

PEOPLE by HOWSER ex rel. LEVIN v. SANTA CLARA COUNTY et al. (WICKETT, Intervenor).

S. F. 18149.

Supreme Court of California, In Bank.

May 28, 1951.

Hearing Denied June 25, 1951.

The People of the State of California, by Frederick N. Howser, Attorney General, on the relation of Albert J. Levin, brought an action against the County of Santa Clara, and others, to determine validity of a charter adopted by electors and duly approved by the legislature. Fred A. Wickett was granted leave to intervene in support of the charter. The Superior Court, Santa Clara County, James L. Atteridge, J., rendered judgment invalidating the charter and defendants and the intervenor appealed. The Supreme Court, Carter, J., held that where five of the ten publications of the charter contained garbled portions which rendered five of the publications in part unintelligible, charter was invalid for lack of substantial compliance with constitutional provisions requiring publication of charter at least ten times.

Judgment affirmed.

Spence, Edmonds, and Traynor, JJ., dissented.

Prior opinion 222 P.2d 88.

1. Counties ⇐3

Municipal corporations ⇐48(1)

Approval or rejection of a county or city home rule charter by Legislature and the steps taken by the local authorities, including vote of people, are part of the process of enacting a legislative act, and court will not look beyond resolution of Legislature approving charter in determining validity of act. Const. art. 11, § 7½; St.1949, pp. 3294, 3296.

2. Counties ⇐3

Where defect in proceedings for adoption of charter by electors of county which occurred prior to submission of charter to Legislature appeared on face of resolution adopted by Legislature approving charter, Supreme Court would examine irregularity of such proceedings and determine whether constitutional requirements were met and whether document submitted was a valid county charter. Const. art. 11, § 7½; St. 1949, pp. 3294, 3296.

3. Counties ⇐3

Where it appeared from resolution of Legislature approving charter for county that, although all of contents of charter were published for ten days, yet on five days a portion of contents were garbled, and that the error rendered five publications, as to three sections of the charter, in part unintelligible, charter was invalid for lack of substantial compliance with constitutional provision for publication of proposed charter in daily newspaper for at least ten times. Const. art. 1, § 22, art. 11, § 7½; St.1949, pp. 3294, 3296.

4. Counties ⇐3

Compliance with constitutional requirements for adoption of county charter is mandatory and prohibitory. Const. art. 1, § 22.

Campbell, Hayes & Custer, San Jose, Edwin J. Owens, Santa Clara, and Robert E. Hayes, San Jose, for intervener and appellant.

Fred N. Howser, Los Angeles, J. B. Peckham, John H. Machado, Peter J. Mancuso and Raymond G. Callaghan, San Jose, for respondents.

CARTER, Justice.

The trial court invalidated a charter adopted by defendant, Santa Clara County Stats.1949, Conc. & Joint Resol., ch. 156, p. 3294, pursuant to § 7½ of Article XI of the Constitution on the ground that the publication of the charter prior to the vote thereon was faulty

A charter may be adopted by a county by following specified procedure set forth in the Constitution. After a board of freeholders has been elected and drafted a proposed charter, the county board of supervisors "shall thereupon cause said proposed charter to be published for at least ten times in a daily newspaper of general circulation, printed, published and circulated in said county * * *." Cal.Const., Art. XI, § 7½. Thereafter the charter is submitted to the electors. After it is adopted by the electorate, it is submitted to the legislature, which must approve or re-

ject it as a whole before it becomes effective. Cal.Const., Art. XI, § 7½.

Here the charter was approved by the electors. Proceedings were then instituted to prevent its submission to the legislature on the same ground advanced in the instant case (defect in publication) but they were unsuccessful. Santa Clara County v. Superior Court, 33 Cal.2d 552, 203 P.2d 1. The charter was submitted to the legislature and a resolution approving it was adopted. Stats.1949, p. 3294, Conc. & Joint Resol., ch. 156. The resolution recites, however, the proceedings by the local authorities, stating that the charter was published for at least ten days (September 16th to September 25th, inclusive) but "That during the course of the ten day publication of the * * * Charter as aforesaid, in certain publications thereof, to-wit, in those published and circulated on the 17th, 18th, 19th, 20th and 21st days of September, 1948 there was a break in the sequence of the context of the Charter, which break arose from the fact that certain sections of said Charter, as more particularly set forth in Exhibit 'C' annexed hereto, were not in numerical sequence nor were the sentences in Sections 202, 303 and 402 as appearing in said publications (see Exhibit 'C') in exact conformance with the sections of the proposed Charter. That in the printing, publishing, and circulating of said proposed Charter on the 16th, 22nd, 23rd, 24th, and 25th days of September, 1948 the wording thereof was in exact conformance of the Charter as prepared and proposed by the duly elected and qualified Board of fifteen Freeholders and as submitted and filed thereby.

"That attached hereto, marked Exhibit 'B', and made a part hereof by this express reference and incorporation is a newspaper publication of said proposed Charter in the San Jose Mercury Herald as it was published on the 16th, 22nd, 23rd, 24th and 25th days of September, 1948.

"That attached hereto, marked Exhibit 'C', and made a part hereof by this express reference and incorporation is a newspaper publication of said proposed Charter in the San Jose Mercury Herald as it was published on the 17th, 18th, 19th, 20th and 21st days of September, 1948." Stats.1949, ch. 156, p. 3296. It is that defect in publication which it is claimed voided the charter. It must first be determined, however, to what extent, if at all, a court will examine the regularity of charter adoption proceedings occurring before the passage of the resolution by the legislature approving the charter.

It has been held that when an act of the legislature is valid on its face, properly enrolled, authenticated and filed, it is conclusively presumed that all of the steps required for its passage have been properly taken; even the journal of the legislature is not available to impeach it. Spaulding v. Desmond, 188 Cal. 783, 207 P. 896; Sherman v. Story, 30 Cal. 253, overruling Fowler v. Peirce, 2 Cal. 165; County of Yolo v. Colgan, 132 Cal. 265, 64 P. 403; People v. Burt, 43 Cal. 560; People v. Harlan, 133 Cal. 16, 65 P. 9; Parkinson v. Johnson, 160 Cal. 756, 117 P. 1057; Taylor v. Cole, 201 Cal. 327, 257 P. 40; People v. Camp, 42 Cal.App. 411, 183 P. 845; People v. Peete, 54 Cal.App. 333, 202 P. 51; See Oroville & V. R. R. Co. v. Supervisors Plumas County, 37 Cal. 354; Harpending v. Haight, 39 Cal. 189; Sacramento Paving Co. v. Anderson, 1 Cal.App. 672, 82 P. 1069; Santa Clara County v. Superior Court, supra, 33 Cal.2d 552, 203 P.2d 1.

[1] That rule has been criticized. 1 Stanford L.Rev., 428; Sutherland, Statutory Construction (3rd ed.) §§ 1403–6. Elsewhere the authorities are split, some holding that they will look behind the statute. It has been said: "Where the failure of constitutional compliance in the enactment of statutes is not discoverable from the face of the act itself but may be demonstrated by recourse to the legislative journals, debates, committee reports, or papers of the governor, courts have used several conflicting theories with which to dispose of the issue. They have held: (1) that the enrolled bill is conclusive and like the sheriff's return cannot be attacked; (2) that the enrolled bill is *prima facie* correct and only in case the

legislative journal shows affirmative contradiction of the constitutional requirement will the bill be held invalid; (3) that although the enrolled bill is *prima facie* correct, evidence from the journals or other extrinsic sources is admissible to strike the bill down; (4) that the legislative journal is conclusive and the enrolled bill is valid only if it accords with the recital in the journal and the constitutional procedure. * * * At the present time the tendency seems to be toward the abandonment of the conclusive presumption rule and the adoption of the third rule leaving only a *prima facie* presumption of validity which may be attacked by any authoritative source of information." Sutherland, Statutory Construction (3rd ed.) § 1402. Starting with the premise that the approval or rejection of a county or city home rule charter by the legislature and the steps taken by the local authorities, including the vote of the people, are a part of the process of enacting a legislative act, Santa Clara County v. Superior Court, supra, 33 Cal.2d 552, 203 P.2d 1; Taylor v. Cole, supra, 201 Cal. 327, 257 P. 40; Spaulding v. Desmond, supra, 188 Cal. 783, 207 P. 896, this court has extended the rule to include such steps and held that it will not look beyond the resolution of the legislature approving the charter. Taylor v. Cole, supra; Spaulding v. Desmond, supra; People v. City of San Buenaventura, 213 Cal. 637, 3 P.2d 3. And in reaching that result, Taylor v. Cole, supra, overruled People v. Gunn, 85 Cal. 238, 24 P. 718. In the Gunn case, it was claimed that the charter had not received sufficient votes and other constitutional provisions had not been followed. The court held that the legislature does not exercise legislative or "law making" power in approving or rejecting a charter, and hence cannot determine the regularity of the proceedings by the local authorities for the adoption of the charter; that such is a court function. Following the Taylor case is People v. City of San Buenaventura, supra, 213 Cal. 637, 3 P.2d 3, 4, where the defect was a failure to advertise the charter. The Taylor case was approved in its holding that "* * * a legislative resolution approving a freeholders' charter, together with the charter which it establishes is the law of the state, and is *conclusive as to the facts so recited in the preamble.*" But the court concluded by stating: "As it appears *on the face* of the Assembly *concurrent resolution* approving the charter that one of the essential steps required by the Constitution to be taken for the adoption and approval by the voters of a municipal freeholders' charter was not taken in this instance, we are compelled to hold that the freeholders' charter of San Buenaventura, submitted to the electors of the city, not having been legally adopted, *its purported approval by the Legislature amounts to nothing.*" (Emphasis added.) People v. City of San Buenaventura, 213 Cal. 637, 640, 642, 3 P.2d 3, 5. Thus the holding is that if the irregularity in the proceedings by the local authorities appears *on the face* of the legislative resolution, the approval by the legislature is not conclusive, as it would be, if it was not revealed by the resolution. The San Buenaventura case was followed by Butters v. Board of Supervisors of Imperial County, 217 Cal. 515, 19 P.2d 983 and Ault v. Council of City of San Rafael, 17 Cal.2d 415, 110 P.2d 379, where the court gave consideration to the regularity of the proceedings by local authorities before the charter was submitted to the legislature, but did not discuss the question of the jurisdiction of the legislature to determine that question by approving or rejecting the charter, a problem later herein discussed. The distinction made in the San Buenaventura case (between a defect in the local proceedings appearing on the face of the resolution and one that did not) was approved by this court in Santa Clara County v. Superior Court, supra, 33 Cal.2d 552, 203 P.2d 1, the latest case on the subject, for there it was concluded that the proceedings taken by the local authorities were a part of the legislative process and we there approved Taylor v. Cole, supra, 201 Cal. 327, 257 P. 40, saying that the *constitution* imposed upon the legislature the duty of seeing that the steps taken by the

local authorities complied with the constitution when it authorized the legislature to approve or reject the charter in *toto*. People v. City of San Buenaventura, supra, 213 Cal. 637, 3 P.2d 3, was also approved, however, in holding that the charter could be attacked where the defect appeared on the face of the legislative resolution.

[2] Since the defect in the proceedings for the adoption of the charter prior to its submission to the legislature appears on the face of the resolution adopted by the legislature approving the charter here involved, the court will examine the regularity of such proceedings and determine whether or not the constitutional requirements have been met and the document submitted is or is not a valid county charter.

On the question of the sufficiency of the publication, it appears on the face of the resolution adopted by the legislature (quoted supra) that five publications were an exact copy of the charter. In the other five, the following errors were made in which parts of the context of some sections were placed in other sections, as follows: The charter correctly reading is: "Section 202. Qualification of Supervisors. The County of Santa Clara shall have a Board of Supervisors consisting of five members, one member to be elected from each supervisorial district. In order to be eligible for election or appointment each supervisor must have been a qualified elector in the district he represents for the period of at least two years immediately preceding his election or appointment, and must continue to reside therein during his incumbency in office.

"Section 303. Clerk of the Board of Supervisors. The Clerk of the Board of Supervisors shall keep the minutes of said board and shall make full records of all proceedings had before it and shall have custody of all minutes, books, and records pertaining to such proceedings and shall render all clerical services required in the conduct of the business of said board or incidental thereto.

"Section 402. Term of Office and Emoluments. The County Executive shall serve at the will of the appointing authority, provided however, that the County Executive first appointed under this charter may not be removed within one (1) year from the date on which he assumes his duties except for cause which would justify the removal of an elected county officer under the provisions of general law.

"The County Executive shall receive a salary which shall be fixed by the Board of Supervisors prior to his appointment, and annually thereafter, in the salary ordinance, except that in the first five years of the operation of this charter the salary shall in no instance be less than $10,000 per annum."

But as published it read: "Section 202. Qualification of Supervisors. The County of Santa Clara shall have a Board of Supervisors consisting of five members, one member to be elected from each supervisorial district, *in the conduct of the business of said board or incidental thereto.*

"Section 303. Clerk of the Board of Supervisors. The Clerk of the Board of Supervisors shall keep the minutes of said board and shall make full records of all proceedings had before it and shall have custody of all minutes, books, and records pertaining to such proceedings and shall render all clerical services required *duties except for cause which would justify the removal of an elected county officer under the provisions of general law.*

"The County Executive shall receive a salary which shall be fixed by the Board of Supervisors prior to his appointment, and annually thereafter, in the salary ordinance, except that in the first five years of the operation of this charter the salary shall in no instance be less than $10,000 per annum.

"Section 402. Term of Office and Emoluments. The County Executive shall serve at the will of the appointing authority, provided however, that the County Executive first appointed under this charter may not be removed within one (1) year

from the date on which he assumes his. *In order to be eligible for election or appointment each supervisor must have been a qualified elector in the district he represents for the period of at least two years immediately preceding his election or appointment, and must continue to reside therein during his incumbency in office.*"

[3, 4] The portion in italics is the misplaced material. It is thus seen that although all of the contents of the charter was published for 10 days, yet on 5 days, a portion of the contents was garbled. It should be clear that the error rendered five publications, as to three sections of the charter, in part, unintelligible. The sections are widely spaced and it would take a diligent search to bring the contents together to make sense. The effect is not only the same as if the material were omitted from three sections of the charter, but an erroneous impression would be gained as to the meaning of the part not omitted. Compliance with constitutional requirements is mandatory and prohibitory. Cal.Const., Art. 1, § 22; People v. Gunn, supra, 85 Cal. 238, 24 P. 718; People v. City of San Buenaventura, supra, 213 Cal. 637, 3 P.2d 3; Santa Clara County v. Superior Court, supra, 33 Cal.2d 552, 203 P.2d 1; Blanchard v. Hartwell, 131 Cal. 263, 63 P. 349. While substantial compliance has been held to suffice under some circumstances, see California Teachers Ass'n v. Collins, 1 Cal.2d 202, 34 P.2d 134; Perry v. Jordan, 34 Cal.2d 87, 94, 207 P.2d 47 such compliance, as above indicated, is not present in this case.

The judgment is affirmed.

GIBSON, C. J., and SHENK and SCHAUER, JJ., concur.

SPENCE, Justice.

I dissent.

The solution of this controversy appears to rest upon the determination of two main questions: First, whether substantial compliance with our constitutional provisions will suffice to render valid the adoption of a proposed county charter; and second, if so, whether there was such substantial compliance in the present case. In my opinion, both questions should be answered in the affirmative.

While the majority opinion concedes that "substantial compliance" will suffice, Perry v. Jordan, 34 Cal.2d 87, 94, 207 P.2d 47; California Teachers Ass'n v. Collins, 1 Cal.2d 202, 34 P.2d 134, there is contrary language in certain earlier decisions of this court. People v. City of San Buenaventura, 213 Cal. 637, 3 P.2d 3; People v. Gunn, 85 Cal. 238, 24 P. 718. In my opinion the language found in those earlier cases should be disapproved, for such language is not in harmony with the position taken by this court in the later cases above cited. Furthermore, to hold that an absolutely literal compliance in every phase of every step is a prerequisite to the adoption of a valid charter is to exalt form above substance, and would compel the invalidation of charter proceedings for the failure to dot an "i" or to cross a "t", or for any other minor defect in a publication which might be of no substantial significance. Any such rule would tend to bring the law into disrepute and to give color to the claim that justice is administered in a hypertechnical manner without regard to the realities.

Assuming, then, that a substantial compliance with our constitutional provisions is sufficient, the facts presented by the record before us clearly show such substantial compliance. It is not claimed that any step required by the Constitution was entirely omitted, but only that one of the steps was imperfectly executed in that 5 of the 10 required publications of the proposed charter were not letter perfect. Between the first publication on September 16, 1948, and the last 4 publications on September 22, 23, 24, and 25, 1948, all of which publications were "in exact conformance" with the sections of the proposed charter, there were certain errors made in the 5 intervening publications, which errors are set forth in the majority opinion. In these intervening publications the entire text was published but there was a slight transposition in 3 out of 71 sections of the charter. It seems entirely clear that the errors were of a

minor nature, and that the effect, if any, upon the electors who might have read the slightly erroneous publications, instead of the perfect publications, would have been to incline such electors to vote against, rather than in favor of, the adoption of the proposed charter. The charter was nevertheless approved by a large majority of the electors. I therefore believe that it should be held here that there was a substantial compliance, for any other conclusion will result in thwarting the will of the vast majority of the electors without any compelling reason for so doing.

The disapproval of certain language used in People v. City of Buenaventura, supra, 213 Cal. 637, 3 P.2d 3, would not imply that the decision should be overruled. The situation in that case is clearly distinguishable. There it affirmatively appeared on the face of the concurrent resolution that one entire step required by the Constitution for the adoption of a charter had been omitted. It was there held that it is not for the courts to say that such entire step could be omitted when the Constitution provided otherwise. But if, as here, it affirmatively appears on the face of the concurrent resolution that every step was completed in exact conformance with the constitutional requirements, except for certain typographical errors which crept into some of the publications involved in completing the publication step, then it is for the courts to determine whether such errors were of such minor nature that there was nevertheless substantial compliance with the constitutional requirements.

As stated by Mr. Justice McFarland in his concurring opinion in People v. Gunn, supra, 85 Cal. 238, 250, 24 P. 718, 721; "Because the constitution declares the provisions to be mandatory, it does not follow that a *substantial* compliance with them is not sufficient. The proceedings for the adoption of a charter will probably never be so literally perfect that a critical and hostile eye cannot detect in them some slight defect or irregularity, which ought not to be considered fatal. Whether or not there has been a sufficient compliance with the constitution in any particular case must depend on the particular facts of that case."

That principle has been adopted in the more recent decisions above cited. It is not necessary here to attempt to specify the limits of those minor errors which may be deemed to be inconsequential within the substantial compliance rule. It seems clear, however, that if, as in the present case, it may be said with certainty that such minor errors in certain publications could have tended only to result in unfavorable, rather than favorable, votes on the question of the adoption of the proposed charter, then such errors should be held to be so inconsequential as not to invalidate the entire proceedings for the adoption of the proposed charter.

The legislature here has approved the proposed charter despite the minor errors in some of the publications. It has impliedly found and concluded that there was a substantial compliance with the constitutional provisions. It has frankly shown the extent of such minor errors on the face of the concurrent resolution so as to permit judicial review of its findings and conclusions under the rules set forth in Taylor v. Cole, 201 Cal. 327, 257 P. 40, and People v. City of San Buenaventura, supra, 213 Cal. 637, 3 P.2d 3. Upon this judicial review, I am of the opinion that the legislature was correct in its findings and conclusions, and that this judicial review should result in the validation, rather than the invalidation of the charter.

For the reasons stated, I would reverse the judgment of the trial court, with directions to enter judgment in favor of defendants.

EDMONDS and TRAYNOR, JJ., concur.

Hearing denied; EDMONDS, TRAYNOR, and SPENCE, JJ., dissenting.

37 Cal.2d 283

PEOPLE v. ONE 1941 CHEVROLET COUPE, etc., et al.

L. A. 21780.

Supreme Court of California, in Bank.

May 25, 1951.

The People of the State of California brought forfeiture proceedings against One 1941 Chevrolet Coupe, Engine No. AA430562, Serial No. 5AHO123201, 1948 License No. 90D650, and the Fred W. Gray Co., a corporation, legal owner, filed an answer denying the allegations of notice of seizure and intended forfeiture proceedings. The Superior Court of Los Angeles County, Philip H. Richards, J., entered a judgment of forfeiture, and the legal owner appealed. The Supreme Court adopted most of the opinion of the District Court of Appeal, Vallée, J., 222 P.2d 473, holding that legal owner had a constitutional right to trial by jury of the issues of fact of the case, and that denial of a trial by jury to him constituted a miscarriage of justice requiring reversal.

Judgment reversed.

Edmonds, J., dissented.

1. Forfeitures ⇐5

There can be no forfeiture of property without notice to owner and a hearing at which he can be heard, except where property is kept in violation of law and is incapable of lawful use.

2. Forfeitures ⇐5

Where property sought to be forfeited is what is termed innocent property threatening no danger to public welfare, owner must be afforded a fair opportunity to be heard, and this is true whether it be a common-law or judicial forfeiture, one which does not take effect until by a judgment the rights of the state have been established in a suit instituted for that purpose, or a statutory or legislative forfeiture, one where forfeiture is effective on commission of offense, and in either case, law requires proceedings to be instituted for purpose of ascertaining facts of forfeiture.

3. Forfeitures ⇐5

A statutory or legislative forfeiture is in rem against property itself.

4. Forfeitures ⇐5

A common-law or judicial forfeiture is in personam against a defendant.

5. Forfeitures ⇐7

Under statute providing that any vehicle used unlawfully to transport any narcotics or in which any narcotic is unlawfully kept, deposited, or concealed, or is unlawfully possessed by an occupant thereof, shall be forfeited to state, forfeiture prescribed is in rem, and effect of such forfeiture is to transfer title to vehicle from owner to state. Health and Safety Code, §§ 11610–11622.

6. Jury ⇐10

The right of trial by jury guaranteed by Constitution is right as it existed at common law at time Constitution was adopted. Const. art. 1, § 7.

7. Common law ⇐3, 7

The common law at time Constitution was adopted includes not only lex non scripta but also written statutes enacted by Parliament.

8. Jury ⇐31(2)

Any act of Legislature attempting to abridge constitutional right to trial by jury is void. Const. art. 1, § 7.

9. Jury ⇐14(12)

The right of trial by jury did not exist at common law in a suit to abate a public nuisance, and is not a constitutional right now. Const. art. 1, § 7.

10. Jury ⇐19(15)

While property which is kept in violation of law, and which is incapable of lawful use and declared to be a nuisance per se may be forfeited without a trial by jury under police power, property ordinarily used for lawful purposes may not be forfeited without a trial by jury where an issue of fact is joined as to whether property was being used for an unlawful purpose or is to be taken from an innocent owner.

11. Jury ⇐19(15)

There is no general constitutional right to a jury trial in actions for seizure and forfeiture of contraband articles, but

property is not contraband or a public nuisance merely because it was instrumental in commission of public offense. Const. art. 1, § 7.

12. Jury ⇐13(2)

The right to trial by jury cannot be avoided by merely calling an action a special proceeding or equitable in nature, and Legislature cannot convert a legal right into an equitable one so as to infringe on right of trial by jury. Const. art. 1, § 7.

13. Jury ⇐13(1)

In determining whether action was one triable by a jury at common law, court is not bound by form of action, but rather by nature of rights involved and facts of particular case, and jury trial must be granted where gist of action is legal, where action is in reality cognizable at law.

14. Jury ⇐10

The right of trial by jury is not limited strictly to those cases in which it existed before adoption of Constitution, but is extended to cases of like nature as may afterwards arise, and embraces cases of same class thereafter arising. Const. art. 1, § 7.

15. Jury ⇐19(15)

Where at common law, prior to adoption of Constitution, a party against whom forfeiture of property used in violation of law was sought to be enforced was entitled to a trial by jury, such right exists now.

16. Statutes ⇐234½

The introduction of a new subject into a class renders it amenable to its general rules, not to its exceptions.

17. Jury ⇐19(15)

Where forfeiture proceeding against automobile was commenced under statute providing for forfeiture of vehicles used unlawfully to transport any narcotics, proceeding was type of action cognizable in a common-law court, and triable by a jury in the Court of Exchequer, and owner of automobile had constitutional right to trial by jury of issues of fact in case. Health and Safety Code, §§ 11610–11622; Const. art. 1, § 7.

18. Appeal and error ⇐1035

The denial of a trial by jury to one constitutionally entitled thereto constitutes a miscarriage of justice and requires a reversal of judgment. Const. art. 1, § 7.

19. Forfeitures ⇐5

Though suit by the state for the forfeiture of an automobile which has been used for unlawful transportation of narcotics, is nominally in rem against the automobile itself, in reality it is directed against those who have property interests in the automobile. Health and Safety Code, §§ 11610–11622.

20. Forfeitures ⇐7

Statute dealing with forfeiture of automobiles for unlawful transportation of narcotics, operates to transfer property rights in the automobile to the state, as a penalty against the owners for misuse of the automobile. Health and Safety Code, §§ 11610–11622.

21. Forfeitures ⇐5

One of the purposes of proceedings to forfeit an automobile for unlawful transportation of narcotics is to determine whether or not the owner of the automobile is in fact innocent of the unlawful transportation. Health and Safety Code, §§ 11610–11622.

Macfarlane, Schaefer & Haun, William Gamble and E. J. Caldecott, all of Los Angeles, for appellant.

Sheppard, Mullin, Richter & Balthis, George R. Richter, Jr., and Roy Littlejohn, all of Los Angeles, amici curiae on behalf of appellant.

Fred N. Howser and Edmund G. Brown, Attys. Gen. and Dan Kaufmann, Deputy Atty. Gen., for respondent.

PER CURIAM.

This appeal is from a judgment ordering forfeiture of an automobile to the state. After decision by the District Court of Appeal, Second Appellate District, Division Three, a hearing was granted by this court in order to give further consideration to the important question of law involved.

We have concluded that the opinion of the District Court of Appeal, prepared by Mr. Justice Vallée, Cal.App., 222 P.2d 473, correctly discusses and decides this question. That opinion, with deletions and additions that have been made for the purpose of discussing certain contentions urged upon us by the Attorney-General, is adopted as the opinion of this court. As modified, the opinion is as follows:

"The State instituted this proceeding by filing a 'Notice of Seizure and Intended Forfeiture Proceedings' as provided by sections 11612 and 11613 of the Health and Safety Code. The notice alleged that the automobile had been seized pursuant to section 11611 of that code and that it 'was used to unlawfully conceal, convey, carry or transport marihuana, and marihuana was unlawfully in the possession of an occupant.' The registered owner and the legal owner answered separately, denying the allegations of the notice. The legal owner alleged that, prior to the seizure, it loaned $886.52 to the registered owner and received a chattel mortgage which was duly filed for record and is a first lien on the automobile. It also alleged that, prior to making the loan, it made a 'reasonable investigation of the moral responsibility, character and reputation of the [registered owner] * * * and found the same to be good,' and that there was a balance due of $865.57, with interest.

"The court found that the automobile was used contrary to the provisions of section 11610 of the Health and Safety Code and that the legal owner did not, prior to the loan, make a reasonable investigation of the moral responsibility, character and reputation of the registered owner. The legal owner appeals from the judgment.

"Prior to the setting of the cause for trial, appellant filed a demand for trial by jury. Thereafter respondent filed objections to the demand and a notice of motion to set the cause for trial without a jury. The respondent's motion was granted. When the cause came on for trial appellant renewed its demand and moved the trial judge for a trial by jury. The motion was denied.

"Appellant contends it was denied its right to a trial by jury in violation of article I, section 7, of the Constitution of California.

"Health and Safety Code, section 11610, provides that a vehicle used to unlawfully transport any narcotic, or in which any narcotic is unlawfully kept, deposited or concealed, or is unlawfully possessed by an occupant thereof, shall be forfeited to the State. At the time of the seizure in 1948, section 11611, amended, Stats.1949, ch. 1475, § 22, provided that any peace officer upon making, or attempting to make, any arrest for violation of the narcotics provisions of the code, shall seize any vehicle so used unlawfully and hold it 'as evidence until a forfeiture has been declared or a release ordered.' Provision is made for notice to owners, answers, notice of hearing, hearing, and for judgment of forfeiture or release. Health & Saf. Code, §§ 11612–11622, both inc.

[1–5] "There can be no forfeiture of property without notice to the owner and a hearing at which he can be heard, except in a few cases of necessity, i. e., property kept in violation of law which is incapable of lawful use. Where the property is what is sometimes termed innocent property, threatening no danger to the public welfare, the owner must be afforded a fair opportunity to be heard. This is true whether it be a common-law or judicial forfeiture (one which does not take effect until by a judgment the rights of the state have been established in a suit instituted for that purpose), or a statutory or legislative forfeiture (one where the forfeiture is effective on the commission of the offense). In either case the law requires proceedings to be instituted for the purpose of ascertaining the facts of the forfeiture. People v. Broad, 216 Cal. 1, 3–7, 12 P.2d 941. A statutory or legislative forfeiture is *in rem* against the property itself. A common-law or judicial forfeiture is *in personam* against a defendant, 37 C.J.S., Forfeitures, § 2, p. 5. The forfeiture prescribed by the Health and Safety Code is *in rem*. People v. Broad, 216 Cal. 1, 12 P.2d 941; 37 C.J.S., Forfeitures, § 2, p. 5. The effect of such a

forfeiture is to transfer the title to the vehicle from the owner to the State.

[6–8] "'The right of trial by jury shall be secured to all, and remain inviolate'. Cal.Const., art. I, § 7; Cal.Const. of 1849, art. I, § 3. The right to trial by jury guaranteed by the Constitution is the right as it existed at common law at the time the Constitution was adopted. People v. Richardson, 138 Cal.App. 404, 408, 32 P.2d 433. The common law at the time the Constitution was adopted includes not only the *lex non scripta* but also the written statutes enacted by Parliament. Moore v. Purse Seine Net, 18 Cal.2d 835, 838, 118 P.2d 1. The common law respecting trial by jury as it existed in 1850 is the rule of decision in this state. Farrell v. City of Ontario, 39 Cal.App. 351, 356, 178 P. 740. Any act of the Legislature attempting to abridge the constitutional right is void. People v. Kelly, 203 Cal. 128, 133, 263 P. 226; People v. Bruneman, 4 Cal.App.2d 75, 79, 40 P.2d 891; Cassel v. Gregori, 28 Cal.App.2d Supp. 769, 774, 70 P.2d 721.[1] It is the right to trial by jury as it existed at common law which is preserved; and what that right is, is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact. The right is the historical right enjoyed at the time it was guaranteed by the Constitution. It is necessary, therefore, to ascertain what was the rule of the English common law upon this subject in 1850.

"Long before the adoption of the California Constitution there were numerous statutes in England providing for the seizure and forfeiture of property used in violation of law.[2]

"1. The right has always been regarded as sacred and has been jealously guarded by the courts. People v. Peete, 54 Cal.App. 333, 363, 202 P. 51. 'Trial by juries is the Englishman's birth-right, and is that happy way of trial, which, notwithstanding all revolutions of time, hath been continued beyond all memory to the present day; the beginning whereof no history specifies, it being contemporary with the foundation of this state, and one of the pillars of it, both as to age and consequence.' Burns, Justice of the Peace (23d ed.), vol. III, p. 80. See also Parsons v. Bedford, 3 Pet. 433, 7 L.Ed. 732, 736.

"2. [1381] 5 Rich. II, stat. 1, ch. 2, act respecting transfer of gold and silver; [1400] 2 Hen. IV, ch. 5, act to prevent gold and silver from being carried out of realm; [1604] 1 James I, ch. 2, § 43, act re tanners, curriers, shoemakers, etc.; [1660] 12 Chas. II, ch. 4, § 5, act providing duties; [1660] 12 Chas. II, ch. 18, § 2, act to encourage shipping—Navigation Act; [1662] 13 & 14 Chas. II, ch. 11, §§ 14, 17, 22, 23, 26, 31, act for preventing frauds; [1662] 14 Chas. II, cap. 7, act to restrain exportation of leather and raw hides; [1663] 14 Chas. II, ch. 11, § 1, act to prevent frauds of brewers and other persons; [1663] 15 Chas. II, ch. 7, §§ 6, 8, act to encourage trade; [1688] 1 W. & M. ch. 32, § 2, act to prevent exportation of wool; [1692] 4 & 5 W. & M. cap. 5, § 8, act to prevent frauds in importation of spirits; [1700] 11 & 12 Will. III, ch. 10, § 2, act to encourage manufacturers and affecting importations; [1709] 8 Anne, ch. 7, § 17, act relating to imports; [1718] 5 Geo. I, ch. 11, §§ 1, 2, 3, 4, 6, 8, 15, 21, act relating to smuggling; [1721] 8 Geo. I, ch. 18, act to prevent clandestine running of goods and infection thereby; [1724] 11 Geo. I, ch. 30, § 16, act to prevent frauds and abuses in public revenues; [1725] 12 Geo. I, ch. 28, §§ 13, 14, act for improvement of his Majesty's revenues; [1728] 1 Geo. II, ch. 17, § 7, act prohibiting certain imports; [1736] 9 Geo. II, ch. 35, §§ 22, 23, act relating to revenues; [1746] 19 Geo. II, ch. 12, §§ 3, 17, 19, 20, 21, act relating to duties on glass, etc.; [1763] 3 Geo. III, ch. 22, §§ 5, 6, 8, act relating to seizures; [1765] 5 Geo. III, ch. 43, § 27, act relating to revenues; [1765] 6 Geo. III, ch. 19, § 1, act relating to imports; [1781] 21 Geo. III, ch. 37, §§ 1, 2, act to prevent exportation to foreign parts of certain goods; [1781] 21 Geo. III, ch. 55, §§ 13, 20, 21, 24, 29, 30, act relating to duties and preventing frauds; [1784] 24 Geo. III, ch. 19, reenactment of 1 James I, ch. 22, § 43; [1784] 24 Geo. III, ch. 47, § 4, act to prevent smuggling; [1786] 26 Geo. III, ch. 77, § 10, act relating to duties; [1787] 27 Geo. III, ch. 32, §§ 1, 2, 3, 5, 7, act relating to smuggling; [1793] 33 Geo. III, ch. 2, § 4, act relating to exportation of arms and ammunition; [1794] 34 Geo. III, ch. 50, §§ 2, 8, 9, act relating to imports; [1797] 38 Geo. III, ch. 89, § 8, act relating to duties; [1798] 39 Geo. III, ch. 59, §§ 5, 14, act relating to im-

"At common law the trial of actions for forfeiture to the Crown of property used in violation of law was in the Court of Exchequer. 'The term "Common Law" often refers to those principles of English Law which were evolved in the Common Law Courts, as opposed to the principles which were applied in the Courts of Chancery and Admiralty and the Ecclesiastical Courts. The Courts of Common Law before the passing of the Judicature Acts, 1873–5, where the three Royal Courts of King's Bench, Common Pleas or Common Bench, and Exchequer, which had emerged from the King's Council (*Curia Regis*) as separate Courts by the end of the thirteenth century.' Phillips, The Principles of English Law and the Constitution, 70.[3] The Court of Exchequer was not a criminal court; and all suits for penalties, though for the King, were considered as civil. Burns, Justice of the Peace (23d ed.) vol. I, p. 806. By the end of the thirteenth century there was a recognized distinction between the Exchequer of Account and Receipt, and the Court of Exchequer or 'Exchequer of Pleas.' Radcliffe & Cross, The English Legal System, p. 54. The proceedings of the Court of Exchequer were originally confined to bills by the Attorney General to recover money or property for the Crown. Idem. 160. It was originally, and continued to be, a common-law court. Idem. 166; Plucknett, a Concise History of the Common Law, 4th ed., 152. The Court of Exchequer was absorbed by the Supreme Court of Judicature in 1875. Idem. 201.

"Blackstone says: 'An *information* on behalf of the crown, filed in the exchequer by the king's attorney general, is a method of suit for recovering money or other chattels, * * *. It is grounded on no writ under seal, but merely on the intimation of the king's officer the attorney-general, who "gives the court to understand and be informed of" the matter in question: upon which the party is put to answer, and trial is had, as in suits between subject and subject. The most usual informations are those * * *, for any forfeiture due to the crown upon the breach of a penal statute.' 3 Bl.Com. (12th ed.) 261.[4]

"In Moore v. Purse Seine Net, 18 Cal.2d 835, 118 P.2d 1, certiorari granted. C. J. Hendry Co. v. Moore, 316 U.S. 643, 62 S. Ct. 1036, 86 L.Ed. 1728, it was held that: a proceeding for forfeiture of a fish net used in violation of law is a type of action that was cognizable in a common-law court; 'an action *in rem* can be brought by the state in an ordinary common law court for the forfeiture of goods or articles used in violation of laws imposing such a penalty', 18 Cal.2d at page 839, 118 P.2d at page 4; '[s]uch forfeiture to the state of illegally used articles has continued as an accepted common law procedure', 18 Cal.2d at page 840, 118 P.2d at page 4; and 'the forfeiture of illegally used nets authorized by the California statute involves a traditional common law remedy cognizable in the state courts, even though the statute was enacted long subsequent to the Judiciary Act.' 18 Cal.2d at page 842, 118 P.2d at page 5.

"* * * [T]he conclusions of our Supreme Court in the Moore case were followed by the Supreme Court of the United States in the decision of the case, C. J. Hendry Co. v. Moore, 318 U.S. 133, 63 S.

ports; [1802] 42 Geo. III, ch. 38, § 20, act relating to duties and to prevent frauds; [1805] 45 Geo. III, ch. 121, § 6, act to prevent smuggling; [1807] 47 Geo. III, ch. 66, §§ 3, 8, 9, 10, 13, 14, act to prevent smuggling; [1825] 6 Geo. IV, ch. 107, §§ 64, 71, 128, act regulating customs; [1825] 6 Geo. IV, ch. 108, §§ 2, 45, act to prevent smuggling; [1833] 3 & 4 Wm. IV, ch. 52, §§ 10, 14, 20, 24, 28, 61, 118, act regulating customs; [1833] 3 & 4 Wm. IV, ch. 53, §§ 2, 3, 6, 14, 28, 31, 47, act to prevent smuggling; [1842] 5 & 6 Vict. ch. 47, §§ 10, 11, 18, 36, 42, act relating to customs; [1842] 5 & 6 Vict. ch. 93, §§ 8, 10, act regulating excise on tobacco.

"3. For the distinction between Queen's Bench, Common Pleas and Exchequer, see The Attorney-General v. Hallett, 15 M. & W. 97, 153 Eng.Rep. 777, 781.

"4. See also Cox, Institutions of the English Government, 517. An information filed in the Court of Exchequer was the first judicial proceeding *in rem* towards the legal condemnation of goods seized as forfeited. The Attorney-General v. Jefferys, 13 Price, 545, 147 Eng.Rep. 1077, 1078.

Ct. 499, 87 L.Ed. 663. In what Dean Dickinson [5] has described as 'at once a monumental piece of erudition and a notable contribution to the meaning of the much mooted phrase "common law remedy,"' [6] Mr. Chief Justice Stone, writing for the court, said 318 U.S. 137, 63 S.Ct. 501, 87 L.Ed. 666:

"'Forfeiture to the Crown of the offending object, because it had been used in violation of law, by a procedure in rem was a practice familiar not only to the English admiralty courts but to the Court of Exchequer. The Exchequer gave such a remedy for the forfeiture of articles seized on land for the violation of law. And, concurrently with the admiralty, it entertained true proceedings in rem for the forfeiture of vessels for violations on navigable waters. Such suits in the Exchequer were begun on information and were against the vessel or article to be condemned. Under the provisions of many statutes the suit might be brought by an informer qui tam, who was permitted to share in the proceeds of the forfeited article; the judgment was of forfeiture and the forfeited article was ordered to be sold. This was the established procedure certainly as early as the latter part of the seventeenth century. * * *

"'Separate courts exercising the jurisdiction of the Court of Exchequer were never established in the American Colonies. Instead, that jurisdiction was absorbed by the common law courts which entertained suits for the forfeiture of property under English or local statutes authorizing its condemnation. Long before the adoption of the Constitution the common law courts in the Colonies—and later in the states during the period of Confederation—were exercising jurisdiction in rem in the enforcement of forfeiture statutes. Like the Exchequer, in cases of seizure on navigable waters they exercised a jurisdiction concurrently with the courts of admiralty. * * * By that time [about 1700], the jurisdiction of common law courts to condemn ships and cargoes for violation of the Navigation Acts had been firmly established, apparently without question, and was regularly exercised throughout the colonies. In general the suits were brought against the vessel or article to be condemned, *were tried by jury*, closely followed the procedure in Exchequer, and if successful resulted in judgments of forfeiture or condemnation with a provision for sale. [Italics added.]

"'The rise of the vice-admiralty courts—prompted in part by the Crown's desire to have access to a forum not controlled by the obstinate resistance of American juries—did not divest the colonial common law courts of their jurisdiction to proceed in rem in cases of forfeiture and condemnation. * * * [318 U.S. 152, 63 S.Ct. 509, 87 L.Ed. at page 674.]

"'It is noteworthy that Blackstone's Commentaries, more read in America before the Revolution than any other law book, referred to the information in rem in the Court of Exchequer as the procedure by which forfeitures were inflicted for violation of Acts of Parliament. Bk. III, p. 262. And Kent, in his Commentaries, pointed out that "seizures, in England, for violation of the laws of revenue, trade or navigation, *were tried by a jury in the Court of Exchequer, according to the course of the common law*; and though a proceeding be in rem, it is not necessarily a proceeding or cause in the admiralty" (12th Ed., Vol. 1, p. 374). He declared that, within the meaning of § 9 of the Judiciary Act, the common law was competent to give such a remedy "because, under the vigorous system of the English law, such prosecutions in rem are in the Exchequer, according to the course of the common law." [Italics added.] * * * [318 U.S. 153, 63 S.Ct. 510, 87 L.Ed. page 675]

"'* * * In all this we perceive a common understanding of judges, lawyers and text writers, both before and after the adoption of the Constitution of the common law nature of the procedure and judgment in rem in forfeiture cases and of its use

"5. Former Dean School of Jurisprudence, University of California, now Professor of Law, University of Pennsylvania.

"6. 36 Cal.L.Rev. 173.

in such proceedings in the Exchequer and in the American common law courts.

"'We conclude that the common law as received in this country at the time of the adoption of the Constitution gave a remedy in rem in cases of forfeiture, and that it is a "common law remedy" * * *.'

"There is evidence that at a very early date (1236 and 1299) in the history of the Court of Exchequer the trial of common-law actions was by jury.[7] Apparently during that period the jury consisted of twelve witnesses gathered from the neighborhood to decide disputed questions of fact upon their previous knowledge.[8]

"As early as 1301, a case involving forfeiture of a ship and goods for piracy was tried by a jury.[9] In 1457 on an information in the Exchequer for the King's goods which were stolen, the Exchequer Chamber said, 'the jurors are the judges of the fact.'[10] In 1662 a statute was enacted providing for a jury of 'natural and free born subjects of the King' in actions, suits and informations commenced for the forfeiture of ships or goods used in unlawful importation or exportation.[11] * * *

"A case decided in 1766, Mitchell, who prosecutes for the King and Himself, v. Torup, —— Exchequer —— Parker, *227*, 145 Eng.Rep. 764, was an information of seizure. It alleged that the plaintiff seized a ship and goods therein for unlawfully bringing the goods into Britain. The prayer was that the ship and goods remain forfeited. Issue was joined. The cause was tried by a jury. In the course of the opinion the court said: 'it is objected, that the penalty or forfeiture, imposed by the fourth clause of the act, is only applicable to cases where there is some crime or guilt; but no crime or guilt can be imputed to the master, mate or owners, without their privity, the mariners being the only criminal or guilty persons, and therefore they ought to be the only sufferers. To which I answer, that though penalty or forfeiture, generally speaking, is the consequences of some crime or guilt, yet neither penalty nor forfeiture necessarily imply the one or the other, though punishment always does. To show this, several instances were mentioned upon the arguments: as where a murder is committed with the sword of an innocent man, the sword is forfeited; the like of all deodands. So, by the 4th of William and Mary, c. 8, the horses of innocent owners, upon which robberies are committed, are forfeited. And by the 8th of Anne, c. 7, § 17, the vessels, boats, horses and other cattle, and carriages, made use of in the landing or removing, carriage or conveyance of any uncustomed or prohibited goods, are forfeited. And there are several other acts to the same purpose, which I shall barely refer to 13 & 14 Car. 2, c. 11, § 7. 1 W. & M. c. 32, § 2. 7 & 8 W. 3, c. 28, § 8. 8 Ann. c. 13, § 16. 10 Geo. 1, c. 10, § 27. 12 Geo. 2, c. 24, § 11. 24 Geo. 2, c. 41, § 22. But by the 4th clause of the Navigation Act, the forfeiture is not upon the person, but upon the ship; nor is this a proceeding in personam, but in rem, for the condemnation of the ship as forfeited. And I am credibly informed, that the informations upon this clause of the act have been in this form from the time of passing it, which shewes how this law has been understood; and as no privity has been laid in them, it was not necessary to prove more than was laid. And though I

"7. Jenkinson, Select Cases in the Exchequer of Pleas, p. 1; idem. p. lxxxii.

"8. Jenkinson, Select Cases in the Exchequer of Pleas, p. cxvi, p. 20 (58), p. 37 (88), p. 40 (94, 95), p. 56 (116), p. 66 (128), p. 88 (146), p. 103 (162), p. 116 (171), p. 121 (174), p. 131 (181), p. 133 (183), p. 140 (189), p. 146 (193), p. 150 (198), p. 168 (215), p. 172, (219A), p. 174 (221), p. 180 (227B), p. 183 (228), p. 196 (243), p. 198 (245), p. 200 (246), p. 206 (251); Case LXII (1457) Jenk. 83, 145 Eng.Rep. 59.

"9. Jenkinson, Select Cases in the Exchequer of Pleas, p. 168 (215).

"10. Case LXII [1457] Jenk. 83, 145 Eng. Rep. 59.

"11. [1662] 13 & 14 Chas. II, ch. 11, § 21. See Roe v. Roe [1673]—Exchequer—Hardres, 185, 145 Eng.Rep. 443, where it was held that the issue of fact for the jury in an information for selling and importing to be sold foreign woolen contrary to statute was whether such cloth was imported to be sold.

agree that the jury are not concluded from finding the truth of the fact where it is within the issue; yet here the jury have found the issue for the plaintiff: and their finding the importation to be without the privity of the master, mate or owners, is nugatory and void, because it is not comprized in the issue. Bro. Verdict, pl. 78, 2 Ro.Abr. 707, pl. 37. Hob. 53, Lord Raym. 860, 865, Tonkin and Crocker. Mr. Attorney insisted, that the ship, in this case was to be considered as the offender; and this is countenanced by the words in the latter part of the first clause; "all such ships or vessels as shall have offended contrary hereunto." '

"Many of the English statutes provided for forfeiture of the conveyance used in carrying articles in violation of law, together with all goods therein.[13]

"There are reports of many cases in the Court of Exchequer in which articles used in violation of law were forfeited to the Crown pursuant to statute, in all of which the cause was tried by a jury.[14]

"13. If certain goods were unlawfully imported the goods were forfeited 'together with the vessels and boats, and all the horses, and other cattle and carriages whatsoever, made use of in the landing, removing, carriage, or conveyance of any of the aforesaid goods.' 8 Anne, c. 7, § 17 [1709]. If glass was unlawfully imported into Great Britain from Ireland in addition to the forfeiture of glass the vessel in which it was imported was also forfeited with her tackle, apparel, and furniture. 9 Geo. II, c. 12, §§ 19, 20, 21 [1746]; see also 33 Geo. III, c. 2, § 4 [1793]; 39 Geo. III, c. 59, § 14 [1798]. On the forfeiture of tea removed from the kingdom 'the same, together with the canisters, bags and other package whatsoever, containing the same and the vessels and boats, and the horses, and other cattle and carriages employed in removing the same, shall be forfeited, and shall and may be seized by any officer or officers of excise.' 21 Geo. III, c. 55, § 20 [1781]. On a forfeiture of salt for failure to declare or pay duties the salt was forfeited 'together with the packages containing the same, and the ships, boats and vessels, and all the horses, and other cattle and carriage whatsoever made use of in the removing, landing, carriage, or conveyance of such salt, and the same respectively shall and may be seized by any officer or officers of the customs or excise.' 38 Geo. III, c. 89, § 8 [1797]. The statute of 3 & 4 Wm. IV, c. 53, § 28 [1833] provided that if any goods liable for duties shall be unshipped 'all such goods as aforesaid shall be forfeited together with all Horses and other animals, and all carriages and other things, made use of in the Removal of such Goods.' The statute 5 & 6 Vict. c. 93, § 8 [1842] provided that no person cut, colour or manufacture, or have in his possession, any leaves or other matters to imitate or to be mixed with tobacco or snuff subject to forfeiture of 200 lbs., and that the leaves and other matters, 'together with all Machines, Tools, Materials, Vessels, and Utensils for cutting, grinding, pounding, colouring, staining, dyeing, manufacturing or preparing the same shall be forfeited.'

"14. Anonymous Case LXX [1459], Jenk. 87, 145 Eng.Rep. 62, was for the forfeiture to the King of merchandise alleged to have been shipped with intent to transport it to an unlawful place. The manner of obtaining a jury is discussed. Anonymous Case XCVI [1506], Jenk. 191, 145 Eng.Rep. 128, was an information in behalf of the King for transporting 'cloath,' custom not being paid. The 'cloath' was forfeited to the King. An information against Page [1607], Lane, 19, 145 Eng.Rep. 264, was for buying butter, and selling it at retail contrary to the statute. Rook's Case [1655], Hardres, 20, 145 Eng.Rep. 359, was an information for importing 'pottacoes' of tobacco of foreign growth in a foreign vessel. The case was tried by a jury resulting in forfeiture of the tobacco which was later set aside because of defects in the information. Jones v. Clerk [1655], Hardres, 46, 145 Eng.Rep. 373, was 'Upon an information for not garbling [culling] two and twenty bags of spice according to the statute of 21 Jacob, whereby it became forfeited.' In Holton v. Raworth [1775 or 1776], Hardres, 358, 145 Eng.Rep. 496, a trial by jury was had on an information upon seizure of wines for not paying custom. In Rex v. Southerby [1716], Bunbury, 4, 145 Eng.Rep. 575, Southerby was outlawed and a writ of execution issued. A trial by jury was then had and 'his house and goods seized by virtue thereof.' Bill v. Robinson [1719], Bunbury, 48, 145 Eng.Rep. 591, was a suit against an informer after a verdict for the defendant on the trial of an information upon seizure. Bradley qui tam v. Long [1721], Bunbury, 78, 145 Eng.Rep. 601, was an

information for importing brandy in a collier. Verdict was for the King. Rickson qui tam v. Sandford [1724], Bunbury, 192, 145 Eng.Rep. 644, forfeiture of seized wines; Idle qui tam v. Vanheck [1727], Bunbury, 231, 145 Eng.Rep. 657, forfeiture of ships for unlawful importation of goods; Attorney General v. Jackson [1727], Bunbury, 234, 145 Eng.Rep. 658, seizure and forfeiture of ships and goods. Robinson qui tam v. Lequesne [1728], Bunbury, 251, 145 Eng.Rep. 664, was upon 'an information of seizure of Jesuits bark * * * for fraudulent exportation of Jesuits bark, two casks out of six being dust.' Scott, who prosecutes for His Majesty and Himself, v. A'Chez [1743], Parker, 20, 145 Eng.Rep. 702, was an information grounded on the statute of 12 Car. 2c. 18, the Navigation Act. It alleged that plaintiff seized a ship and goods therein because the goods were imported unlawfully. The prayer was 'that the ship and goods may remain forfeited.' Issue was joined. The penalty provided by the act was forfeiture of the ship and cargo. Attorney-General v. Munn [1748], Parker 91, 145 Eng. Rep. 723, was an information 'on a seizure of several parcels of tobacco stalks as forfeited, by being imported contrary to the act 12 Geo. I, c. 28, § 13.' Malden v. Bartlett [1750], Parker, 105, 145 Eng.Rep. 727, was an information by the plaintiff suing for the King and himself. It was alleged that the plaintiff had seized a parcel of tobacco imported unlawfully. The statute provided that the tobacco be forfeited to the King and burned. Bartlett came in and claimed the property. The issues were tried by a jury. The Attorney General v. Parke [1793], 1 Anst. 240, 145 Eng. Rep. 860, was an information for forfeiture for violation of a statute relative to the making of glass. The Attorney General v. Brown [1796], 3 Anst. 720, 145 Eng.Rep. 1018, was an information for forfeiture of a cutter alleged to have been found out of the limits of her license in violation of law. On the same facts The Attorney General v. Roote [1796], 3 Anst. 726, 145 Eng.Rep. 1020. The Attorney General v. Sheriff [1801], Forrest, 41, 145 Eng.Rep. 1107, was an information for the forfeiture of a ship and cargo for unlawfully importing wines. The Attorney General v. Forge [1801], Forrest, 104, 145 Eng.Rep. 1127, was an information for the forfeiture of treble the value of candles possessed unlawfully. The statute also provided for forfeiture of the candles. The Attorney-General v. Wilson [1817], 3 Price, 431, 146 Eng.Rep. 311, was an information for condemnation of a ship and her cargo on the ground of illicit importation of flaxseed, etc. The Attorney-General v. Theakstone [1820], 8 Price, 89, 146 Eng.Rep. 1140, was an information for condemnation of a vessel after seizure for having prohibited gunpowder on board. The Attorney-General v. Jefferys [1824], 13 Price, 545, 147 Eng. Rep. 1077, was an information (of seizure in rem) for the condemnation of machines unlawfully packed for export. The statute (21 Geo. III, ch. 37, § 2) provided for forfeiture. The prayer was that the goods 'might remain forfeited.' The Attorney-General v. Vondiere [1834], 1 C.M. & R. 570, 149 Eng.Rep. 1207, was an information for the condemnation of 'silk waistcoats.' The goods had been illegally removed from a warehouse. The statute (3 & 4 Will. IV, ch. 52, sec. 28) provided that the goods 'together with all horses and other animals, and all carriages and other things made use of in the removal of such goods' be forfeited. Attorney-General v. Schiers [1835], 2 C.M & R. 286, 150 Eng.Rep. 124, was an information praying the forfeiture of a foreign vessel, seized by officers of the customs, for being found on the high seas within one league of the coast of the United Kingdom with contraband spirits aboard. The statute (3 & 4 Will. IV, ch. 53, § 2) provided for forfeiture of the vessel and goods. Attorney-General v. Catt [1837], 3 M. & W. 7, 150 Eng.Rep. 1033, was an information for being concerned in unshipping goods liable to duties; for concealing goods illegally shipped; and for 'harbouring' goods illegally imported. Attorney-General v. Le Revert [1840], 6 M. & W. 405, 151 Eng.Rep. 469, on like facts was tried by a jury and the vessel and goods forfeited. The Attorney-General v. Rogers [1843], 11 M. & W. 670, 152 Eng.Rep. 974, was 'an information filed against the defendant, a tobacconist, for penalties for mixing saccharine matter with tobacco in the course of manufacture, and for having in his possession saccharine matter for the purpose of using it in the manufacture of tobacco.' The statute provided for forfeiture of the tobacco (5 & 6 Vict. c. 93.) The Attorney-General v. Clerc [1844], 12 M. & W. 640, 152 Eng.Rep. 1355, was an information for the condemnation of foreign wines after seizure. The statute (5 & 6 Vict. ch. 47, § 18) provided for forfeiture. See also Anonymous Case XCIV, Jenk. 229, 145 Eng.Rep. 159; The Attorney General v. Woodmass [1727], Bunbury, 246, 145 Eng.Rep. 662; The Attorney-

"Cases involving penalties to the Crown, other than forfeiture of conveyances and goods, were also tried by a jury in the Court of Exchequer.[15]

"The determination of a question of fact by means of a jury, and public and oral procedure, was common to all the courts of law. Fischel, The English Constitution, 237, 238, 263. '* * * each form of action was started by a different writ and had its own pecularities, but there was one characteristic possessed by nearly all of them, the submission of issues of fact to a jury. It is true that the common law knew of other methods of trial; appeals of felony and writs of right might result in trial by battle, and the defendant in an action of debt or detinue could resort to "compurgation"; but, broadly speaking, one may say that actions in the common law courts

General v. Norstedt [1816], 3 Price, 97, 146 Eng.Rep. 203; The Attorney General v. Stevens [1816], 3 Price, 72, 146 Eng.Rep. 195; The Attorney General v. King [1817], 5 Price, 195, 146 Eng.Rep. 579; The Attorney General v. Delano [1819], 6 Price, 383, 146 Eng. Rep. 841; The Attorney General v. Kent [1819], 7 Price, 533, 146 Eng.Rep. 1052; The Attorney-General v. French [1819], 7 Price, 557, 146 Eng.Rep. 1060; The Attorney-General v. Goodman [1820], 8 Price, 220, 146 Eng.Rep. 1184; The Attorney-General v. Hall [1823], 11 Price, 760, 147 Eng.Rep. 629; Attorney-General v. Greaves [1835], 2 C. M. & R. 669, 150 Eng.Rep. 284. As stated, all of these cases were tried by a jury.

"15. Isabell Fortescues Case [1611], Lane, 91, 145 Eng.Rep. 324, was that a penalty be imposed upon her for recusancy (absence from church). An inquisition issued and the case was tried by a jury. In The Protector v. Sir Thomas Ashfield [1656], Hardres, 62, 145 Eng.Rep. 381, two parts of Ashfield's land were seized for recusancy. He pleaded conformity. The court held that before the lands could be forfeited to the King conformity must be tried by the common law. Stevens v. Duckworth [1775 or 1776], Hardres, 338, 145 Eng.Rep. 486, was an information 'tam quam' for forfeiture of five pounds a day for selling wines without a license. The Attorney General v. Brewster [1795], 2 Anst. 559, 145 Eng.Rep. 966, was an information for a penalty of 500 l. for concealing soap in violation of 1 Geo. I, st. 2, c. 31. The Attorney General v. Brown [1801], Forrest, 110, 145 Eng.Rep. 1129, was an information for penalties, for assisting in unshipping spirituous liquors and tobacco before the duties were paid. The Attorney General v. Saggers [1814], 1 Price, 182, 145 Eng. Rep. 1370, was for treble the value of goods unlawfully imported. The Attorney General v. Farr [1817], 4 Price, 122, 146 Eng.Rep. 414, was for assisting in unshipping prohibited and unaccustomed goods. The prayer was for treble the value of the goods. The Attorney General v. Horton [1817], 4 Price, 237, 146 Eng.Rep. 451, was an information for smuggling salt which had been seized. The Attorney-General v. Key [1830], 1 C. & J. 159, 148 Eng. Rep. 1375. An information for penalties (treble value) for 'harbouring' and concealing smuggled goods. See also The Attorney General v. Courtice [1821], 9 Price, 450, 147 Eng.Rep. 147; The Attorney General v. Vew Llette [1822], 10 Price, 9, 147 Eng.Rep. 225; The Attorney-General v. Freer [1822], 11 Price, 183, 147 Eng.Rep. 441; The Attorney-General v. Bevington [1822], 11 Price, 222, 147 Eng.Rep. 454; The Attorney General v. Tongue [1823], 12 Price, 51, 147 Eng.Rep. 653; The Attorney General v. Woolhouse [1823], 12 Price, 65, 147 Eng.Rep. 657; The Attorney-General v. Hatton [1824], M'Cle. 214, 148 Eng.Rep. 91; The Attorney General v. Good [1825], M'Cle. & Yo. 286, 148 Eng.Rep. 421; The Attorney-General v. Barrell [1827], 1 Y. & L. 495, 148 Eng.Rep. 766; The Attorney-General v. Key [1830], 1 C. & J. 159, 148 Eng.Rep. 1375; The Attorney-General v. Siddon [1830], 1 C. & J. 220, 148 Eng.Rep. 1400; The Attorney General v. Slee [1824], M'Cle. 567, 148 Eng.Rep. 237; The Attorney-General v. Key [1831], 2 C. & J. 2, 149 Eng.Rep. 1; The Attorney-General v. Dyer [1834], 2 C. & M. 664, 149 Eng.Rep. 927; The Attorney General v. Tomsett [1835], 2 C. M. & R. 170, 150 Eng.Rep. 73; The Attorney-General v. Kenifeck [1837], 2 M. & W. 715, 150 Eng.Rep. 944; The Attorney General v. Hurel [1843], 11 M. & W. 585, 152 Eng.Rep. 938; The Attorney-General v. Lockwood [1842], 9 M. & W. 378, 152 Eng.Rep. 160; The Attorney-General v. Bailey [1846], 16 M. & W. 74, 153 Eng.Rep. 1104. See also Hale's Pleas of the Crown, vol. I, pp. 493, 530; Gilbert, a Treatise on the Court of the Exchequer, 62–64.

were tried by jury.' Radcliffe & Cross, The English Legal System, p. 83. Blackstone says: 'For it is a part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon or seise any man's possessions upon bare surmises without the intervention of a jury.' 3 Bl.Com. 259.[16]

"The common-law courts in the Colonies and in the states during the period of Confederation exercised jurisdiction *in rem* in the enforcement of forfeiture statutes. In general the actions were brought against the article to be condemned, were tried by jury, closely followed the procedure in the Court of Exchequer,[17] and, if successful, resulted in judgments of forfeiture or condemnation with a provision for sale.[18]

"In C. J. Hendry Co. v. Moore, supra, 318 U.S. 133, 63 S.Ct. 499, 510, 87 L.Ed. 663, 675, it was said that the court 'has repeatedly declared that, in cases of forfeiture of articles seized on land for violation of federal statutes, the district courts proceed as courts of common law according to the course of the Exchequer on informations in rem *with trial by jury*. The Sarah, 8 Wheat. 391, 396, note (a) [21 L. Ed. 391], 5 L.Ed. 644 [645]; 443 Cans of Frozen Egg Product v. United States, 226 U.S. 172, 33 S.Ct. 50, 57 L.Ed. 174, and cases cited.' (Italics added.)[19]

"In exhaustive opinions the Court of Appeals of New York in Colon v. Lisk, 1897, 153 N.Y. 188, 47 N.E. 302, 60 Am.St.Rep.

"16. 'Actions *qui tam* are such as are given by acts of parliament, which impose a penalty, and create a forfeiture for the neglect of some duty, or commission of some crime, to be recovered by action or information, at the suit of him who prosecutes as well in the king's name as in his own.' Bacon's Abridgement, 5th ed. vol. 1, p. 61. Bacon says that most penal statutes directed that the penalty might be recovered by action or information, and 'a new trial may be had after a *verdict* for the defendant. Wilson v. Rastall, 4 Term.Rep. 753,' (idem. italics added), and 'Such information may demand what is due to the informer, without mentioning what is due to the king; also, if the *quantum* depend *on what shall be found by the jury*, a blank may be left for the sum,' (idem. 63. Italics added) and 'Also where a statute limits suits by an informer qui tam to other courts, yet any one may, by construction of law, exhibit an information in the Exchequer for the whole penalty, for the use of the king,' (idem. 65) and 'If the jury find a general verdict with one penalty for the plaintiff, and he apply it to one count, he shall not be permitted afterwards to apply it to another count * * *.' (idem. 69.) 3 Bl.Com. 258, 259; Kent's Commentaries, 13th ed. vol. I, pp. 375–378.

"17. The procedure under the common law in the Court of Exchequer for the forfeiture of property used in violation of law was similar to that prescribed by the Health and Safety Code. Attorney General v. Lade [1745], Parker, 57, 145 Eng.Rep. 712; Malden v. Bartlett [1750], Parker, 105, 145 Eng.Rep. 727; 13 & 14 Chas. II, c. 11, s. 28; 31 Eliz. c. 5, s. 5; 3 Geo. III, c. 22, s. 1, 6; 6 Geo. III, c. 19, s. 3, 4, 6, 10; 21 Geo. III, c. 37, s. 6, 7, 8, 9; 26 Geo. III, c. 77, s. 13; 45 Geo. III, c. 121, s. 13, 14.

"18. Footnotes 4, 5, and 6 to the opinion in C. J. Hendry Co. v. Moore, 318 U.S. 133, 63 S.Ct. 499, 87 L.Ed. 663, contain references to many such cases. In Virginia by 1690 forfeiture cases under the Navigation Acts were tried at common law by a jury. In Maryland forfeiture cases were tried generally in courts of oyer and terminer acting with the jury. In Massachusetts forfeiture cases under the Navigation Acts were regularly tried by the Court of Assistants before juries, apparently in the same manner as other common-law cases. In New Jersey proceedings to condemn forfeited property were tried by a jury as early as 1685. In Pennsylvania forfeiture cases under the Navigation Acts were tried in the common-law courts by a jury. In New Hampshire forfeiture cases were tried in the court of common pleas with a jury as early as 1679. In Connecticut a cargo of a vessel was condemned by a jury in the county court in 1692. In Maine a vessel was cleared by a jury in 1680. Idem. footnote 4. In New York before 1691 forfeiture cases were tried in the General Quarter Sessions of the Peace with a jury; after 1691 in the Supreme Court of Judicature with a jury. C. J. Hendry Co. v. Moore, 318 U.S. 133, 63 S.Ct. 499, 87 L.Ed. 663, 670, and footnotes 5–9.

"19. See also Garnhart v. U. S., 16 Wall. 162, 83 U.S. 162, 21 L.Ed. 275, 276; The J. W. French, D.C., 13 F. 916, 924; 651 Chests of Tea v. United States, 22

609,[20] the Supreme Court of Oklahoma in Keeter v. State, 1921, 82 Okl. 89, 198 P. 866, 17 A.L.R. 557,[21] and the Supreme Court of Oregon in State v. 1920 Studebaker Touring Car, 1926, 120 Or. 254, 251 P. 701, 50 A.L.R. 81,[22] held that before a claimant can be deprived of his property in proceedings of this kind he is entitled to a trial by jury as a matter of constitutional right.[23] * * *

[9] "The right of trial by jury did not exist at common law in a suit to abate a public nuisance. People v. McCaddon, 48 Cal.App. 790, 792, 192 P. 325. Hence it is not a constitutional right now.

[10, 11] "Automobiles, carriages, wagons, horses, and mules, that are ordinarily used for lawful purposes, cannot be classified with narcotics, gambling paraphernalia, counterfeit coins, diseased cattle, obscene books and pictures, decayed fruit and fish, unwholesome meat, infected clothing, or other contraband, which are ordinarily used for an unlawful purpose, and are public nuisances *per se*.[24] While property kept in violation of law which is incapable of lawful use and declared to be a nuisance *per se* may be forfeited without a trial by jury under the police power, it does not follow that property ordinarily used for lawful purposes—innocent property—may be forfeited without a trial by jury where an issue of fact is joined as to whether the property was being used for an unlawful purpose or is to be taken from an innocent owner. There is no general constitutional right to a jury trial in actions for the seizure and forfeiture of contraband articles.[25] But property is not contraband or a public nuisance merely because it was instrumental in the commission of a public offense.

[12, 13] "It is argued that this proceeding for the forfeiture of property used in violation of law is a special proceeding, equitable in nature. * * * The right to a trial by jury cannot be avoided by merely calling an action a special proceeding or equitable in nature. If that could be done, the Legislature, by providing new remedies and new judgments and decrees in form equitable, could in all cases dispense with jury trials, and thus entirely defeat the provision of the Constitution. The Legislature cannot convert a legal right into an equitable one so as to infringe upon the right of trial by jury.[26] The provision of the Constitution does not permit the Legislature to confer on the courts the power of trying according to the course of chancery any question which has always been triable according to the course of the common law by a jury. If the action has to deal with ordinary common-law rights cognizable in courts of law, it is to that extent an action at law.[27] In determining whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case—the gist of the action. A jury trial must be granted where the gist of the

Fed.Cas. page 253, No. 12,916, 1 Paine 499; United States v. Yamoto, 9 Cir., 50 F.2d 599.

"20. See same case below Colon v. Lisk, 13 App.Div. 195, 43 N.Y.S. 364.

"21. The charge was using an automobile to transport liquor in violation of law. The Oklahoma statute expressly provided that the hearing be 'without a jury.' 37 O.S.1941 § 112.

"22. The statute provided that the return of seizure should be tried without a jury. The lower court forfeited the automobile of the appellant because her husband drove it with a pint of whisky in his pocket. She did not know that her husband carried the whisky in the car.

"23. See also Lorance v. State, Tex.Civ. App., 172 S.W.2d 386; Donovan v. Mayor etc. of Vicksburg, 29 Miss. 247, 249, 64 Am.Dec. 143.

"24. See State v. Intoxicating Liquor, 55 Vt. 82; State v. Certain Intoxicating Liquors, 53 Utah 171, 177 P. 235.

"25. See Moore v. Brett, 193 Okl. 627, 137 P.2d 539, 540; People v. One Pinball Machine, 316 Ill.App. 161, 44 N.E.2d 950, 957.

"26. Norris's Appeal, 64 Pa. 275, 280.

"27. Donahue v. Meister, 88 Cal. 121, 127, 25 P. 1096, 22 Am.St.Rep. 283; Cassel v. Gregori, 28 Cal.App.2d Supp. 769, 774, 70 P.2d 721.

action is legal, where the action is in reality cognizable at law.

[14–16] "It is suggested that the statute was enacted since the adoption of the Constitution, and for that reason is not within the guaranty of trial by jury. The constitutional right of trial by jury is not to be narrowly construed. It is not limited strictly to those cases in which it existed before the adoption of the Constitution but is extended to cases of like nature as may afterwards arise. It embraces cases of the same class thereafter arising. At common law, prior to the adoption of the Constitution, a party against whom the forfeiture of property used in violation of law (then a carriage, wagon, horse or mule, now usually an automobile), was sought to be enforced was entitled to a trial by jury. Consequently such right exists now.[28] The introduction of a new subject into a class renders it amenable to its general rules, not to its exceptions.[29]

"There were petty offenses against statutes or municipal ordinances which were not triable by jury at the time the Constitution was adopted. As to them, the right of trial by jury has never existed; and, since they were triable without a jury when the Constitution was adopted, they are now triable without a jury. Blackstone gives a number of illustrations.[30] In none of the illustrations given by Blackstone was the power sanctioned or upheld to enforce, in a summary proceeding, without a jury, the forfeiture of property which may be, and ordinarily is, used for lawful purposes. * * *

[17] "We conclude that this forfeiture proceeding by the State is the type of action which was cognizable in a common-law court, and triable by a jury in the Court of Exchequer, according to the course of the common law; that trial by jury was recognized as a right in the trial of actions for the forfeiture of property seized because used in violation of law at common law at the time of the adoption of the Constitution of California, and that appellant had a constitutional right to a trial by jury of the issues of fact in this case.

[18] "The denial of a trial by jury to one constitutionally entitled thereto constitutes a miscarriage of justice and requires a reversal of the judgment. Cowlin v. Pringle, 46 Cal.App.2d 472, 476, 116 P.2d 109."

The Attorney-General contends: (1) that this conclusion has been rejected by a majority of the states that have considered the question; (2) that the federal practice denies lienholders a jury trial; (3) that at least three decisions of this state have held that such a proceeding is equitable in nature; (4) and that cases before 1849 in which jury trials were allowed involved forfeitures for violation of revenue and maritime laws and are not authority for forfeitures founded on the police power.

(1) It is true that a number of states have denied the right to a jury trial in forfeiture proceedings. An examination of the cases cited by the Attorney-General, however, shows that in none of them was the problem adequately discussed in terms of the common law practice in England and the United States before 1850.

(2) In determining questions of forfeiture on the high seas, the federal courts sit as courts of admiralty and, in accordance with historic admiralty practice, there is no right to a jury trial. In cases of forfeiture arising on land, however, there is a right to a jury trial. Union Insurance Co. v. United States, 6 Wall. 759, 73 U.S. 759, 764–766, 18 L.Ed. 879; In re Armstrong's Foundry, 6 Wall. 766, 73 U.S. 766, 769; United States v. Yamoto, 9 Cir., 50 F.2d 599, 600; see also Dobbins Distillery v. United States, 96 U.S. 395, 404, 24 L.Ed. 637; Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 509, 41 S.Ct. 189, 65

"28. Colon v. Lisk, 13 App.Div. 195, 202, 43 N.Y.S. 364, 369; State v. 1920 Studebaker, 120 Or. 254, 251 P. 701, 50 A.L.R. 81.

"29. Wood v. City of Brooklyn, 14 Barb. N.Y., 425, 432; Cooley, Constitutional Limitations, 8th ed. vol. I, pp. 668–674. Cf. Moore v. Purse Seine Net, 18 Cal.2d 835, 837, 118 P.2d 1.

"30. 4 Bl.Com. (12th ed.), ch. 20, 281 et seq.

L.Ed. 376; 1 Kent's Commentaries 375–376.

The Attorney-General has cited two federal decisions under the National Prohibition Act that apparently hold that, whatever the rights of the party in possession of the vehicle, a lienholder has no right to a jury trial. Missouri Investment Corp. v. United States, 6 Cir., 32 F.2d 511; C. I. T. Corp. v. United States, 10 Cir., 37 F.2d 890, 891. In the earlier of these cases, cited and followed in the later case, the court stated that, "The nature of the proceedings which may be taken under title 2, § 26, of the National Prohibition Act (27 U.S.C.A. § 40), by the claimant of the seized vehicle, is not made very clear. We think, however, that such a petition as this is in the nature of an intervening petition in equity." 32 F.2d at 511. Whether or not this interpretation of that act can be considered authoritative in the federal courts, see United States v. Yamoto, 9 Cir., 50 F.2d 599, 600, we do not subscribe to the reasoning on which it rests.

Two theories appear to underlie the conclusion that a lienholder in a forfeiture action is merely a petitioner in equity. The first theory is that the statute has combined in a single proceeding what were formerly two actions: (1) a common law action for declaration of forfeiture and (2) an equitable suit to foreclose a lien. It is argued that under ordinary circumstances the lienholder has only an equitable remedy to enforce his lien and that he gains no right to a jury trial merely because that remedy is joined with a forfeiture action triable by jury.

[19, 20] Although the suit by the state is nominally in rem against the vehicle itself, in reality it is directed against those who have property interests in the vehicle. The automobile is not itself an offender but has merely been used in the commission of an offense. The statute operates to transfer property rights in the automobile to the state, as a penalty against the owners for this misuse. In People v. Broad, supra, 216 Cal. 1, 3, 7, 12 P.2d 941, an earlier statute on this subject was declared unconstitutional because of its failure to provide notice and hearing for interested parties other than the narcotics offender. That case clearly recognized, moreover, that the forfeiture is directed against all owners, and in fact the owner involved in that case was the assignee of the seller under a conditional sale contract. See also Ieck v. Anderson, 57 Cal. 251, 252. The present statute provides that notice shall be given to owners, Health & Safety Code, § 11613, which includes legal owners such as appellant, Vehicle Code, §§ 67, 197, and that they may file answers, Health & Safety Code, §§ 11619, 11620.

[21] It is true that the forfeiture does not apply to innocent lienholders. It does not follow, however, that lienholders are not parties to the forfeiture. One of the purposes of the forfeiture proceeding is to determine whether or not the lienholder is in fact "innocent." With respect to the issue of reasonable investigation of the registered owner, Health & Safety Code, § 11620, as well as the issue of the narcotics offense, Health & Safety Code, § 11619, the appellant is vitally concerned, for unless there is an adverse decision on both of these issues, appellant's interest in the vehicle is not forfeited to the state. It is therefore a misconception to regard appellant as interested only in the establishment and foreclosure of its lien—it is also interested in protecting that lien from the claim against it that is being asserted by the state.

A second theory underlying the federal cases cited by the Attorney-General is that a lienholder is an intervenor and that, since intervention was not allowed at common law, his position is analogous to that of an intervening petitioner in equity. This argument overlooks the extensive use of intervention permitted under our modern system of code pleading, even as to actions formerly tried in the common law courts. It also overlooks an essential difference between the National Prohibition Act and the statute now before us. By the National Prohibition Act, 27 U.S.C.A. § 40, the declaration of forfeiture was made a part of the criminal action in which the party guilty of illegally transporting liquor was prosecuted; after his conviction, lienhold-

ers were permitted to intervene. The present California procedure, however, does not combine the forfeiture action with the criminal prosecution. The forfeiture is litigated in an independent proceeding in which a lienholder is not an intervener but rather, in compliance with People v. Broad, supra, a necessary party defendant. As noted above, the statute itself expressly refers to his pleading as an "answer", Health & Safety Code, §§ 11619, 11620.

(3) In Traffic Truck Sales Co. v. Justice's Court, 192 Cal. 377, 384, 220 P. 306, it was stated that a forfeiture proceeding such as that under consideration herein is in the nature of an equitable proceeding. No issue of jury trial was presented, however, and the court did not consider the historical background of forfeiture statutes. In reliance on this decision, similar statements appear in People v. One 1941 Mercury Sedan, 74 Cal.App.2d 199, 202, 168 P.2d 443, and People v. One 1941 Chrysler Sedan, 81 Cal.App.2d 18, 30, 183 P.2d 368. In view of the conclusion reached in the present case, these expressions must now be regarded as disapproved.

(4) Contrary to the contention of the Attorney-General, a number of the forfeitures cited herein did involve exercise of the police power. See, for example, Jenkinson, Select Cases in the Exchequer of Pleas, 48 Selden Society Publications, p. 168, #215 [piracy, robbery, and homicide]; 4 W. & M., c. 8, § 6 [robbery]; 1 James I, c. 22 [trade regulation]; 42 Geo. III, c. 38, § 20 [unhealthful adulterated beer]. See also Mitchell v. Torup, 145 Eng.Rep. 764, 767.

The judgment is reversed.

EDMONDS, Justice (dissenting).

The question here presented for decision concerns only the right of the corporate mortgagee of the seized automobile to a trial by jury. In effect, by an affirmative defense, the corporation is seeking to establish and to foreclose a lien upon the vehicle.

The position of a lienholder is substantially different from that of an owner of property seized and ordered to be sold because of an asserted violation of law. The foreclosure of a chattel mortgage is an equitable proceeding, Elmore Jameson Co. v. Smith, 34 Cal.App.2d 609, 616, 93 P.2d 1063; Bush v. Bank of America, 1 Cal.App.2d 588, 592, 37 P.2d 168, and it is elementary in equity cases that there is no right to a trial by jury. J. I. Case Threshing Machine Co. v. Copren Bros., 45 Cal.App. 159, 167, 187 P.2d 772. This general rule has been followed in forfeiture proceedings. For example, in Missouri Investment Corp. v. United States, 6 Cir., 32 F.2d 511, the holder of a chattel mortgage sought to establish its lien in accordance with the provisions of the Volstead Act. The statute authorized forfeiture of any vehicle used for the unlawful transportation of intoxicating liquor but allowed a lienholder to obtain the amount due from the owner if the seizure was upheld. The procedure specified was substantially the same as that provided in sections 11620–22 of the Health and Safety Code of this state. In that case, it was said: "The court, through the order for sale, has at least constructive possession of the property, and the determination of the liens upon it is essentially a matter of equitable jurisdiction. It follows that there was no right to a jury trial * * *." Ibid.

The decision was cited and followed in C. I. T. Corp. v. United States, 10 Cir., 37 F.2d 890. There the claimant was the assignee of a conditional sales contract of an automobile ordered forfeited under the Volstead Act. The court found that the contract was a chattel mortgage and held: "* * * the intervention is equitable in character, being designed to enforce a lien * * *." 37 F.2d 890, 891.

True, there are cases which appear to hold to the contrary, but in not one of them was the court's attention directed to the distinction between the position of an owner of property and a mortgagee. The applicant in United States v. Yamoto, 9 Cir., 50 F.2d 599, was the holder of a conditional sales contract of a vehicle ordered forfeited under the Volstead Act. No question concerning the right of trial by jury was raised at the trial of the action and the case was heard by the court. On appeal from a judg-

ment in favor of the claimant, it was held that the action was one at law, triable by a jury, and since a jury had not been waived "in the manner prescribed by law", the appellate review was limited to a consideration of the process, pleadings and judgment.

That conclusion was based upon Kennedy v. United States, 9 Cir., 44 F.2d 57. The court held that a seizure on land is not within the admiralty jurisdiction of the United States and the proceeding for forfeiture was, therefore, an action at law, triable by jury. In the Yamoto case, no reference was made to cases in which lienholder's claimed the right to foreclose but looked only to the place of seizure as the basis for its decision.

For these reasons, I would hold that a mortgagee seeking to establish and to foreclose lien upon seized property is not entitled to a trial by jury upon those issues.

37 Cal.2d 385

PEOPLE v. MEICHTRY.

Cr. 5195.

Supreme Court of California, in Bank.

June 5, 1951.

Rehearing Denied June 28, 1951.

Joseph Emal Meichtry was convicted in the Superior Court of Los Angeles County, Charles W. Fricke, J., for assault with intent to rape, and he appealed. The Supreme Court, Shenk, J., held that the evidence was sufficient to show that defendant committed assault with intent to have carnal knowledge of the victim against her will and for that purpose to use whatever force might be required.

Judgment affirmed.

Prior opinion, 224 P.2d 854.

1. Criminal law ⇐1159(5)

In reviewing application for reduction of degree of crime, appellate court may not judge credibility of witnesses nor weigh evidence but may consider only its sufficiency as a matter of law.

2. Rape ⇐16(1)

The crime of assault with intent to rape is complete if at any moment during the assault the accused intends to have carnal knowledge of the victim against her will, and to use for that purpose whatever force may be required. Pen. Code, § 220.

3. Rape ⇐57(5)

Whether defendant accused of assault with intent to rape had requisite intent is question for jury to determine from conduct of defendant and surrounding circumstances, and existence of intent becomes question for court only when facts afford no reasonable grounds for inference that the intent existed. Pen.Code, § 220.

4. Rape ⇐53(3)

Evidence was sufficient to show that defendant, accused of assault with intent to rape, committed an assault with intent to have carnal knowledge of victim against her will and for that purpose to use whatever force might be required. Pen.Code, § 220.

5. Rape ⇐16(1)

Exposure of defendant's sexual organs is not essential to crime of assault with intent to rape. Pen.Code, § 220.

6. Rape ⇐16(2)

Sexual capacity is not matter for consideration, in prosecution for assault with intent to rape, in the absence of offer of any evidence that defendant was impotent. Pen.Code, § 220.

7. Rape ⇐53(2)

Absence of immediate outcry by prosecutrix does not conclusively refute hypothesis of guilt of crime of assault with intent to rape. Pen.Code, § 220.

8. Criminal law ⇐825(1)

If defendant desires a more specific instruction his proper course is to request it.

9. Criminal law ⇐814(10)

Failure to instruct on intoxication of defendant, accused of assault with intent to rape, was not prejudicial error, where defendant did not base his defense on

ground of intoxication and there was no substantial evidence showing that defendant was in such a state of intoxication as would require the trial court, notwithstanding defendant's failure to request such an instruction, to give an instruction on the subject.

10. Criminal law ⇐824(3)

Failure to instruct as to lesser included offense of simple assault was not prejudicial error to defendant, accused of assault with intent to rape, where defendant failed to request instruction, and evidence supported verdict of guilty of assault with intent to rape. Pen.Code, § 220.

11. Criminal law ⇐1037(1)

Deputy district attorney's use of expression "Bang! Bang!" in examination of prosecutrix could not be reviewed on appeal from judgment of conviction for assault with intent to rape where defendant did not object at trial and any prejudicial impression could have been removed by admonition if objection had been made. Pen.Code, § 220.

12. Rape ⇐34(1)

Information for assault with intent to rape was sufficient in charging defendant with the intent then and there, and by force and violence, to have and accomplish the act. Pen.Code, §§ 220, 261, subd. 3; 950, subd. 2.

Morris Lavine, Los Angeles, for appellant.

Fred N. Howser and Edmund G. Brown, Attys. Gen., and Donald D. Stoker, Deputy Atty. Gen., for respondent.

SHENK, Justice.

The defendant appealed from a judgment entered on a verdict of guilty of assault with intent to commit rape. He questions the sufficiency of the evidence to support the implied finding that he had the intent as charged. He also claims that there was prejudicial error in the giving of instructions and that he was prevented from having a fair trial by asserted misconduct of the district attorney. He seeks a reversal of the judgment or a reduction of the degree of the crime to that of simple assault.

The information charged that the defendant committed the crime of assault with intent to commit rape on Bertha Kieber on November 19, 1949. The jury found him guilty as charged.

The defendant is fifty-one years of age, is married and has a young daughter He is Bertha Kieber's uncle and godfather. He had lived in the home of Bertha's father for about ten years prior to the establishment of his own home. Bertha was 29 years of age, married and the mother of a two year old boy. Their homes were a few miles apart.

The Kiebers had been working on the construction of their home with some help from the defendant. About 10:30 on the morning of November 19, 1949, after Bertha's husband and her brother-in-law, who had quarters in a separate house on the premises, had left for their employment, the defendant called unexpectedly. Bertha offered him coffee which he refused because he had had beer. The young son was playing in a pen in the yard. The record shows that after some general conversation concerning domestic matters and construction details the defendant made improper advances toward Bertha; that he pushed her into the bedroom and on to the bed; that she kicked and otherwise struggled; that the defendant released her only when she feigned alarm by saying that some one was coming and she ran into the kitchen; that in the kitchen she slapped him and told him to leave and that he left about noon. She told her husband of the incident on his return from employment and they reported the matter to the police. Bruises appeared on Bertha's right arm, she complained of internal injuries and went to a physician for examination.

The defendant was apprehended and he related to the officers a story substantiating the details reported by Bertha. In explanation of why he did it, he said he

thought "Bertha was ready" and that he "could make out with her." He admitted that she struggled and that the struggle was broken when she said some one was coming. On the stand he told a different story implying that Bertha, rather than he, was the intending paramour.

[1] The defendant contends that the evidence is insufficient to support the verdict because there is lacking proof of any act or conduct on his part which showed an intent to use whatever force might be required to accomplish the act, and that at most he was guilty of simple assault. In reviewing an application for a reduction of the degree of the crime an appellate court may not judge the credibility of the witnesses nor weigh the evidence but may consider only its sufficiency as matter of law. People v. Thomas, 25 Cal.2d 880, 905, 156 P.2d 7.

[2, 3] The essential element of the offense charged is the intent to commit the act against the will of the complainant. The offense is complete if at any moment during the assault the accused intends to use whatever force may be required. People v. Stewart, 97 Cal. 238, 32 P. 8. The question whether the intent existed is one for the jury to determine from the conduct of the defendant and the surrounding circumstances. A determination by the court is permissible only when the facts afford no reasonable ground for an inference that the intent existed. See also People v. Woods, 75 Cal.App.2d 246, 170 P.2d 477; People v. Lutes, 79 Cal.App. 2d 233, 179 P.2d 815.

[4] The record of the complainant's testimony and the defendant's voluntary admissions clearly establishes a question for the jury on the issue of intent, and supports the implied conclusion that the defendant had the requisite intent which he did not abandon until the complainant's feigned alarm.

[5, 6] The defendant urges an insufficiency in the evidence because there was no testimony that he was exposed so as to be able to complete the act. The stated test for the determination of the existence of the intent does not include exposure as an element. Nor is sexual capacity a matter for consideration in the absence, as here, of the offer of any evidence that the defendant was impotent.

[7] The absence of an immediate outcry on the part of the complainant does not conclusively refute the hypothesis of guilt. People v. Norrington, 55 Cal.App. 103, 108, 202 P. 932. There was sufficient corroborating evidence from the defendant himself to justify the jury's acceptance of her story. The presence of evidence from which the jury could infer the requisite intent distinguishes this case from others, such as People v. Manchego, 80 Cal. 306, 22 P. 223; People v. Fleming, 94 Cal. 308, 29 P. 647; and Commonwealth v. Merrill, 14 Gray, Mass., 415, 77 Am.Dec. 336, relied on by the defendant.

[8] The jury was correctly instructed concerning the elements required to establish the offense charged, including the element of intent, in the language of the code sections. Thereby the jury was in substance admonished that the required intent was not present unless the defendant intended to commit the act by force and violence sufficient to overcome any resistance offered by the complainant. There is therefore no merit in the contention that the court failed to instruct the jury specifically that the offense was not committed unless there was proof of an intent to overcome resistance by force and violence. If the defendant wanted a more specific instruction his proper course was to request it. People v. Carothers, 77 Cal.App.2d 252, 255, 175 P.2d 30.

[9] Nor was there error in the failure to give an instruction on intoxication. The defendant did not base a defense on that ground nor request an instruction. There is nothing in the record which would support a conclusion that he was in that state of intoxication which would require the trial court to give an instruction on the subject notwithstanding his failure to request it. People v. Coston, 82 Cal. App.2d 23, 41, 185 P.2d 632.

[10] The defendant contends that the court's failure to instruct on the lesser included offense of simple assault was

prejudicial error. Neither the People nor the defendant requested the instruction. The former rested the outcome on the establishment of the elements of the charge. The defendant apparently believed that the People would not establish the requisite intent and therefore staked his chances on an acquittal. Since the record discloses support for the elements of the offense for which he was convicted, the defendant is not in a position to complain that a miscarriage of justice resulted because of the failure to instruct the jury regarding the inclusion of the lesser offense. People v. Perhab, 92 Cal. App.2d 430, 438, 206 P.2d 1133, and cases cited. This state of the evidence likewise precludes any justification for the requested reduction of the degree.

[11] The defendant was not prevented from having a fair trial by reason of alleged misconduct of the deputy district attorney which he claims occurred during the examination of the complaining witness regarding the length of time the struggle continued. In characterizing her testimony that she was "fighting all the time with him", the deputy district attorney used the words "Bang! Bang!" before proceeding to the next question. This the defendant designates as "impetuous and forceful conduct before the jury." There was no assignment of misconduct at the trial. There is nothing to indicate that if objection had been taken an admonition by the court would not have removed any possible prejudicial effect. The objection at this time comes too late. People v. Gray, 52 Cal.App.2d 620, 658–660, 127 P.2d 72.

[12] The final contention is that the information fails to state an offense because it did not charge that the defendant intended to overcome resistance by force. There was no demurrer and the point is raised for the first time on the appeal. However, the information was sufficient in charging the defendant "with the intent then and there, and by force and violence, to have and accomplish" the act. The charge is substantially in the language of sections 220 and 261, subd. 3, Pen.Code. It conforms to the requirements for a statement in ordinary and concise language and was sufficient to enable the defendant as a person of common understanding to know what was intended. (Sec. 950, subd. 2, Penal Code.)

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

37 Cal.2d 380

PEOPLE v. OSBORN.

Cr. 5169.

Supreme Court of California.

June 5, 1951.

Claude L. Osborn was convicted of first degree murder in the Superior Court for Fresno County, Strother P. Walton, J., and an automatic appeal was taken from the judgment for defendant. The Supreme Court, Spence, J., held that the evidence sustained the conviction and that remarks of the trial court in response to questions of the jurors as to the penalty to be imposed were not improper.

Judgment affirmed.

1. Homicide ⇐230

Evidence sustained conviction of first-degree murder as against defense of lack of intent to kill.

2. Homicide ⇐18(5)

Where injuries to deceased resulting in his death were inflicted by defendant in perpetration of robbery, the crime constituted murder of the first degree, notwithstanding lack of intent to kill by defendant. Pen. Code, § 189.

3. Criminal law ⇐438

In murder prosecution admitting photographs of body of deceased taken at scene of the crime, showing position of body, and nature of wounds, was not error.

4. Criminal law ⇐863(2)

In murder prosecution statements of trial judge in answer to questions asked by jurors with respect to parole of defendant in case a penalty of life imprisonment was imposed were not improper.

N. Lindsay South, Fresno, for appellant.

Fred N. Howser and Edmund G. Brown, Atty. Gen., Clarence A. Linn and Gail Strader, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

Defendant was charged with the murder of Ejnar Thorwald Asmussen, which murder was alleged to have occurred in Fresno County on or about April 10, 1950. He pleaded not guilty and admitted a prior felony conviction in Washington of second degree assault. Upon a trial by jury, defendant was found guilty of first degree murder without recommendation. No motion for new trial was made and judgment was entered imposing the extreme penalty. This is an automatic appeal from such judgment. Penal Code, § 1239(b).

[1, 2] Appellant contends that (1) the evidence was insufficient to sustain the judgment; (2) the trial court committed prejudicial error in admitting in evidence certain photographs; and (3) the trial court committed prejudicial error in making certain statements in answer to questions asked by the jurors. A review of the record, however, shows that these contentions cannot be sustained, and that the judgment should be affirmed.

The deceased, a frail man of about "60 years or past" weighing about 125 pounds, lived alone in a cabin or "dugout" some four miles above Toll House in Fresno County. Appellant, a young man of about 35 years of age and a brick mason by trade, had previously served several years in the army. There were no eyewitnesses to those acts of appellant which caused the death of the deceased. Appellant at first denied knowing the deceased and later told conflicting stories, but upon the trial he testified that he had inflicted the injuries upon the deceased on the day in question and had left the deceased tied in his cabin in the manner hereinafter described. His testimony, however, was to the effect that the injuries were inflicted in an altercation which had been started by the deceased. All of the other testimony, however, clearly indicated that appellant inflicted the injuries upon the deceased in the perpetration of robbery. The only claim now made by appellant with respect to the alleged insufficiency of the evidence is that the "evidence from every witness that connected defendant with the fight stated that according to defendant's statement there was no intention on the part of defendant to kill."

The body of the deceased was found in a battered and decomposed condition on the floor of his cabin on April 20, 1950. The clothing consisted of a shirt and pants but no shoes or socks. Deceased's hands were found to be securely tied behind his back. The sheriff and coroner were summoned and pictures were taken at the scene. One of the pockets of deceased was turned partly inside out as if the man had been searched. The cabin was in complete disarray with the chair overturned, the mattress "turned back off" the bed, the "covers were all messed up" and "all of the cans" of food were open.

The autopsy surgeon testified that in his opinion the deceased had probably lived for some time after receiving his injuries, and that he had died several days before his body had been found. He further testified at length concerning the numerous injuries inflicted upon the deceased. His finding was that the terminal cause of death was coronary thrombosis, a clotting of the blood vessels within the heart. He summarized his testimony as follows: "the thing that really caused this man's death of course was the coronary thrombosis, contributed to by multiple bruises and abrasions, fractures of the 8th and 9th ribs on the right side, and fractures of the transverse process of the first and second lumbar vertebra, right side, and gangrenous changes of both hands listed due to the constriction of the rope on the wrists." With respect to the effect of the fractures of the ribs and vertebrae, he tes-

tified that it would have been extremely painful for deceased to have moved, or to have attempted to do so.

In view of those portions of appellant's testimony in which he admitted that he had inflicted the extensive injuries upon the deceased, it seems clear that the jury was not bound to believe those other portions of his testimony or of his prior statements to the effect that he had not intended to kill the deceased. Considering all of the evidence, the jury might well have concluded that appellant had intended to kill the deceased, and that he had left the cabin believing that deceased was in fact dead. Furthermore, the question of whether appellant actually intended to kill the deceased is not of paramount importance in considering the sufficiency of the evidence here, in view of the other testimony showing that the injuries to the deceased which resulted in his death were inflicted by appellant in the perpetration of robbery. Thus it has been held that any killing, intentional or otherwise, committed in the perpetration of one of the felonies specified in section 189 of the Penal Code, constitutes murder of the first degree. People v. Valentine, 28 Cal.2d 121, 135–136, 169 P.2d 1; People v. Denman, 179 Cal. 497, 498–499, 177 P. 461; People v. Milton, 145 Cal. 169, 171–172, 78 P. 549.

It appears from the testimony of several witnesses that appellant inflicted the injuries while perpetrating the robbery of the deceased. Samuel Donabedian testified that appellant had told him that he knew a fellow in the mountains who had a practice of flashing money around and that he would go up and take it away from him. Later, appellant told this witness that he had seen the old man; that he got in a fight with him; that he got a couple of dollars and left him tied up. William Osborn, appellant's half brother, testified that after the discovery of the body appellant told him that he hit and robbed the old man and got $2.38. Walter Hankel testified that appellant told him that he had robbed an old man in the mountains after beating him up and tying his hands, stating "Yes, I really beat the hell out of him." In view of this evidence, which was no doubt believed by the jury, there can be no question concerning the sufficiency of the evidence to sustain the verdict of first degree murder. In this connection, it should be stated that appellant does not claim that there was any error in the giving or refusing of instructions relating to the degrees of murder.

[3] Appellant's second contention, relating to the admission, over objection, of the photographs of the body of the deceased taken at the scene, is likewise without merit. These pictures showed the tied hands and the condition of the body, including the nature of certain wounds inflicted, all of which showing was relevant to the question of whether a criminal agency had brought about the death of the deceased. Such pictures have consistently been held to be admissible in evidence in murder trials. People v. Green, 13 Cal.2d 37, 43, 87 P.2d 821; People v. Goodwin, 9 Cal.2d 711, 714, 72 P.2d 551; People v. Shaver, 7 Cal.2d 586, 591–592, 61 P.2d 1170; see, also, note in 159 A.L.R. 1414.

[4] The final contention of appellant relates to the statements of the trial court given in answer to questions asked by the jurors when they returned to the courtroom during the course of their deliberations. One juror stated that there was a "question that bothers us considerably. We wonder in case of life imprisonment if a person can be paroled in a length of time."

After the trial court and counsel engaged in a discussion, which was not heard by the jury, the following proceedings were had in the presence of the jury:

"The Court: I assume now that it is perfectly clear in the minds of the jury in case they find the defendant guilty of murder of the first degree that they can bring one of two verdicts. That is clear, isn't it? The question is the meaning or effect of the verdict which recommends life imprisonment, is that it?

"Jurywoman White: That is it.

"The Court: Well of course you understand on that verdict, that is mandatory on me. I would have no discretion, and on sentence the sentence would be imprisonment for life. I am sorry I am not allowed

to explain that any further. The general rule is that in a case that the jury are not concerned with the penalty. They are concerned with the penalty in a case charging murder, because if they find the defendant guilty of murder in the first degree they must fix the penalty. But I think I understand your question, and I am afraid I am not allowed to answer it. Is there anything else now? Any other way I can be helpful to you, or any further instructions read?

"Juror Maddox: Would it be possible, your Honor, for the jury to bring a verdict in murder of the first degree, imprisonment for life without eligibility for parole?

"The Court: A provision as you suggest wouldn't be binding on anybody. It wouldn't be binding on—it would be of no effect. Does that answer your question? (Juror nods.)

"The Court: You have the option of the two verdicts. The recommendation "We recommend life imprisonment" is binding on me. That is the only sentence that I would be allowed to pronounce. Any addition to that is not binding. I can answer that very definitely, that any addition to that—you have the form of verdict. Anything that you would write on there in addition to that is of no legal effect."

Appellant does not claim that the trial court's answers constituted incorrect statements of the law, and he cites no authority to show that the trial court erred in answering the questions in the manner above set forth. It is understandable that jurors, who are charged with the duty of fixing the penalty in the event that they find a defendant guilty of first degree murder, should be interested in knowing the nature and effect of the penalties which they may impose; and neither reason nor authority indicates that the trial court should be prohibited from enlightening the jurors when questions are asked upon that subject. We therefore conclude that the trial court did not err in making said statements in response to the jurors' questions.

In conclusion, we may state that a review of the entire record shows that appellant was accorded a fair trial, and that there was ample evidence to sustain the judgment entered.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

37 Cal.2d 316

HOLBROOK v. BOARD OF EDUCATION OF PALO ALTO UNIFIED SCHOOL DIST. et al.

S. F. 18263.

Supreme Court of California, in Bank.

May 25, 1951.

Rehearing Denied June 18, 1951.

C. Ray Holbrook, also known as C. R. Holbrook, filed a petition against Board of Education of the Palo Alto Unified School District, and others, for writ of mandate to compel defendant to reinstate petitioner to petitioner's prior position and to employ petitioner as a full time employee of the District in a position requiring certification requirements of a proper grade. The Superior Court, Santa Clara County, M. G. Del Mutolo, J., rendered a judgment adverse to the petitioner and the petitioner appealed. The Supreme Court, Carter, J., held that petitioner was entitled to be classified as a permanent full time teacher and was not entitled only to one fourth tenure.

Judgment reversed with directions.

Prior opinion, 221 P.2d 205.

1. Schools and school districts ⇐133, 133.9

The relationship between Board of Education and person who was employed by Board as Director or Adult Education and Business Manager was that of employer and employee, and such relationship was created by contract, the result of tenure statutes not being to make the relation any the less one originating in contract, but to annex to contracts of employment when repeated for sufficient time certain legal consequences.

2. Schools and school districts ⇐133.11

Where petitioner was employed as business manager of school district, a non-certificated service, and as principal of evening high school, a certificated service, was continued in same position for following year, and in third year petitioner's duties were designated as Business Manager and Director of Adult Education, a certificated service, and fourth year his duties were designated as business manager for three quarters of his time and as Director of Adult Education for one quarter of his time, petitioner was entitled to be classified as permanent full time teacher and was not entitled to only one quarter tenure. Education Code, §§ 13004, 13034, 13049, 13050, 13081, 13082, 13086, 13089, 13201, 13651.

K. R. McDougall, Palo Alto, for appellant.

Tanner, Odell & Taft and Robert A. Odell, Los Angeles, Gardiner Johnson and Thomas E. Stanton, Jr., San Francisco, as amicus curiae on behalf of appellant.

Hardy, Carley & Brenner and John M. Brenner, Palo Alto, for respondents.

CARTER, Justice.

This is an appeal on an agreed statement from a judgment denying a petition for writ of mandate. Respondents are the Board of Education of the Palo Alto Unified School District, the individual members of the board, and the superintendent of schools of the district. Appellant, claiming full time tenure rights by virtue of his full time employment in the school district for seven consecutive school years, seeks to compel respondent board to reinstate him to his prior position and to employ him as a full time employee of the district in a position or positions requiring certification qualifications of a proper grade. The board contends that appellant has acquired no more than "one-fourth time tenure" and the trial court so held.

At all times pertinent appellant held valid life elementary and secondary teachers' credentials and a valid life general administrative certificate. On August 1, 1940, respondent board adopted a resolution that appellant "be elected Business Manager and Principal of the Evening High School to succeed Mr. Charles L. Suffield * * * and that he serve as other certificated employees on a probationary basis for three years." The following day the district superintendent of schools addressed a letter to appellant which contained the following: "At a special meeting of the Board of Education held on August 1st you were on my recommendation elected Business Manager and Director of Adult Education, which includes being Principal of the Evening High School, to succeed Mr. Charles L. Suffield resigned, at a salary at the rate of $3,000 a year, and your service shall be thought of in the same relation as other certificated employees who serve under the rules of the Board on a three-year probationary basis."

On August 8, 1940, pursuant to section 5.403 of the School Code (now section 13004 of the Education Code), the secretary of the board gave written notice to the county superintendent of schools that the school district had employed appellant "to render service in a full time position requiring certification qualifications, in the following capacity: Business Manager and Principal of Evening High School—he has been classified by this board as a probationary employee."

Appellant testified that he performed the following business management duties during the school year 1940–1941: Directed the accounting for the school system and the issuing of purchase orders and other financial contracts; supervised the making of the monthly payroll for all district employees; directed the management of the cafeteria; took care of school funds collected through the principals and set up an accounting plan concerning such funds; made a continuous study of the types of equipment and supplies required in the school system, kept inventories thereof and directed the storing and distribution of such items; took care of the business documents and records; directed the work of custodians, gardeners and maintenance men and selected persons to do such work; had charge of the school district transportation system; helped make the budget and ad-

ministered it; assisted the district superintendent in drafting and revising salary schedules and rules and regulations; planned and conducted school elections; furnished information to the school employees and others on matters of school law, salary reduction, retirement system, income tax procedures and group insurance claims; made claims for reimbursement from the state and federal governments for special activities such as child care centers, adult education activities, and the cafeteria.

Appellant also testfied that the evening high school provides classes for adults; that the duties of the principal of that school involved scheduling classes for adults, selecting teachers, making reports to the state and superintendent, and general direction of the adult education program. Holbrook and his secretary, Mrs. Young, testified that appellant had to interview prospective teachers.

The agreed statement recites that appellant was employed for the school year 1941–1942 to serve as "Business Manager and Principal of the Evening High School." No contracts were issued for that year and there were no minutes of the board showing his election. He performed the same duties as in the first year and also started what was called the National Defense Training Center—a program for training adults for war production. With another man selected as principal of the center, appellant had to do the preliminary organizing work, select the teachers, make rules and regulations, and direct the program in general. The center involved from 15 to 20 teachers and the training of 400 to 500 men every day. It was operated 24 hours a day during the war years.

On May 7, 1942, respondent board adopted a resolution that appellant "be employed as Director of Adult Education and Business Manager for the school year 1942–1943 at an annual salary of $3840.00." Appellant accepted a formal offer of employment which was in the following form (underscored portions indicate blank spaces as filled in):

"You are hereby notified that at a meeting of the governing board of Palo Alto Unified School district held May 7, 1942, you were elected to serve as a full time / part time Business Manager & Director of Adult Educ. for the school year beginning July 1, 1942 and ending June 30, 1943.

"The following conditions of employment have been stipulated by the governing board and are hereby expressly made a part of this contract: * * *

"4. You are hereby classified by this board as a probationary employee, subject to acceptance of this offer."

Neither the words "full time" nor "part time," preceding the title of the position, was crossed off. The notice of employment sent to the county superintendent was the same as that of August 8, 1940, quoted above. During the year 1942–1943 appellant served as director of adult education and a Mr. Ruppel served as a part time principal of the evening high school. Otherwise, Holbrook's duties were the same as in the preceding year. Ruppel entered the armed forces in November, 1943, and appellant served as principal until February, 1944. Thereafter a Mr. Stone was principal of the evening high school until Ruppel's return on February 1, 1946. Ruppel testified that he has been a full time principal since his return; that appellant, as director of adult education, has been his immediate supervisor during all the time that he, Ruppel, has been principal.

Respondent board passed a resolution on May 13, 1943, that appellant "be elected to devote three-fourths of his time as Business Manager and one-fourth of his time as Director of Adult Education for the school year 1943–1944," the fourth consecutive year of appellant's employment in the school district. The following day the district superintendent sent a letter to appellant, stating: "At the regular meeting of the Board of Education held May 13, 1943, you were elected to serve as an employee of the Palo Alto Unified School District for the school year 1943–1944 in the following capacity—one-fourth time as director of adult education, and three-fourths time as business manager. The annual salary voted you was $4020.00."

Appellant's letter of June 3, directed to the board, accepted his appointment "in accordance with your notice of May 14th." Holbrook signed a formal contract on June 5, which stated (blanks filled in with underscored words and figures):

"You are hereby notified that at a meeting of the governing board of the Palo Alto Unified School district held May 27, 1943, ~~full-time~~ you were elected to serve as ~~part-time~~ one-fourth time as Director of Adult Education—three fourths time as Business Manager (non-certificated) for the school year beginning July 1, 1943, and ending June 30, 1944.

"The following conditions of employment have been stipulated by the governing board and are hereby expressly made a part of this contract:

"1. Your annual salary for the school year in the above named position will be $4200.00 * * *

"4. You are hereby classified by this

"4. You are hereby classified by this board as—Three-fourths time as Business Manager (Non-Certificated)—a permanent one-fourth time as Director of Adult Education employee, subject to acceptance of this offer * * "

A letter from the district superintendent read as follows:

"Enclosed is your offer of employment for the school year 1943–1944. Your assignment will be one-fourth time as Director of Adult Education for which you will be paid $1050.00 per year, and three-fourths time as Business Manager, for which you will be paid $3150.00 per year. This makes a total annual salary of $4200.00 * * *

"As Director of Adult Education you are classified as a one-fourth time permanent employee. In that the position of Business Manager requires no certification, you are employed three-fourths time as a non-certificated employee."

Appellant's testimony was that when he received this contract he went to see the district superintendent and told the latter that "the contract was not in harmony with the minutes in two respects: first, it says that the meeting was held on May 27th, when the meeting was held May 13th; and there was no authorization in the minutes for the Board to give me a contract that said only one-fourth permanent tenure, that I had understood that I had been elected to a full-time permanent position on May 13th * * * and he agreed with me, but he said that 'Your argument is that the contract is not important, anyway, if it doesn't agree with the minutes, so why fuss about it,' and after discussing it at some length, * * * I concluded, since they were not attempting to remove me at that time, to let the matter ride [until] they attempted to remove me from my position * * *" On motion of respondents, this testimony was stricken and appellant assigns that ruling as error.

Other testimony by appellant was that in 1943–1944 (the fourth year) he performed the same services as in the prior year, except that he acted as district superintendent of schools in July, 1944, and, in 1943, he began a study of a proposed junior college. He also served as principal of the evening high school from November, 1943, to February, 1944.

Appellant's contracts for the following three school years (1944 through 1947) recited that he was "elected to serve as full time Business Manager (¾ time) — Director of Adult Education (¼ time)," and that he was classified as "a permanent (¼ time) employee." In these years appellant continued with the same duties, except that the junior college study was finished in the year 1944–1945 and the war training program was completed in 1945–1946.

Additional testimony by Holbrook was that he worked at the high school plant during the evenings and at the board of education office in the day time; that he could only be present at the high school in the evenings, so that he had to carry his adult education work over to the board office and do a great deal of it over there; that, in a similar manner, he would take some business work to the evening school; that there was no definite place where he performed any particular type of duties. Mrs. Young also testified that, insofar as

she knew, appellant took care of the various phases of his duties as they came up.

There was no particular conflict in the evidence with respect to appellant's performance of the foregoing duties. Mrs. Young and Dr. Almack, a member of respondent board from May, 1935, to May, 1945, corroborated appellant's testimony to some extent. Dr. Almack testified that administrative employees did certain acts at the request of the district superintendent, although such services had not been officially ordered by the board; that Holbrook performed some services which had not been officially authorized in the minutes of the board and the board accepted those services. With respect to appellant's claim that he served as acting superintendent and had chief responsibility for preparing the school budget, there was conflicting testimony.

Appellant testified that the printed form on which notices of his employment were given to the county superintendent of schools was used for certificated employees. Throughout his employment, Holbrook's salary was paid by means of one school warrant per month without any indication thereon of any apportionment of salary.

On August 21, 1947, respondent board resolved to discontinue appellant's services as business manager as of September 1, 1947, and to employ him for one-fourth time only to direct adult education. Appellant then instituted the present proceeding to compel his reinstatement to full time employment in the district.

As amended in 1941, Stats.1941, ch. 558, p. 1936, section 5.500 of the School Code read as follows: "Every employee of a school district of any type or class, except a joint union or union high school district with an average daily attendance of 850 or more, maintaining eight or more schools lying not less than six miles apart, who, after having been employed by the district for three complete consecutive school years in a position or positions requiring certification qualifications, is re-elected for the next succeeding school year to a position requiring certification qualifications shall, except as hereinafter otherwise provided, at the commencement of said succeeding school year be classified as and shall become a permanent employee of the district. * * *" The second paragraph of this section contained the same provision with respect to employees of the excepted class of joint union or union high school districts.

The Palo Alto Unified School District has had an average daily attendance of more than 850 pupils at all times pertinent to this case and it is conceded that appellant's rights are governed by section 5.500. The Education Code went into effect in August, 1943, Stats.1943, ch. 71, p. 310, and sections 13081 and 13082 of that code were substituted for the first two paragraphs of section 5.500 of the School Code.

Other pertinent statutes were:

Section 5.430 of the School Code (now Educ.Code, § 13034): "No person shall be employed as principal of a school of six or more teachers, including the principal, unless he is the holder of a valid teacher's certificate and a valid school administration certificate of the same grade as the school to be administered."

Section 5.470 (now Educ.Code, § 13049): "No one shall be employed to supervise the work of teachers for more than half time during any school week unless he is the holder of a valid teacher's certificate authorizing him to teach in the schools and classes in which he is to supervise instruction and a valid supervision certificate."

Section 5.471 (now Educ.Code, § 13050): "The holder of a valid school administration certificate may supervise general instruction in all subjects."

The trial court found that appellant's duties were substantially as claimed by him with certain exceptions; that the duties of "the position of Business Manager" were of a kind and nature substantially different from the duties of principal of the evening high school and those of director of adult education. It was found as a fact and concluded as a matter of law that three separate and distinct positions were involved.

Other findings were that none of appellant's duties as business manager required the supervision of the work of teachers, nor did such duties require the supervision of general instruction in all subjects; that some of his duties as director of adult education required the supervision of general instruction in all subjects; that appellant was required to, and did, devote one-fourth of his time to the duties of director of adult education and three-quarters of his time to the duties of business manager for the years 1943–1944 through 1946–1947; that he is and was able and willing to render full and satisfactory service to respondent board in a position or positions requiring certification qualifications.

It was concluded that none of appellant's duties as business manager required certification qualifications; that the position of principal of the evening high school did require such qualifications; that some of his duties as director of adult education required certification qualifications; and that by virtue of his employment for one-fourth time as director of adult education for the school year 1943–1944, appellant was entitled to classification as a permanent one-fourth time employee of the school district, but he was not entitled to permanent full time employment.

Appellant contends that he held one full time certificated position in the school district, whereas respondents take the view that the contrary determination of the trial court is a finding of fact which is supported by the evidence and that, in any event, the trial court correctly held as a matter of law that three separate positions were involved because of the different nature of the services required by employment in the different capacities.

Our attention has not been directed to any decisions or statutory provisions dealing with the main question presented in this case. The soundness of the reasoning in the few decisions attempting to define the term "position or positions requiring certification qualifications," as found in former section 5.500 of the School Code, supra, may be considered somewhat questionable in view of the number of statutory amendments which have changed the law with respect to the points actually decided in such cases. (See note, 24 Cal.L. Rev. 441, 442, setting forth the changes effected by the 1935 amendments to the School Code with references to prior decisions.)

In Cullen v. Board of Education, 1932, 126 Cal.App. 510, 15 P.2d 227, 16 P.2d 272, the petitioner had been assigned to duty as a teacher in day high school classes for eight years and as an evening school instructor for six years when he was dismissed from the latter function. In compelling his reinstatement, it was said, 126 Cal.App. at pages 512–513, 15 P.2d at page 228, 16 P.2d 272: "The power of the board of education to assign its employees to these various duties is not questioned and when such assignments have been made they must be taken as making up the 'position, or positions' to which the tenure law applies.

"Here it is admitted by the demurrer that petitioner served as teacher in both day and evening schools for a period of more than six years prior to his dismissal, and that his total period of service in any one day did not exceed eight hours. We are inclined to hold that these assignments constitute but one 'position' within the meaning of the tenure law and that petitioner, having served in that 'position' for more than the probationary period, has become automatically re-elected to that position."

Anderson v. Board of Education, 1932, 126 Cal.App. 514, 15 P.2d 774, 16 P.2d 272, involved similar facts with the exception that the petitioner had served as principal of the evening school. In reinstating him to that office (and holding that he had acquired tenure as such under the provisions of the San Francisco charter), the court stated 126 Cal.App. at pages 520–521, 15 P.2d at page 776, 16 P.2d 272. "In this connection we should add that we are not impressed with respondents' insistent argument that our judgment grants *double* tenure to these teachers and principals. * * * [W]e must interpret the word 'position,' as used in the school law and in the charter, as applying to the 'employment' of the individual. If they were officers the

term 'position' would be interpreted with greater strictness as to the term, duties, and place of employment. But, generally speaking, these factors do not control the relation of master and servant or employer and employee. The latter may be assigned to such duties within his employment as the employer may designate. Here the employer assigned the employee to teach in two separate school buildings and permitted him to continue in that *service* beyond the probationary period and to become classified as a permanent employee—not for a part of the service only—but for all. The tenure, therefore, runs to a position of employment, *or service,* of equal grade and rank to that to which the statutory classification has applied * * *."

In denying a hearing in these cases, this court withheld approval from the portion of each opinion "which holds that the two employments of petitioner constitute but one position." Cullen v. Board of Education, 126 Cal.App. 510, at page 513, 15 P.2d 227, 16 P.2d 272; Anderson v. Board of Education, 126 Cal.App. 514, 521, 15 P.2d 774, 16 P.2d 272. Such a holding was unnecessary to the decisions, in that, assuming the petitioners held two part time positions, they had acquired tenure in both capacities and were entitled to permanent full time employment.[1]

In Mitchell v. Board of Trustees, 1935, 5 Cal.App.2d 64, 42 P.2d 397, the petitioner had taught for four hours a week in the evening school, in addition to teaching full time in the day high school. The trial court entered judgment restoring him to his "two positions." It was held that the reinstatement of the petitioner to his evening school employment was error. The court stated, 5 Cal.App.2d at pages 69–70, 42 P.2d at page 400. "In effect, the petitioner seems to contend that he acquired one position as a teacher in the regular high school and another and different position through his work in the evening high school. In Cullen v. Board of Education, supra, the court was inclined to hold that teaching part of the time in a day school and part of the time in an evening school constituted but one position. In denying a hearing the Supreme Court withheld its approval of that proposition. It is unnecessary to decide that question here since this petitioner had, in any event, acquired permanent status as a full-time teacher in the day school. * * *

"While a permanent status may be acquired through service in one or more positions, we think the status when acquired cannot apply or relate to anything in excess of the regular and ordinary full-time employment of a teacher. We take it that these tenure laws, at most, give to a teacher a right to continue in full-time employment without arbitrary dismissal, and that they were not intended to apply to or cover any extra work which goes beyond the usual full-time employment."

Since Holbrook is not claiming anything more than the right to permanent full time employment, the Mitchell case is not helpful.

Former sections 5.710 and 5.711 of the School Code,[2] which authorized the dismissal of permanent employees of a school district when that becomes necessary "on account of the discontinuance of a particular kind of service in such district," were considered in Walsh v. Board of Trustees, 1934, 2 Cal.App.2d 180, 37 P.2d 700. The teacher, a permanent employee, had taught vocal music four periods a day in the senior high school and the same subject in the junior high school for two periods a day. Upon the discontinuance of the teaching of vocal music in the senior high school, the petitioner contended that he was entitled to full time work in the junior high school in perference to a probationary teacher. In disposing of this contention, the court commented 2 Cal.App. 2d at pages 182–183, 37 P.2d at page 701: "The main question here is whether the discontinuance of teaching vocal music in this senior high school while the teaching

1. For the present provisions with respect to service in both day and night schools, see section 13086 of the Education Code.

2. The present statute is section 13651 of the Education Code.

of the same subject was continued in the junior high school is 'a discontinuance of a particular kind of service in the district' within the meaning of the statute. a closely related question is whether an employment as teacher of a certain subject in both a senior high school and a junior high school, which has resulted in a permanent status, constitutes one position or two positions within the meaning of the School Code." In discussing the difference between junior and senior high schools, it was said: "[I]t would seem that a teaching service in two schools which are totally different in kind and nature should be held to constitute two positions rather than one, and that the classification statute in question was intended to and does cover such a situation." 2 Cal.App.2d at page 184, 37 P.2d at page 702. (See, also, Unruh v. Piedmont High School Dist., 4 Cal.App.2d 390, 393, 41 P.2d 212.

Respondents contend that this case establishes the rule than an employee of a school district occupies two part time positions if he is employed to perform two different kinds of services; that, therefore, the trial court correctly held that appellant's employment involved three different positions and that he acquired only part time tenure. However, it is evident that the statements of the court with respect to how many positions were present in the Walsh case were dicta; that the only question decided was that a particular kind of service had been discontinued in the district. Moreover, for reasons hereinafter stated, we are not inclined to follow the concept expressed in the Walsh opinion—that an employee of a school district necessarily holds as many positions as the number of kinds of duties he is required to perform.

We have concluded that the reasoning set forth in Cullen v. Board of Education, supra, is sound.[3] Former section 5.530 of the School Code and the present section 13201 of the Education Code give school boards the power, and make it their duty, to "fix and prescribe the duties to be performed by all persons in public school service in the school district." Here, respondent board assigned various duties to appellant, and, as stated in the Cullen case, supra, 126 Cal.2d at page 512, 15 P.2d at page 228, 16 P.2d 272, "when such assignments have been made they must be taken as making up the 'position, or positions' to which the tenure law applies." If all or some of the duties assigned to an employee require certification qualifications, then the employee holds a position requiring certification qualifications within the meaning of the statute; that is, under the statutory provisions, such a position can only be held by a person having the requisite certificate or certificates. Neither section 5.530 of the School Code nor section 13201 of the Education Code require the local board to assign only certificated duties to any one employee, and we are referred to no authority which necessitates a holding that, upon reelection for the fourth consecutive school year, an employee of a school district becomes entitled to permanent status only as to the amount of time devoted to certificated duties during the probationary period. At least, under the circumstances here, such a conclusion would be administratively impractical, and would, in effect, deprive certificated employees of the protection of the tenure laws in cases where they are required to perform some services which could have been performed by non-certificated employees. To make the employee's tenure rights dependent upon the duties assigned to him for which a certificate was required, allocated according to time, would mean that the employee would attain permanent status on a part time basis in every case where, in accordance with the authority given the local board, he was assigned some other duties during his probationary period. Obviously, to one who must earn his living from his

3. We are not here concerned with the applicability of that reasoning to the particular facts of the Cullen case. Neither do we express any opinion as to whether the present provisions of section 13086 of the Education Code contemplate part time or full time tenure in the Cullen and Anderson situations.

profession, such part time tenure rights would be valueless. In the absence of some compelling reason, we cannot assume that the Legislature intended such a result.

That full time employment normally leads to full time tenure if some of the duties allocated to the school district employee require certification is indicated by the cases arising prior to the 1935 amendment to section 5.502 of the School Code, which dealt with the rights of persons employed both as principals and as teachers during the probationary period. Prior to 1935, section 5.502 read: "No person employed in an administrative or supervisory position requiring certification qualifications shall be classified as a permanent employee other than as a classroom teacher. * * *" In construing this section and its predecessor, section 1609 of the Political Code, it was held that one employed solely as a principal could not acquire permanent status, Bland v. Board of Trustees, 67 Cal.App. 784, 228 P. 395, but that a person employed to serve both as a principal and as a teacher could acquire tenure. Gastineau v. Meyer, 1933, 131 Cal.App. 611, 22 P.2d 31; see Klein v. Board of Education, 1934, 1 Cal.2d 706, 37 P.2d 74; Work v. Central Union High School Dist., 1935, 6 Cal.App.2d 626, 44 P.2d 1047. The following portion of the opinion in Gastineau v. Meyer, supra, 131 Cal.App. at pages 615–616, 22 P.2d at page 32, is pertinent here: "The language of this statute clearly implies that, while one engaged *solely* in an administrative or supervisory capacity may not be classified as a permanent principal, yet if at the same time he also successfully performs the required services as a teacher, he is nevertheless entitled to permanent tenure 'as a classroom teacher.' * * * We are satisfied [that] the law does not authorize permanent classification as a principal or supervisor, but that the act does guarantee permanent tenure to all other employees, including classroom teachers who have been successfully employed by the district for two or three complete consecutive school years in positions requiring certification qualifications, in spite of the fact that such employee may have been primarily hired as a principal and actually devotes a part of his time to the performance of the duties of that officer. Since the respondent was qualified as a teacher *and actually engaged in teaching* for the required length of time and in strict compliance with the requirements of the statute, he certainly should not be deprived of his vested right to permanent tenure as a teacher merely because he also performed other services at the same time." (Italics added.)

Apparently it was never thought that such employees could be reduced to a part time status, in proportion to the amount of time required to be devoted to teaching activities as contrasted with other duties, after attaining classification as permanent employees.

[1] While no authority on the question has been cited, we may assume that part time employment in a position requiring certification qualifications during the period of probation will result in the right to permanent employment on a part time basis only,[4] and that, with the same result, the local board of education may contract to employ one person in two part time positions involving substantially different kinds of services, only one of which positions is certified. The relationship between respondent board and appellant is that of employer and employee and this relationship is created by contract. Gould v. Santa Ana High School Dist., 1933, 131 Cal.App. 345, 349–350, 21 P.2d 623. In Taylor v. Board of Education, 1939, 31 Cal.App.2d 734, 743, 89 P.2d 148, 153, it was said: "The contract can specify the salary, subject to a statutory minimum, the duties to be performed, the number of hours per day which the teacher shall perform his services, the age and class of students which will be taught, and other details relating to actual employment." See, also, Rible v. Hughes, 24 Cal.2d 437, 443, 150 P.2d 455, 154 A.L.R. 137; Richardson v. Board of Education, 6 Cal.2d 583, 58 P.2d 1285; Hogsett v.

4. See section 13842 of the Education Code, prescribing the minimum annual salary to be paid each person employed in a full time or part time position requiring certification qualifications and defining "full time."

Beverly Hills School Dist., 11 Cal.App.2d 328, 53 P.2d 1009; Wood v. Los Angeles City School Dist., 6 Cal.App.2d 400, 44 P.2d 644. The result of the tenure statutes "was not to make the relation any the less one originating in contract, but to annex to contracts of employment when repeated for a sufficient time certain legal consequences." Abraham v. Sims, 2 Cal.2d 698, 710, 42 P.2d 1029, 1035. See, also, Kacsur v. Board of Trustees, 18 Cal.2d 586, 591, 116 P.2d 593.

Insofar as permitted by the statutes, the formal contracts, the resolutions appointing appellant, and the rules and regulations of the board fix the status of appellant during the first three years of his employment. Fry v. Board of Education, 17 Cal.2d 753, 760, 112 P.2d 229. The following factors, as detailed above, show that appellant was employed in one full time position, rather than two part time positions: The resolution of August 1, 1940; the letter of the district superintendent dated the following day; the notice sent to the county superintendent of schools on August 8, 1940; the reelection of appellant in the same capacity in 1941; the resolution, contract, and notice to the county superintendent for the third year; the fact that appellant performed his various duties as they came up, without reference to time or place, and that this was necessary by the nature of his employment; the payment of appellant by a single, unapportioned salary.

Respondents contend that the fact that the regulations of respondent board separately list the duties of business managers and principals is evidence upon which the trial court could base its conclusion that appellant was employed in two different part time positions during each school year. But the regulations do not purport to state what shall constitute a single full time position and there is no indication that the employment of one person to carry out the various duties specified under the different headings should make up two employments or positions. Also, the fact that the regulations do not contain any reference to the duties relating to the direction of adult education, and that appellant's activities included general administrative work not ordinarily pertaining to any specific office, indicates the fallacy of considering a position in terms of a title rather than in terms of a group of duties assigned to an employee.

Neither does the appointment of Ruppel to serve as evening school principal, first on a part time basis in 1942 and subsequently for full time, tend to show that appellant had been occupying two part time positions. The district superintendent's letter of August 2, 1940, informing appellant of his employment, shows that it was intended from the beginning that appellant should direct the adult education program and that that work should include being principal of the evening high school. Ruppel's testimony indicates that he was appointed, not to take over a part time position formerly held by appellant, but to assist appellant with the adult education work which appellant continued to do.

From the foregoing discussion it is apparent that this court is not bound by the trial court's determination that appellant held three different positions during the first three years of his employment in the district and that that conclusion is predicated upon either an erroneous construction of the words "position or positions requiring certification qualifications" as used in section 5.500, or a misconception of the terms of appellant's employment as expressed in the documentary evidence and the testimony, which is generally undisputed, with respect to the duties assigned to, and performed by, appellant.

[2] Having been elected to a full time position for three consecutive school years, some of the duties of which required certification qualifications, appellant is entitled to permanent full time employment in the district if he was reelected for the fourth year in a position requiring certification qualifications. Respondents assert that the resolution in May, 1943, and the contract accepted by appellant for the fourth year of his employment (1943–1944), and for succeeding years, demonstrates that two part time positions were involved, at least beginning with the fourth year. We may assume, without deciding, that such a reso-

lution and formal contract would have had the asserted effect if they had been made during the probationary period. But appellant and the California Teachers Association in an amicus curiae brief contend that the form of the fourth year contract was adopted as a device to evade the full effect of the tenure laws and should be held ineffectual to accomplish that purpose. It has been held that resignations of teachers exacted at the close of their probationary period as a condition of reemployment for the next year in the same capacity are not effective so as to deny tenure to teachers who in fact continue service in the school district. Sherman v. Board of Trustees, 1935, 9 Cal.App.2d 262, 49 P.2d 350; Mitchell v. Board of Trustees, 1935, 5 Cal.App.2d 64, 68, 42 P.2d 397. The situation in the present case is substantially similar. The evidence shows that appellant was required to, and did, perform essentially the same services during the fourth year and thereafter as in the first three years of his employment. In this connection, appellant's testimony to the effect that he protested concerning the form of his fourth year contract was material, Merman v. Calistoga Joint Union High School Dist., 5 Cal. 2d 438, 55 P.2d 195, and should not have been stricken. The failure of respondent board to classify appellant as a full time permanent employee did not prevent him from attaining that status, for, as stated in La Rue v. Board of Trustees, 40 Cal. App.2d 287, at 293, 104 P.2d 689, at page 693, with respect to school districts, such as the one involved here: "[W]hen by the operation of law a teacher is entitled to classification as a permanent employee the failure of the school board to so classify such teacher does not prevent the classification, but the same inures by operation of the statutes." See, also, La Shells v. Hench, 98 Cal.App. 6, 12–13, 276 P. 377. Under the circumstances, we hold that appellant was reelected for the year 1943–1944 to a position requiring certification qualifications and was thereafter entitled to full time permanent employment in the school district.

This conclusion is not in conflict with Work v. Central Union High School Dist., supra, 6 Cal.App.2d 626, 44 P.2d 1047, or Crawford v. Board of Education, 20 Cal. App.2d 391, 67 P.2d 348, for in those cases the petitioners did not continue doing the same work after the expiration of their probationary periods.

It does not follow, however, that appellant is entitled to continue in an administrative position similar to that held by him. Section 5.502 of the School Code was amended in 1935 (Stats.1935, ch. 690, § 8, p. 1881) to read as follows: "* * * Persons employed in administrative or supervisory positions requiring certification qualifications upon completing a probationary period, as hereinbefore provided, including any time served as a classroom teacher if any, in the same district, shall, in districts having an average daily attendance of 850 or more pupils, be classified as and shall become a permanent employee as a classroom teacher. * * *" This portion of section 5.502 is now section 13089 of the Education Code with some slight changes in terminology. While the present statute makes it clear that a principal or other supervisory employee need not perform any teaching services in order to be entitled to tenure, there has been no change in the provision that such persons become permanent employees as classroom teachers after the probationary period is served. See, Griffin v. Los Angeles City High School Dist., 1942, 53 Cal.App.2d 350, 127 P.2d 939. Accordingly, appellant is entitled to be classified as a permanent classroom teacher. This does not, of course, affect our conclusion that respondent board exceeded its authority in purporting to reduce appellant to part time employment.

The agreed statement recites that the evidence concerning the amount of salary due appellant has not been included in the statement for the reason that it is contemplated that, if appellant should prevail on this appeal, the case will be remanded to the trial court for a determination of that question. In view of this stipulation and the fact that the question has not been argued on this appeal, no opinion is expressed on the matter of salary.

The judgment is reversed with directions to the trial court to proceed in accordance with the views herein expressed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

EDMONDS, J., concurs in the judgment.

104 Cal.App.2d 512

BAUMGARDNER v. CITY OF HAWTHORNE et al.

Civ. 18330.

District Court of Appeal, Second District, Division 3, California.

May 31, 1951.

M. R. Baumgardner filed petition against the City of Hawthorne, a municipal corporation, and others, for writ of mandate commanding defendants to reinstate petitioner as chief of police. The Superior Court of Los Angeles County, Arnold Praeger, J., entered judgment ordering that writ of mandate issue, and the city and four defendant councilmen appealed from judgment and also from decision and minute order whereby it was decided and ordered that peremptory writ of mandate should issue. The District Court of Appeal, Vallee, J., held that city council and city manager had no power to discharge petitioner, and that decision and minute order were not appealable.

Judgment affirmed, appeal from decision and minute order dismissed.

1. Municipal corporations ⇐89

Where city council adopted motion ordering city manager to discharge chief of police, but one councilman was not present at special meeting, received no notice thereof, and did not sign call and waiver of notice, action of council was a nullity. Government Code, § 36806; Gen.Laws, Act 5233, § 858.

2. Municipal corporations ⇐182

Where chief of police had been member of police department for 26 years and chief of police for 13 years, had taken and passed required competitive examinations, and was duly appointed chief of police under civil service system, he was a "permanent employee".

See publication Words and Phrases, for other judicial constructions and definitions of "Permanent Employee".

3. Mandamus ⇐164(2)

In proceeding for writ of mandate commanding city to reinstate petitioner as chief of police, allegations in answer that petitioner had never taken a valid civil service examination and that purported examination allegedly taken and passed was a sham and fraud upon city and civil service commission, were conclusions of pleader and did not raise an issue.

4. Mandamus ⇐164(3)

Where petition for writ of mandate commanding city to reinstate petitioner as chief of police contained allegation that petitioner had taken and passed required competitive civil service examination and was duly appointed chief of police, and answer contained no direct denial of any allegation or any averment of facts from which conclusion could be drawn that petitioner was only temporary chief of police rather than a permanent employee, trial court could conclude that petitioner was lawful holder of his position as permanent chief of police and that he had obtained civil service status.

5. Municipal corporations ⇐182

Where chief of police was discharged by city manager pursuant to invalid order of city council, he was not discharged by city manager, but was discharged by council. Government Code, § 36806.

6. Municipal corporations ⇐182

Under ordinance establishing civil service system and placing members of police department, including chief of police, under civil service and providing that chief of police shall be removed or reduced in rank only as provided for other members of classified service, power to discharge chief of police was vested in civil service board. Government Code, § 45001.

7. Municipal corporations ⇐182

Where ordinance, adopted pursuant to statute, established civil service system and placed members of police department, including chief of police, under civil service, and provided for discharge by preferring written charges filed with trial board, serving copy upon person to be discharged, and hearing before trial board, and vested power to discharge chief of police in civil service board, city council no longer had power to discharge chief of police, and statute permitting city manager to dismiss chief of police would no longer be applicable. Government Code, §§ 34856, 45001.

8. Municipal corporations ⇐218(8)

Where city adopted ordinance establishing civil service system and establishing method of discharge of employees therein, no employee of city having civil service status could be discharged in any other manner except as expressly provided in the ordinance. Government Code, § 45001.

9. Mandamus ⇐164(3)

Where material allegations of petition for writ of mandate commanding city to reinstate petitioner as chief of police were not denied, they would have to be taken as true.

10. Mandamus ⇐170

Where material allegations of petition for writ of mandate commanding city to reinstate petitioner as chief of police were not denied, and answer raised only questions of law, evidence was not required, and court properly heard and decided case upon pleadings. Code Civ.Proc. § 1094.

11. Mandamus ⇐187(2)

Decision and minute order deciding and ordering that peremptory writ of mandate should issue commanding city to reinstate petitioner as chief of police, were nonappealable.

A. J. O'Connor, George J. Hider, Los Angeles, for appellants.

David Lynn, William F. Kistler, Inglewood, for respondent.

VALLÉE, Justice.

Appeal by the city of Hawthorne and four of its councilmen from a judgment ordering that a writ of mandate issue commanding them to reinstate petitioner as chief of police.

The matter was heard on the petition and the answer thereto. No evidence was taken. The judgment recites that "The allegations of paragraphs V, VI and VII of the petition are not denied. The facts alleged therein show that the special meeting of the City Council held on August 25, 1950 at which the motion to discharge petitioner was acted upon, was illegally held. The action taken at said meeting, therefore, was void. The provisions of Section 17 of Ordinance No. 235 of the City of Hawthorne were not complied with. Accordingly the discharge of petitioner, in the manner in which it was accomplished, was illegal and void.

The following facts are alleged in the petition and admitted by the answer.

Hawthorne is a city of the sixth class. The respondents below, Greenwood, Hargrave, Baguley, Bateman, and Crozier, were and are members of the city council of Hawthorne; Keel is the city clerk, and Wirsching, the city manager. Crozier, Keel, and Wirsching did not appeal.

Petitioner, for 26 years, has been a member of the police department, and for 13 years prior to August 25, 1950, has been the appointed and acting chief of police of Hawthorne.

On September 23, 1935, the city council of Hawthorne adopted Ordinance No. 235. A copy is attached to the petition. The ordinance has been in full force and effect at all times since. Pursuant to the ordinance there was established a civil service commission and personnel system.

On August 25, 1950, appellants Greenwood, Hargrave, Baguley, and Bateman met at the city hall in Hawthorne and held what they declared to be a special meeting of the city council. A written call and waiver of notice of the special meeting for the purpose of considering and acting on the discharge of the chief of police was

signed at the meeting by Greenwood, Hargrave, Baguley, and Bateman. Councilman Crozier did not sign the call and waiver of notice. He was not at any time given any notice of the special meeting, nor did he at any time in any manner consent to the holding of the meeting. He was not present. Thereupon, by vote of members present, a motion was adopted ordering the city manager to discharge petitioner as chief of police and as a member of the police department. Following the meeting the city manager served on petitioner a document reading: "Pursuant to the order of the City Council and to good cause appearing therefore, I hereby discharge you as Chief of Police of the Police Department of the City of Hawthorne, Hawthorne, California, to become effective immediately on this day, Friday, August 25, 1950." No written charges were served on petitioner at any time although he made demand therefor.

The petition alleges that petitioner is a member of the civil service system; that he took and passed the required competitive examinations and was duly appointed chief of police; and at the times complained of was the duly appointed, qualified and acting chief of police pursuant to said appointment and under and subject to the civil service system and ordinance. These allegations are admitted except that the answer alleges "that petitioner at no time took a valid civil service examination as required by the aforesaid Ordinance No. 235, or any examination pursuant to said Ordinance; that said petitioner never qualified for a permanent appointment as Chief of Police of said City of Hawthorne; that no eligible list of qualified members of the Police Department for the appointment to the office of the Chief of Police was ever prepared; that petitioner's name never appeared on any such eligible list as required by said Ordinance and that the said petitioner never received any appointment to the office of the Chief of Police of said City of Hawthorne, except a temporary appointment; further, that the purported examination which the Petitioner alleged he has taken and passed was a sham and a fraud upon the City of Hawthorne and the Civil Service Commission."

[1] It is patent, we think, on the admitted facts, that the so-called special meeting of August 25, 1950, was illegally held and that the action of the four members of the city council was a nullity. Hawthorne is a city of the sixth class. Government Code, § 36806, 1949 Supp., which applies to cities of the sixth class, provides: "At any time the mayor or three city councilmen may call a special meeting by delivering written notice to each member at least three hours before the meeting. Written notice may be dispensed with if all councilmen give their written consent to the meeting, and the consent is filed in the clerk's office when the meeting is held. A councilman may give such consent by telegram." Section 36806 is a codification of statutes 1941, chapter 545, section 3, page 1869, and prior statutes. See 2 Deering's Gen.Laws, Act 5233, p. 1982, § 858. In City of Orange v. Clement, 41 Cal.App. 497, 183 P. 189, it was held that a special meeting of the board of trustees of a city of the sixth class and all proceedings thereof are void where notice of the meeting is not given and one member of the board is absent. We do not understand appellants to contend otherwise. They claim that petitioner was a temporary employee; that he was discharged by the city manager; and that the city manager had the power to discharge him.

[2–5] We think it clear on the admitted facts that petitioner was a permanent employee. The allegations of the answer with respect to the failure of petitioner to take a civil service examination are conclusions of the pleader and did not make an issue. The answer is devoid of any direct denial of any allegation of the petition and of any averment of fact from which a conclusion can be drawn that petitioner was only temporary chief of police. The trial court was warranted in concluding that petitioner was the lawful holder of his position as permanent chief of police and that he had obtained civil service status. Nilsson v. State Personnel Bd., 25 Cal.App.2d 699, 702–705, 78 P.2d 467. It also appears clear

that petitioner was not discharged by the city manager but was discharged at an illegal meeting of the four members of the city council. The city manager merely acted as an errand boy at the direction of those four members.

Further, the city manager was without power to discharge petitioner. Appellants rely on section 34856 of the Government Code 1949 Supp. which reads: "The city manager may appoint and dismiss the chief of police, city judge, and other subordinate officers except the city clerk, the city attorney, and the city treasurer." As will appear, section 34856 does not apply to the city of Hawthorne.

In 1935 a statute was enacted which in part provided: "The legislative body of any city within this State is hereby authorized to adopt by ordinance a personnel system, merit system, or civil service system, for the selection, employment, classification, advancement, suspension, discharge and retirement of appointive officers and employees. Such legislative body may provide for the appointment of a Civil Service Commission or personnel officer and may delegate to such Civil Service Commission or personnel officer such powers and duties in relation thereto as in its discretion may be deemed advisable." Stats.1935, ch. 48, § 1, p. 380. This statute is now Government Code 1949 Supp. § 45001.

[6–8] Pursuant to this statute, Ordinance No. 235 was adopted. Ordinance No. 235 established a civil service system and placed the members of the police department, including the chief of police, under civil service. Section 5, in part, provides: "All officers and men of the Police and Fire Department shall belong to the classified service * * *." Section 10, in part, provides: "The Chief of the Department (or Civil Service Board) in whom shall be vested removal or disciplinary power, shall be allowed full freedom in his or its action * * *." Section 13, in part, provides: "Chief of the Police and Fire Department: The Chief of the Department shall be appointed by the City Council from among the members of the Hawthorne Police and Fire Department, and after appointment shall be removed or reduced in rank only as provided for other members of classified service." Sections 17 and 20 provide that discharges from the civil service system shall be accomplished by written charges and a hearing. As we construe Ordinance No. 235, the power to discharge the chief of police was vested in the "Civil Service Board." The power to discharge is not absolute. It can only be accomplished in the manner provided by Ordinance No. 235, by preferring written charges "filed with the trial board," serving a copy upon the person to be discharged, and a hearing before the "trial board." When the city council adopted the civil service system, the previously exercised powers to discharge officers and employees could be exercised only in conformity with the procedure prescribed by that system. Potter v. City of Compton, 15 Cal.App.2d 232, 236, 237, 59 P.2d 537. No employee of the city having civil service status may be discharged in any manner other than as expressly provided in Ordinance No. 235. Shannon v. City of Los Angeles, 205 Cal. 366, 270 P. 682; Lotts v. Board of Park Commrs., 13 Cal.App.2d 625, 628, 57 P.2d 215; Potter v. City of Compton, supra, 15 Cal.App.2d at page 236, 59 P.2d at page 537.

[9, 10] The material allegations of the petition are not denied and must be taken as true. The answer raised only questions of law. No evidence was required. The court therefore properly heard and decided the case on the pleadings. Code Civ. Proc. § 1094; Carter v. Hobba, 102 Cal. App.2d 170, 227 P.2d 57; 16 Cal.Jur. 870, § 68.

[11] Appellants also appealed from the decision and the minute order whereby it was decided and ordered that a peremptory writ of mandate should issue. As this decision and this order are nonappealable the appeals therefrom are dismissed. The judgment is affirmed.

SHINN, P. J., and WOOD, J., concur.

104 Cal.App.2d 175

RUBY et al. v. SUPERIOR COURT IN AND FOR CITY & COUNTY OF SAN FRANCISCO, Dept. No. 10.

Civ. No. 14973.

District Court of Appeal, First District, Division 1, California.

May 29, 1951.

Donovan Ruby and wife and John P. Andrews filed a petition for writ of mandate against the Superior Court of the State of California, in and for the City and County of San Francisco, Department Number Ten, the Honorable Preston Devine, Judge Presiding therein, respondent to compel substitution of John P. Andrews as one of the parties plaintiff. The District Court of Appeal denied the petition, and on petition for rehearing, the District Court of Appeal, Per Curiam, 230 P.2d 860 denied the petition for rehearing. Thereafter another petition for rehearing was filed. The District Court of Appeal, Per Curiam, held that permission for a late filing of petition for rehearing would be denied under the circumstances.

Permission to file petition for rehearing refused.

1. Mandamus ⇐175

Though District Court of Appeal has power to consider petition for rehearing three days after rendition of its order of denial of petition for writ of mandate, such petition for rehearing should be filed within 15 days of the rendition.

2. Mandamus ⇐175

Where petition for writ of mandate was filed on May 1, and on May 5 it was denied, and petition for rehearing was filed on May 9, and was denied on May 15, petition for rehearing on May 29 was nine days late.

3. Mandamus ⇐175

The District Court of Appeal has power on proper showing to permit late filing of petition for rehearing on petition for writ of mandate.

4. Mandamus ⇐175

Where petitioners offered no excuse for fact that petition for rehearing on petion for writ of mandate was tendered nine days late, and an examination of the petition showed that if it were filed it would be a contempt of the District Court of Appeal because it contained threats, insinuations, and charges against the integrity of both the District Court of Appeal and the Superior Court, District Court of Appeal would not permit a late filing of the petition for rehearing.

Donovan Ruby, Helen Ruby and John P. Andrews in pro. per.

Herbert Pothier, Marcel E. Cerf, Robinson & Leland, San Francisco, for respondents.

PER CURIAM.

[1, 2] The petition for a writ of mandate was filed on May 1, 1951. On May 5, 1951, it was denied without opinion. A petition for rehearing was filed on May 9, 1951, and denied, with opinion, on May 15, 1951. On May 29, 1951 petition has tendered for filing a document entitled "Petitioners' Petition for a Rehearing, also Ultimatum." While this court has power to consider a petition for rehearing for 30 days after rendition of its order of denial, such petition for rehearing should be filed within 15 days of the rendition. The last day for filing such a petition in this case was May 20, 1951. This petition is tendered 9 days late, and no excuse is offered for its late filing.

[3, 4] While this court has power on a proper showing to permit a late filing, such permission is hereby denied, not only because no excuse for the late filing is tendered, but also because an examination of the document demonstrates that, were it filed, it would be a contempt of the appellate court. The document contains threats, insinuations and charges against the integrity of both the appellate court and the superior court. Such a document, if filed, would subject petitioners to a charge of contempt of the appellate court. See cases collected 5 Cal.Jur, p. 900, § 10.

Permission to file the document is refused.

BIFFLE v. SOCIAL WELFARE BOARD OF CALIFORNIA et al.

Civ. 17984.

District Court of Appeal, Second District, Division 3, California.

May 25, 1951.

Hearing Denied July 19, 1951.

Mary E. Biffle brought an action against the Social Welfare Board of the State of California, and others, for judgment declaring void a rule of Social Welfare Board prohibiting the granting of old age security to a person under the age of 65 years. The Superior Court of Los Angeles County, William B. McKesson, J., rendered a judgment adverse to the plaintiff and the plaintiff appealed. The District Court of Appeal, Bartlett, J., pro tem., held that title of proposed measure to repeal constitutional provision for pensions for needy, aged and blind as prepared by Attorney General, under which measure 63 years as age of eligibility for old age security was changed to 65 years, was sufficient.

Judgment affirmed.

1. Constitutional law ⇐48

Title and summary of chief purposes and points of proposed repeal measure prepared by Attorney General is presumed sufficient, and doubts are to be resolved in favor of its sufficiency. Const. art. 4, § 1.

2. Constitutional law ⇐9(1)

Title and summary of chief purposes and points of proposed repeal measure prepared by Attorney General pursuant to constitutional requirement need not contain a summary or index of provisions of the measure or auxiliary and subsidiary matters. Const. art. 4, § 1.

3. Evidence ⇐83(1)

Officers referred to in constitutional provision requiring repeal measures to be voted on to be printed and, together with arguments for and against such measures, to be mailed to each elector, and officers referred to in sections of Election Code implementing such constitutional provision, would be presumed to have regularly performed their duties with respect to proposed measure to repeal constitutional provision for pensions for needy, aged and blind. Code Civ.Proc. § 1963, subd. 15; Elections Code, §§ 1510–1514.

4. Evidence ⇐48

Judicial notice would be taken that officers of state referred to in constitutional provisions requiring repeal measures to be voted on to be printed and, together with arguments for and against such measures, to be mailed to each elector, and officers referred in sections of the Election Code implementing such constitutional provision, regularly performed their duties with respect to proposed measure to repeal constitutional provision for pensions for needy, aged and blind, and that "ballot pamphlets" containing such information were mailed. Code Civ.Proc. § 1875, subd. 2; Elections Code, §§ 1510–1514; Const. art. 4, § 1.

5. Constitutional law ⇐9(1)

Title of proposed and enacted measure to repeal constitutional provision for pension for needy, aged and blind as prepared by Attorney General, under which measure 63 years as age of eligibility for old age security was changed to 65 years, was sufficient, as against contention that title was insufficient as being silent upon fact that rights of plaintiff who would have been eligible for old age security under 63 year age provision were being wiped out. Elections Code, §§ 1510–1514; Const. art. 1, § 10; arts. 25, 27.

6. Constitutional law ⇐92

A person who reached 63 years of age at time when Constitution provided for pensions for aged upon reaching 63 years of age, had no vested right in old age security pension, and such constitutional provision could be repealed so as to raise age requirement to 65 years. Const. arts. 25, 27.

Kenny & Morris, Los Angeles, for appellant.

Fred N. Howser, Atty.Gen., Clarence A. Linn, Deputy Atty.Gen., for respondents.

BARTLETT, Justice pro tem.

This is an action for declaratory relief. The complaint alleged that the plaintiff

was a citizen of the United States who became 63 years of age on December 1, 1949. Prior to that date she had received $23 per month, general relief; that subsequent to December 1, 1949, she was found by the Department of Social Welfare to be eligible for payments of old age security in the sum of $75 per month which she received for three months; that the defendant The Social Welfare Board is an official agency of the State charged with the duty of administering the laws pertaining to old age security and to promulgate rules and regulations for the administration thereof; that the other defendants are the members of that board. The complaint then alleged that on December 29, 1949, defendants enacted a rule which became effective on March 1, 1950, which reads as follows: "The age of the applicant is a factor in determining his eligibility in all aids. An applicant for OAS is not eligible for aid until he has reached his 65th birthday. Aid may not be granted prior to the day and month as well as the year when the age of 65 is reached. (W & I. C. 2140, 2160)" The complaint further alleged that the rule was invalid in that, under the law, an applicant for old age security when he reaches his 63rd birthday is eligible for aid and that it was solely on the ground of this invalid rule that appellant was removed from the rolls of persons eligible for old age security. After alleging that by reason of the facts a controversy affecting the rights of the parties existed, a judgment was prayed for declaring this rule and regulation to be void.

To this complaint a general demurrer was sustained without leave to amend and a judgment upholding the rule of The Social Welfare Board as being legal and valid was entered. From this judgment the appeal is taken.

The primary question is whether 63 years as the age of eligibility as provided by article XXV of the Constitution, was validly changed to 65 years by the repeal of article XXV through the adoption of article XXVII. 65 years was the qualifying age prior to the adoption of article XXV. Welfare & Institutions Code, sec. 2160. Appellant sets forth the grounds she urges for a reversal of this judgment in these words: "I. The purported repeal of Article XXV was void in so far as this appellant is concerned in that the title voted upon was absolutely silent upon the fact that her rights were being totally wiped out. II. This question was not adjudicated in Perry v. Jordan, 34 Cal.2d 87, 207 P.2d 47. III. The appellant enjoys a vested right in her old age security payments."

On November 8, 1949, article XXVII of the Constitution was adopted by the voters pursuant to an initiative measure on the ballot at that election. In section 1 of this measure, article XXV of the Constitution was thereby repealed. Appellant states that the repeal was invalid and that therefore the rule of The Social Welfare Board set forth in the complaint "* * * deprived her of the old age security payments to which she was entitled under Article XXV before the purported repeal."

The title of the act repealing article XXV is as follows: "'Aged and Blind Aid, Initiative Constitutional Amendment. Adds Article XXVII, repeals Article XXV, State Constitution. Reinstates plan of Old Age Security and Aid to Blind, and method of administration thereof, in existence prior to adoption of Article XXV, except that maximum aid payments are retained at present level of $75 per month for aged persons and $85 per month for blind persons, with participation by the State and the counties. Authorizes Legislature to increase or decrease amount of payments to aged and to blind, and otherwise to amend or repeal existing law.'" This is the precise title which was before the court and held not to be defective or faulty in the case which appellant claims is not controlling here. Perry v. Jordan, 34 Cal.2d 87, 207 P.2d 47. Appellant admits that in that case the opponent of the measure claimed that the title was faulty. She follows that by saying: "However, the objection at that time was general and not pinpointed to the effect of the title's silence upon the rights of this particular class of plaintiffs." It may not have been pinpointed" in the sense that in that case

the defect or fault in the title was not there, as here, the only defect or fault suggested. It is apparent from the decision in Perry v. Jordan, supra, 34 Cal.2d 87, 207 P.2d 47, that this same alleged defect or fault was brought to the court's attention, considered by it and directly passed on in that decision. The court there says, referring to a proceeding in the superior court of Sacramento County, the petition in which case was Exhibit B to the petition for a writ of mandate in Perry v. Jordan, supra, 34 Cal.2d 87, 90, 207 P.2d 48. "The same issues are thus presented in the proceeding here that are involved in the superior court action." One of the allegations in the superior court petition was that the title did not suggest, state or inform the signers of the petition, among other things, that it "Disqualifies needy citizens sixty-three (63) to sixty-five (65) years of age, of ten to fifteen years residence in California from receiving Old Age Security." Also, according to the brief in that case, the measure under attack embraced at least four major purposes, one of which was "To raise the minimum age requirement from 63 to 65 years." The court said on pages 93 and 94 of 34 Cal.2d on page 50 of 207 P.2d: "It is manifest that the general subject of Article XXV which it is proposed to repeal is aid to the needy aged and blind. That article sets forth the pension payments to be made, the requirements to be met by a prospective recipient, the officer selected by name to administer the act, and the like, all aimed at the machinery to carry out the main subject and wholly incidental to it. Opponents of the repeal measure refer to four different purposes and incidentally claim eighteen in all, such as that the repeal of Article XXV will result in giving the legislature power to reduce the pension payments provided for in such article, giving the administration thereof to the counties instead of the state, imposing liabilty on relatives and *raising the minimum age qualification.* All those things obviously pertain to any plan—single subject—of aid to the needy aged and blind. They are merely administrative details." (Italics ours.)

[1, 2] This case also sets forth rules to be applied in instances wherein the title prepared by the Attorney General is contended to be faulty as follows, 34 Cal.2d at page 94, 207 P.2d at page 51: "A title so prepared is presumed sufficient, and doubts are to be resolved in favor of its sufficiency; a substantial compliance is sufficient and it need not contain a summary or index of the provisions of the measure or auxiliary and subsidiary matters. California Teachers Ass'n v. Collins, 1 Cal.2d 202, 34 P.2d 134; Epperson v. Jordan, 12 Cal.2d 61, 82 P.2d 445; Brown v. Jordan, 12 Cal.2d 75, 82 P.2d 450; Vandeleur v. Jordan, 12 Cal.2d 71, 82 P.2d 455."

In considering the question as to whether or not Perry v. Jordan, supra, 34 Cal.2d 87, 207 P.2d 47, is controlling here, another matter should be noted. The court in that decision ordered that a peremptory writ of mandate, as prayed for, be issued. The writ prayed for was one commanding the Secretary of State "* * * to submit the initiative measure, a copy of which is attached hereto as Exhibit "A", to electors of the State * * *." The Exhibit "A" referred to carried as an integral part of it the very title which is under attack here and in compliance with the mandate of the Supreme Court it appeared on the ballot in that form.

[3–5] Appellant concedes that when nothing is put in the title but the number of the section repealed the courts have upheld a statute and that the title under attack did reveal the article of the Constitution repealed but, she contends, "* * * the voter deception occurred when the draftsman went further and professed to be explicit about the effects of such a repeal," and did not specifically mention the eligibility which applies to the appellant herein. Appellant further says: "Before it can be held that the people of this State intended to reverse themselves upon their policy of paying pensions to persons 63 to 64 years of age, it should be demonstrated to this Court that the popular decision was obtained fairly." We cannot follow appellant in her argument that there was any deception or that the popular decision on this act was obtained unfairly.

The article of the Constitution sought to be repealed was of recent enactment. The Constitution and Statutes of California set up elaborate and effective safeguards to prevent any deception of those voting on an initiative amending the Constitution. Not only does article IV, section 1 of the Constitution require that the title be prepared by a public officer, the Attorney General, but it also provides that all such measures to be voted on be printed and, together with arguments for and against such measures, be mailed to each elector. These provisions of the Constitution are implemented by provisions concerning these "Ballot Pamphlets" by sections 1510 to 1514, both inclusive, of the Elections Code. Section 1513 of the Elections Code contains this additional safeguard: "The provisions of the proposed measures differing from the existing provisions shall be designated in print, so as to facilitate comparison." It is the presumption that these officers of the State referred to in the Constitution and the designated sections of the Elections Code have regularly performed their duties, Code of Civil Procedure, section 1963, subdivision 15, and, in addition, we can take judicial notice that they, in fact, did so and that the "Ballot Pamphlets" containing all of this information was mailed to each voter in the State. Code Civ.Proc. sec. 1875, subd. 2. It is worthy of note that in Part 1 of these Ballot Pamphlets containing the argument pro and con it is said: "Proposition No. 2 will take away security from the needy in the 63-64 age bracket, and force them on the relief rolls of the counties." When the title is considered, stating as it does, that the plan adopted just one year prior to the election is repealed and the plan of old age security in effect prior thereto reinstated, and in addition to that the additional information which was so meticulously furnished to the voters by the State itself, to suggest that the voters did not know what they were doing in adopting this Constitutional Amendment is to underestimate their intelligence. Furthermore, all these arguments concerning a defective title were considered and decided adversely in Perry v. Jordan, supra, 34 Cal.2d 87, on pages 94 and 95, 207 P.2d 47, on page 51, not only in the statements we have already quoted from that decision but in the following cogent language: "It [referring to the title] is clearly sufficient, especially in the light of the very recent enactment of the measure sought to be repealed. Among the things in the repeal measure which are claimed not to be embraced in the title are that it recalls a director of social welfare named by Article XXV, abolishes the welfare board thereby created, state administration of pensions, changes method of raising money to meet payments and amount of payments, and similar things. Obviously the repeal measure in the main goes back to the law as it existed prior to the adoption of Article XXV, the chief feature of which is that the authority in the field of needy aged and blind relief is returned to the legislature. The title adequately covers these subjects. It states that the measure repeals Article XXV, which dealt with and which deals with 'Old Age Security and Aid to the Blind, and the administration thereof.' It states specifically that the legislature is vested with authority in the field. We believe it adequately advised the signers of the petition of the general nature of the measure."

[6] Appellant's final contention that appellant enjoys a vested right in her old age security payments is set forth in one sentence in her brief as follows: "It is now settled in California that old age security payments are not gratuities but are debts due the beneficiaries." That statement is true as far as it goes but the one case cited by appellant, Board of Social Welfare v. County of L. A., 27 Cal.2d 81, 162 P.2d 630, illustrates the fact that this right is based on statute. In the case of appellant no such statutory right now exists.

We come to the conclusion that the rule adopted by the respondents subsequent to the adoption of article XXVII of the Constitution was in accordance with the pro-

visions thereof and a proper exercise of their power.

The judgment is affirmed.

SHINN, P. J., concurs.

VALLÉE, J., concurs in the judgment.

104 Cal.App.2d 455

TAKETA v. STATE BOARD OF EQUALIZATION et al.
Civ. No. 14691.

District Court of Appeal, First District, Division 2, California.

May 28, 1951.

Hearing Denied July 26, 1951.

Petition by T. Taketa against State Board of Equalization of the State of California, and others, for writ of mandate to compel defendant to set aside order of May, 1942, revoking certain off-sale alcoholic beverage licenses of petitioner and to restore said licenses. The Superior Court, County of Santa Clara, John D. Foley, J., held petitioner's action was not commenced within time permitted by law and denied the writ of mandamus, and petitioner appealed. The District Court of Appeal, Schottky, J., held that petitioner's action was barred by statute of limitations.

Judgment affirmed.

1. Limitation of actions ⇐71
War and national defense ⇐51

Petitioner, a Japanese, who had been evacuated from West Coast in 1942 and whose liquor license had been revoked in 1942 by order of Board of Equalization, was by reason of state of war under disability to commence an action to have liquor license restored, but where disability ended in 1945, and petitioner did not bring mandate to restore license for more than four years after removal of disability, statute of limitations providing that such actions for relief must be commenced within four years after cause of action arose, barred petitioner's action. Executive Order Feb. 19, 1942, No. 9066; Act Cong. March 21, 1942, 56 Stat. 173; Code Civ.Proc. §§ 343, 354; Gen.Laws, Act 3796, §§ 1 et seq., 44.

2. Limitation of actions ⇐66(2)

Where right has fully accrued, except for some demand to be made as a condition precedent to legal relief, which the claimant can make at any time, if he so chooses, the cause of action has accrued for the purpose of setting the statute of limitations running.

3. Mandamus ⇐7

Granting of the writ of mandamus is to a certain extent a discretionary matter.

4. Mandamus ⇐143(1)

Refusal of trial court to grant writ of mandate to restore petitioner's liquor license, where application was made more than four years after cause of action arose and thus was barred by statute of limitations, was not abuse of discretion. Code Civ.Proc. §§ 343, 354.

James T. Davis, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., J. Albert Hutchinson, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice pro tem.

On May 9, 1949, petitioner and appellant filed a petition for writ of mandate in the superior court of Santa Clara to compel respondent State Board of Equalization to set aside its order of May, 1942, revoking certain off-sale alcoholic beverage licenses of petitioner and to restore said licenses. The trial court found that petitioner's action was not commenced within the time permitted by law and more particularly, section 343 of the Code of Civil Procedure and judgment was entered denying the writ of mandamus. This is an appeal by petitioner from said judgment.

The matter was submitted to the trial court upon a stipulated set of facts and before discussing the legal issues involved we shall summarize briefly the factual situation.

The respondent Board of Equalization issued to petitioner, a Japanese, for the fiscal year July 1, 1941 to June 30, 1942, two licenses authorizing the off-sale disposition of beer and wine and the off-sale disposition of distilled spirits in San Jose. On February 19, 1942, following the bombing of Pearl Harbor, an Executive Order, No. 9066, of the President of the United States, subsequently ratified on March 21, 1942, by Act of Congress, 56 Stat. 173, required and directed the compulsory evacuation of persons of Japanese ancestry from the westerly half of California. The first compulsory evacuation order was issued on March 24, 1942, and pursuant thereto petitioner on or before March 28, 1942, was personally "removed" from the "Pacific Coast area" by order of the appropriate military authorities of the United States and was not permitted to return until January 1 or 2, 1945.

On February 27, 1942, the State Board of Equalization adopted a resolution reciting, among other things, that "the holding of liquor licenses by any person not loyal to the United States constitutes a threat to the national safety" and that all such licenses "held by Japanese enemy aliens, or by Japanese Americans, be revoked, it being determined by the Board that the continuance of such licenses would be contrary to the public welfare." All District Liquor Control Administrators were instructed to file complaints against every licensee who was a Japanese, and on March 5, 1942, an accusation was filed against petitioner before the Board, which was, after due notice, heard before a representative of the Board on March 21, 1942. On May 6, 1942, the Board voted to adopt the proposed decision revoking petitioner's licenses, which decision was reduced to writing and filed on May 29, 1942.

On December 8, 1948, petitioner filed with respondent Board a petition for the restoration of his licenses, which petition was rejected on December 13, 1948, and on December 29, 1948, filed with said board a petition for restoration of said licenses together with the application prescribed by law for the issuance of an Off Sale General License, which petition and application were denied on January 6, 1949.

Additional facts will be noted hereinafter.

In arguing for a reversal of the judgment petitioner makes the following main contentions:

"I. The 'Equal Protection of the law' clause of the Fourteenth Amendment of the Constitution applies to a liquor license issued by a state.

"II. The action of the Respondent in this case was discriminatory and in violation of the 'Equal protection of the law' clause of the Fourteenth Amendment to the Constitution and of Rev.Stat. Sec. 1978, 8 U.S.C. 42 [8 U.S.C.A. § 42].

"III. The admittedly discriminatory action in this case cannot be excused upon the ground that it was a valid exercise of the War Powers.

"IV. Petitioner's cause of action is not barred by the statute of limitations."

Because we have reached the conclusion that the trial court correctly determined that petitioner's application for a writ of mandate should be denied for the reason that it was barred by the statute of limitations and also because petitioner was free to pursue all his rights and remedies in California on and after January 2, 1945, we shall first discuss the fourth contention of petitioner.

In its momorandum opinion the trial court said:

"Petitioner's application for a Writ of Mandate is ordered denied for the reason that his cause of action is barred by the statute of limitations. Assuming that pursuant to the provisions of Section 354 of the Code of Civil Procedure the statute was tolled for the period of time that petitioner was by reason of the existence of a state of war under a disability to commence this action, this disability, if any, was removed at which time petitioner returned or was eligible to return to California. (Oral stipulation at hearing on February 24, 1950.)

"The greatest length of time within which he could institute his suit was four years from and after January 1945. (C.C. P. sec. 343.) The present litigation was commenced on May 9, 1949 which date was more than four years after the removal of

any disability which might have prevented the running of the statute."

Section 354 of the Code of Civil Procedure, referred to in the court's memorandum, as amended in 1943, provides as follows:

"When a person is, by reason of the existence of a state of war, under a disability to commence an action, the time of the continuance of such disability is not part of the period limited for the commencement of the action whether such cause of action shall have accrued prior to or during the period of such disability."

Section 343 of the Code of Civil Procedure provides as follows: "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

[1] The licenses issued under the Alcoholic Beverage Act Gen.Laws, Act 3796, § 1 et seq., and the privileges thereunder are at all times subject to revocation for "good cause" under the act and the constitutional provision. As hereinbefore set forth, an accusation was filed against petitioner, due notice was given, a hearing was held, and an order was made revoking petitioner's licenses. Under section 44 of the Act a person whose license has been revoked may within 10 days petition for a reconsideration of the matter, and if such reconsideration is denied, he may within 30 days after final action by the board file an action for a review by the superior court. No further action was taken by petitioner after the revocation of his licenses, nor did he make application and pay the statutory fee for the renewal of said licenses prior to June 30, 1942.

Giving section 354, Code Civ.Proc., its fullest effect as applied to the facts of this case and conceding that by reason of the fact that petitioner had been evacuated from California, he was under a disability to take any action during that time, it is still a fact that he was free to take such or any other necessary or appropriate legal action after January 2, 1945. He did not petition the Board of Equalization for the restoration of his licenses until December, 1948, and in the meantime legislation had been enacted, effective July 1, 1945, which limited off-sale distilled spirits licenses to 1 to 1000 population, and, effective July 1, 1946 licenses of the two types held by petitioner were consolidated into one license known as the Off Sale General License. He did not file his petition for a writ of mandate until May 9, 1949, more than four years and four months after he was permitted to return to California. Under such circumstances respondent Board was certainly entitled to set up defenses of the statute of limitations and of laches. The following language of the court in Wittman v. Board of Police Commssioners, 19 Cal.App. 229, at page 231, 125 P. 265, 266, is quite applicable to the instant case: "It is the dismissal from the department that really lies at the bottom of appellant's cause of action. It is this alleged wrong that he seeks to have redressed by the action of the court, invoked more than three years after its commission. The denial of his right to hold a position in the police department occurred when he was formally dismissed by the board of police commissioners from the department. This dismissal occurred at a definitely fixed time, and was an unequivocal denial of his right to longer hold the position of captain of police, or any other position in the department. If his contention as to the illegality of such dismissal is well founded, he could immediately upon his dismissal have perfected his right to the remedy by mandate by making his demand for reinstatement or assignment to duty as such captain of police.

[2] "These considerations bring the case within the rule followed and recognized in many cases that, where a right has fully accrued, except for some demand to be made as a condition precedent to legal relief, which the claimant can at any time make, if he so chooses, the cause of action has accrued for the purpose of setting the statute of limitations running. (Citations.) "Otherwise, as is pointed out in the cases above cited, he might indefinitely prolong his right to enforce his claim or right by neglecting to make the demand until it suited his convenience so to do."

[3, 4] We do not believe that under the factual situation hereinbefore set forth

petitioner can avoid the defenses of the statute of limitations and of laches, and we are convinced that the trial court was fully justified in denying the petition for a writ of mandate. The granting of such a writ is to a certain extent a discretionary matter, and under all the circumstances of this case it cannot be held that there was an abuse of discretion on the part of the trial court.

What we have hereinbefore said makes it unnecessary to discuss the other contentions made by petitioner for our conclusion on the issues of the statute of limitations and laches is determinative of this appeal.

The judgment is affirmed.

SCHOTTKY, Justice, pro tem.

NOURSE, P. J., and DOOLING, J., concur.

104 Cal.App.2d 506

In re BARR'S ESTATE.

KUCHEL, State Controller v. McCORMACK.

Civ. 18349.

District Court of Appeal, Second District, Division 2, California.

May 31, 1951.

Proceedings in the matter of the estate of Gertrude K. Barr, wherein Helen Barr McCormack filed objections to the report of the inheritance tax appraiser. The Superior Court of Los Angeles County, Roy L. Herndon, J., sustained the objections to the report of the tax appraiser, and Thomas H. Kuchel, State Controller, appealed. The District Court of Appeal, Wilson, J., held that the risk which an insurance company assumed by issuing retirement income bond, was not an insurance risk but was an investment risk, and therefore proceeds received by beneficiary from that portion of decedent's money which had not been repaid to decedent by insurance company under retirement income bond was not exempt from inheritance tax.

Judgment reversed with instructions.

1. Statutes ⇐188

Words in a statute should be given their ordinary meaning unless otherwise clearly intended or indicated.

2. Annuities ⇐1

Basically an annuity contract is not a life insurance policy, for the risk assumed in a "life insurance contract" is to pay upon insured's death, while risk assumed in "annuity contract" is to pay as long as insured may live. Insurance Code, § 22.

See publication Words and Phrases, for other judicial constructions and definitions of "Annuity Contract" and "Life Insurance Contract".

3. Insurance ⇐2

For a contract to be one of insurance it is essential that there be hazard and a shifting of the incidence, and if there is no risk, or if there be one and it is not shifted to another or others, there can be no insurance. Insurance Code, § 22.

4. Insurance ⇐2

"Insurance" is a device which furnishes protection against a risk of loss by distributing the losses of the few among the many who are subject to the same risk. Insurance Code, § 22.

See publication Words and Phrases, for other judicial constructions and definitions of "Insurance".

5. Insurance ⇐124

A "life insurance policy" is a contract whereby the insurance company agrees to insure or indemnify the beneficiary against the death of the insured, and by which the insured protects the beneficiary against loss accruing by the early or premature death of the insured.

See publication Words and Phrases, for other judicial constructions and definitions of "Life Insurance Policy".

6. Annuities ⇐1

A "refund annuity contract" is a contract whereby the insurance company agrees to repay to the annuitant, in instalments during his life, the amount paid in by him to the company, and if at his death there be a balance unpaid to him, to pay

that balance to the person designated by the annuitant to receive the same.

See publication Words and Phrases, for other judicial constructions and definitions of "Refund Annuity Contract".

7. Taxation ⇐872

Where by terms of retirement income bond, insurance company agreed to repay to annuitant in instalments during her life, the amount paid into the company, and at death of annuitant to pay balance to person designated as beneficiary, the risk assumed by the insurance company was not an insurance risk but an investment risk, and proceeds received by beneficiary from that portion of decedent's money which had not been repaid, not being proceeds of insurance policy within meaning of statute relating to insurance exemption and rules and regulations of State Controller construing statute, was subject to inheritance tax. Revenue and Taxation Code, §§ 13721, 13723, 13724.

8. Taxation ⇐872

Insurance Code which classifies annuities as life insurance, does not require annuities to be classified as life insurance under Revenue and Taxation Code, for purpose and object of two Codes are totally different. Revenue and Taxation Code, § 13721; Insurance Code, §§ 100, 101.

9. Administrative law and procedure ⇐330
Statutes ⇐219

The construction of a statute by the officials charged with its administration must be given great weight.

James W. Hickey, Sacramento, Morton L. Barker, Richard K. Yeamans, Los Angeles, Vincent J. McMahon, Sacramento, for appellant.

Calvin H. Conron, Jr., Bakersfield, for respondent.

WILSON, Justice.

This is an appeal by the State Controller from an order sustaining objections to the report of the inheritance tax appraiser. The sole question for determination is whether the proceeds of an annuity contract paid on the death of the annuitant to her named beneficiary are exempt from inheritance tax by reason of the insurance exemption.

On January 6, 1930, decedent obtained from the Pacific Mutual Life Insurance Company of California a "Retirement Income Bond" which provided for the payment of an income to her of $100 a month commencing at age 65. Annual premiums of $590.40 were paid from that date until the maturity date in 1948, when decedent became 65 and began to draw the $100 monthly payments. On March 18, 1949, Mrs. Barr died and the insurance company paid to her named beneficiary the proceeds of the bond totaling $9,065.30 which sum the inheritance tax appraiser included among the property subject to an inheritance tax.

The insurance exemption allowed under the inheritance law is set forth in sections 13721, 13723 and 13724 of the Revenue and Taxation Code.[1]

1. Sec. 13721: " 'Insurance policy,' as used in this article, means a life or accident insurance policy the proceeds of which are payable by reason of the death of the insured."

Sec. 13723: "Except to the extent specified in Section 13724, the payment or right to receive payment of the proceeds of either of the following insurance policies is a transfer subject to this part:

"(a) Any insurance policy issued after June 25, 1935, which is payable to a named beneficiary.

"(b) Any insurance policy issued on or before June 25, 1935, which is payable to a named beneficiary and under which the insured has the right to change the beneficiary or has the right of cash surrender."

Sec. 13724: "In addition to the exemptions allowed by this part, the payment or right to receive payment of fifty thousand dollars ($50,000) of the proceeds of either of the insurance policies mentioned in Section 13723 is not subject to this part, with the following limitations:

"(a) Where there is more than one policy, whether of the same or a different type, only fifty thousand dollars ($50,000) of the aggregate proceeds is not subject to this part.

"(b) Where there is more than one beneficiary, the fifty thousand dollars ($50,000) shall be prorated among the beneficiaries in proportion to the amount of insurance payable to each."

[1-4] Words in a statute should be given their ordinary meaning unless otherwise clearly intended or indicated. County of Los Angeles v. Frisbie, 19 Cal.2d 634, 642, 122 P.2d 526. Insurance has been defined by the Legislature as "a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event." Ins. Code, sec. 22. Basically, an annuity contract is not a life insurance policy. The risk is fundamentally different in the two contracts. In a life insurance policy the risk assumed is to pay upon the assured's death; in a pure annuity contract the risk assumed is to pay as long as the assured may live. Equitable Life Assur. Soc. v. Johnson, 53 Cal.App.2d 49, 57, 127 P.2d 95. For a contract to be one of insurance it is essential that there be hazard and a shifting of the incidence. If there is no risk, or if there be one and it is not shifted to another or others, there can be no insurance. According to the better view insurance also involves distribution of risk, California Physicians' Service v. Garrison, 28 Cal.2d 790, 803-804, 172 P.2d 4, 167 A.L.R. 306. "Basically, insurance is a device which furnishes protection against a risk of loss by distributing the losses of the few among the many who are subject to the same risk * * * an annuity is not insurance. Both insurance and annuity contracts are, it is true, gambles against the contingency of death. They are dissimilar, however, in that under an annuity the company's obligation is not to indemnify on the happening of a contingent event causing loss. From the viewpoint of risk, a life insurance policy and an annuity contract are, in fact, diametrically different. Under the former the company will lose in the event of the insured's premature death; under the latter the company will gain. The only risk of the company issuing an annuity, except for the possibility that the annuitant may outlive his expectancy, is the investment risk that the capital may shrink in value or that the return may be less than the amounts payable to the annuitant." (Randolph Paul, Federal Estate and Gift Taxation, Vol. I, p. 498.)

The precise question presented by the instant case has not been decided in California. It has been determined in connection with the federal estate tax exemption of $40,000 on amounts receivable by beneficiaries as insurance under policies taken out by the decedent upon his own life. In Helvering v. LeGierse, 312 U.S. 531, 539, 61 S.Ct. 646, 649, 85 L.Ed. 996, it was held that in order to have the benefit of the exemption "the amounts must be received as the result of a transaction which involved an actual 'insurance risk' at the time the transaction was executed." The decedent in that case at the age of 80 executed two contracts with the same life insurance company. One was an annuity contract entitling her to annual payments for life. The consideration stated for this contract was $4,179. The other was a single premium life insurance policy in the sum of $25,000, payable to her daughter. The premium specified was $22,946. She was not required to pass a physical examination and the insurance policy would not have been issued without the annuity contract. The court held that the amount paid to the daughter on the decedent's death was not receivable as "insurance" so as to permit the exemption. The court stated that the elements of risk-shifting and risk-distributing are essential to a life insurance contract; that when Congress used the words "receivable as insurance" it contemplated amounts received pursuant to a transaction possessing these features; the two contracts must be considered together and when so considered they fail to spell out any element of insurance risk; annuity and insurance are opposites and in this combination the one neutralizes the risk customarily inherent in the other; any risk that the prepayment would earn less than the amount paid to the beneficiary as an annuity was an investment risk and not an insurance risk.

[5, 6] The same result was reached in Keller v. Commissioner, 312 U.S. 543, 61 S.Ct. 651, 85 L.Ed. 1032, in which the facts are substantially the same as the LeGierse case. Also in accord with the Supreme Court decisions are Old Colony Trust Co.

v. Commissioner of Internal Revenue, 1 Cir., 102 F.2d 380; In re Smiley's Estate, 35 Wash.2d 863, 216 P.2d 212; and In re Atkins' Estate, 129 N.J.Eq. 186, 18 A.2d 45. In the latter case the court stated, 18 A.2d at page 49: "A life insurance policy is a contract whereby the insurance company agrees to insure or indemnify the beneficiary against the death of the insured; it is a contract by which the insured protects the beneficiary against loss accruing by the early or premature death of the insured. The refund annuity contract such as we are here considering is very different. By it the insurance company agrees to repay to the annuitant, in instalments during his life, the amount paid in by him to the company, and if at his death there be a balance unpaid to him, to pay that balance to the person designated by the annuitant to receive the same. It is a contract by which the annuitant protects himself, during his life, by making an investment which will assure the receipt by himself, of an adequate or desired annual sum during his life, with the further assurance that if he should die prematurely, his estate or those whom he desires to receive distribution thereof will not suffer the loss of the repayment he has himself not yet received. In the judgment of this court this is not a life insurance policy."

[7] In the instant case the retirement income bond was taken out by decedent in 1930, at which time she paid the annual premium of $590.40. She paid the annual premium until 1948 when, at age 65, she was entitled to receive $100 a month for life. From the schedule of death benefits attached to the policy it is evident that the insurance company did not assume any risk of loss on her death. The first year she paid a premium of $490.40 and was guaranteed in case of death $520. The second year the paid premiums totaled $1,180.80 and the death benefit payment amounted to $1,060. After a few years the death benefits slightly exceeded the amount of premiums paid but they would not exceed the amount contributed by decedent plus the income thereon. What the beneficiary received is that portion of decedent's money which had not been repaid to her and whatever risk the insurance company assumed was an investment risk and not an insurance risk.

[8] Respondent contends that the term "insurance" as used in section 13721 of the Revenue and Taxation Code should be so construed as to include annuities since section 101 of the Insurance Code provides that "Life insurance includes insurance upon the lives of persons or appertaining thereto, and the granting, purchasing, or disposing of annuities." Section 100 of that code divides insurance into twenty classes; section 101 does not purport to define life insurance but states that within that classification shall be included the granting, purchasing and disposing of annuities. The Insurance Code is primarily a regulation and licensing statute whereas the Revenue and Taxation Code, as the name implies, is a revenue statute. The classification of annuities as life insurance for the purposes of the Insurance Code does not require its classification as insurance for the purposes of the Revenue and Taxation Code the objects of which are totally different.

[9] The construction of a statute by the officials charged with its administration must be given great weight. Nelson v. Dean, 27 Cal.2d 873, 880, 168 P.2d 16, 168 A.L.R. 467. Since the enactment of the insurance exemption in 1935 the Controller has construed annuity contracts as not being within the scope of the insurance exemption. Section 719 of the Inheritance Tax Rules and Regulations (Title 18 of the Administrative Code) provides: "The right of any beneficiary to the balance payable under a refund annuity contract upon the death of the annuitant constitutes a transfer subject to the Inheritance Tax Law." Section 797 of those rules provides in part: "It is to be noted that an annuity contract is not a life insurance policy. Consequently the exemption mentioned in section 677 is not allowable on any payment made under any such contract." Section 677 provides: "* * * The first $50,000 of proceeds of any life or accident insurance policy, * * * are exempt * * *"

The construction of the statute by the Controller is in accord with the decisions

construing the federal statute and with the ordinary meaning given the term "life insurance."

Reversed with instructions to enter an order fixing the inheritance tax in accordance with the report of the inheritance tax appraiser.

MOORE, P. J., and McCOMB, J., concur.

104 Cal.App.2d 495

McCORD CO. v. PLOTNICK et al.

Civ. 18508.

District Court of Appeal, Second District, Division 2, California.

May 29, 1951.

Action by McCord Company, a California corporation, against L. A. Plotnick, and others, wherein defendants made a motion that the reporter's transcript be amended by striking certain words from an answer of a witness and inserting other words in lieu thereof. The Superior Court, Los Angeles County, Frank G. Swain, J., entered an order denying the motion and defendants appealed. The District Court of Appeal, Wilson, J., held that the order which denied motion to amend reporter's transcript which neither affected the judgment nor its enforcement nor the stay of its execution and did not direct the payment of money by defendants or the performance of an act by defendants was not a special order made after judgment and was not an appealable order.

Appeal dismissed.

1. Appeal and error ⇐82(1)

An order which is made after judgment, to be appealable, must affect judgment in some manner or bear some relation to judgment, either by way of enforcing or staying its execution. Code Civ. Proc. § 963, subd. 2.

2. Appeal and error ⇐82(1)

In order to be appealable, it is not sufficient that order which is made after judgment determine finally for purposes of further proceedings in trial court some issue in case, but it must direct payment of money by appellant or performance of an act by or against him. Code Civ.Proc. § 963, subd. 2.

3. Appeal and error ⇐82(1)

An order which denied motion to amend reporter's transcript by striking certain words from answer of witness and inserting other words in lieu thereof, which neither affected judgment nor its enforcement nor stay of its execution and did not direct payment of money by appellants or performance of act by appellants was not "special order made after judgment" and was not appealable order. Code Civ.Proc. § 963, subd. 2.

See publication Words and Phrases, for other judicial constructions and definitions of "Special Order Made After Judgment".

Jacob Chaitkin, Pasadena, and Rose Hemperly, Los Angeles, for appellants.

Irving M. Walker, John L. Martin, Mark Mullin, all of Los Angeles, for respondent.

WILSON, Justice.

Plaintiff recovered a judgment against defendants from which they appealed. See Civ. No. 18390. They made a motion in the trial court that the reporter's transcript be amended by striking certain words from an answer of a witness and inserting other words in lieu thereof. After a hearing at which the court reporter testified that the transcript is in accord with his shorthand notes the motion was denied. Defendants have appealed from the order.

Plaintiff has moved to dismiss the latter appeal on the ground that it is not a "special order made after final judgment," referred to in subdivision 2 of section 963 of the Code of Civil Procedure, from which an appeal may be taken.

[1, 2] An order made after judgment to be appealable "must affect the judgment in some manner or bear some relation to it, either by way of enforcing or staying its execution * * *." Williams v. Superior Court, 14 Cal.2d 656, 666, 96 P.2d 334, 339; Imperial Beverage Co. v. Superior

Court, 24 Cal.2d 627, 632, 150 P.2d 881; Lande v. So. Calif. Freight Lines, 78 Cal. App.2d 417, 419, 177 P.2d 936. "It is not sufficient that the order determine finally for the purposes of further proceedings in the trial court some distinct issue in the case; it must direct the payment of money by appellant or the performance of an act by or against him." Sjoberg v. Hastorf, 33 Cal.2d 116, 119, 199 P.2d 668, 670; Carradine v. Carradine, 75 Cal.App.2d 775, 778, 171 P.2d 911.

[3] Since the order appealed from affects neither the judgment nor its enforcement nor the stay of its execution and does not direct the payment of money by defendants or the performance of an act by them, it is not classed as a special order made after judgment and is therefore not an appealable order.

Appeal dismissed.

MOORE, P. J., and McCOMB, J., concur.

104 Cal.App.2d 380

PEOPLE v. BIGELOW et al.

Cr. 4583.

District Court of Appeal, Second District, Division 3, California.

May 23, 1951.

Hearing Denied June 21, 1951.

Harry Bigelow and Florence Ivery were convicted in the Superior Court of Los Angeles County of possessing a preparation of heroin and defendant Bigelow appealed from the judgment and from the order denying his motion for new trial. The District Court of Appeal, Vallee, J., held that evidence was sufficient to establish corpus delicti and to establish that defendant Bigelow possessed the narcotic, that he had knowledge of its presence, and that he knew substance in his possession was a narcotic.

Judgment and order denying a new trial affirmed.

1. Poisons ⇐9

In prosecution for possession of narcotic, evidence that narcotic identified as heroin was found at residence which defendant told police officers was his home sufficiently established corpus delicti. Health and Safety Code, § 11500.

2. Poisons ⇐9

It is not necessary to prove a defendant's connection with a narcotic in order to establish corpus delicti. Health and Safety Code, § 11500.

3. Poisons ⇐9

In prosecution for possession of a preparation of heroin, evidence was sufficient to establish that defendant possessed narcotic, that he had knowledge of its presence, and that he knew substance in his possession was a narcotic.

4. Property ⇐10

A person has "possession" of a chattel who has physical control with intent to exercise such control, or, having had such physical control, has not abandoned it and no other person has obtained possession.

See publication Words and Phrases, for other judicial constructions and definitions of "Possession".

5. Poisons ⇐9

In prosecution for possession of a preparation of heroin, where defendant told police officers that he lived at certain address, he had key to house at that address, he was seen frequently there and defendant's clothing was in bedroom where 81 capsules of heroin were found and defendant said stuff was his and that he knew at that time that stuff was a narcotic, evidence warranted jury in inferring that defendant had occupied bedroom, that heroin found in that room belonged to him and that he knew it was there and that it was heroin. Health and Safety Code, § 11500.

6. Criminal law ⇐1169(8)

In prosecution for possession of a preparation of heroin, where in reply to question asked on cross-examination codefendant replied that she was not defendant's common-law wife, and after answer defendant's objection to question was sustained and he did not move to strike answer or ask court to disregard fragmentary question or answer, answer was favorable to defendant, and if question was improper there

was no error. Health and Safety Code, § 11500.

7. Criminal law ⇐1169(8)

An answer to an improper question that is favorable to defendant is a complete reply to a claim of prejudicial error in asking question.

8. Witnesses ⇐330(1)

In prosecution for possession of a preparation of heroin, where codefendant testified on direct examination that she was unable to identify heroin, interrogation of codefendant on cross-examination as to whether she had not seen heroin previously in a municipal court was not error, since, in so far as prosecution was against defendant, codefendant was a witness.

9. Witnesses ⇐269(1)

A witness may be cross-examined as to any facts stated in his direct examination or connected therewith. Code Civ.Proc. § 2048.

10. Witnesses ⇐269(1)

The fact that an inquiry on cross-examination may bring to light criminal conduct of a witness does not render such cross-examination erroneous when it is relevant to subject matter of direct examination.

11. Witnesses ⇐350

A cross-examiner's inquiry is limited to fact of conviction and nature of offense and he may not go into details or circumstances surrounding the offense.

12. Criminal law ⇐1171(1)

In prosecution for possession of a preparation of heroin, where defendant admitted on direct examination that he had been convicted of a felony, cross-examining of defendant as to nature of offenses although defendant's counsel agreed to stipulate that defendant had been convicted of crimes of robbery and assault with a deadly weapon, although not approved, was not prejudicial misconduct. Health and Safety Code, § 11500.

13. Criminal law ⇐1036(1)

In prosecution for possession of a preparation of heroin, where no objection was made by defendant to question which elicited testimony of Federal Narcotics Agent, who assisted in searching defendant's house and in interrogating defendant, that word "stuff" meant narcotic or dangerous drug of some kind to persons who use or possess narcotics, and no request was made that jury be instructed to disregard it, defendant could not raise objection on appeal. Health and Safety Code, § 11500.

14. Criminal law ⇐1172(1)

In prosecution for possession of a preparation of heroin, instruction that jury was required to decide separately the question of guilt or innocence of each of the two defendants was not prejudicial to the defendant and did not improperly single out to defendant's prejudice that his codefendant was a woman. Health and Safety Code, § 11500.

15. Criminal law ⇐810

In prosecution for possession of a preparation of heroin, instructions defining "principals" and "aiding and abetting" and telling jury that a person, whether present or not, who advises and encourages commission of offense, is a principal, were not inconsistent with instruction defining possession of a narcotic. Health and Safety Code, § 11500; Pen.Code, § 31.

16. Poisons ⇐4

One may aid and abet another in possession of a narcotic, and one who is not present may advise and encourage another in its commission. Health and Safety Code, § 11500; Pen.Code. § 31.

17. Criminal law ⇐781(1)

In a proper case where there is an issue as to whether a confession was voluntary or involuntary, court should instruct jury as to when a confession is voluntary and when it is involuntary.

18. Criminal law ⇐1173(2)

In prosecution for possession of a preparation of heroin, where there was no contention that statements of defendant to officers were not voluntary or that force, violence, threats, duress or intimidation was used, or that an offer or promise of reward or leniency was made, or that any hope of immunity was held out, or that conduct

of officers in obtaining statements was unlawful or unfair, defendant was not prejudiced by failure of court to instruct jury as to circumstances under which a confession is voluntary or by not telling jury that they should disregard a false confession. Health and Safety Code, § 11500.

19. Constitutional law ⇐266
Criminal law ⇐519(4)

Fact that statements were made in response to questions of officers of the law while defendant was under arrest did not, in and of itself, render statements involuntary or taken in violation of due process clause. U.S.C.A.Const. Amend. 14.

Morris Lavine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Harry Bigelow and Florence Ivery were tried by a jury and convicted of a violation of section 11500 of the Health and Safety Code—possession of a preparation of heroin. Bigelow appeals from the judgment and from the order denying his motion for a new trial. He asserts: (1) The corpus delicti was not established. (2) The evidence was insufficient to prove that he possessed the narcotic. (3) The evidence was insufficient to prove guilty knowledge. (4) The evidence was insufficient to prove "aiding and abetting." (5) The court erred in the admission and exclusion of evidence. (6) The prosecutor was guilty of prejudicial misconduct. (7) The court erred in the giving and refusal of instructions. (8) The use of a purported confession violated constitutional guarantees.

About 5:00 p. m. on April 13, 1950, three officers were parked in an automobile near 1134 East 127th Street, Los Angeles. About 6:00 p. m. Bigelow came out of the house at that address, changed the water, and went back into the house. About 10:00 p. m. he again left the house, entered a car, and drove to Compton where he was stopped by the officers who had followed him.

The officers then searched Bigelow and the automobile. He told them he was looking for a house to buy and that he lived at 1134 East 127th Street. The search revealed nothing. Bigelow testified "he [an officer] shook me down, he said that he heard that I was fooling with stuff—it is the word stuff again—and I asked him what did he mean, and he said narcotics." The officers and Bigelow then returned to 1134 East 127th Street. One of the officers approached the front door of the house with Bigelow and rang the bell. Defendant Florence Ivery opened the small aperture in the front door and looked out. The officer identified himself and Bigelow said, "Open the door, honey, this is a deputy sheriff with me." Florence closed the small aperture and the officer heard footsteps running toward the back of the house. The officer then forced the front door open with his shoulder. When he got in Florence was standing in the center of the living room moving her right hand and crumpling her fist. As she did so white powder fell to the rug. The officers opened her hand and found therein a crumpled and shredded piece of paper. Some of the white powder was picked up from the rug and examined by a chemist. It was heroin.

The officers searched all the rooms in the house at that time but did not move all the furniture. When they left the house all doors and windows were locked and Bigelow locked the front door.

Bigelow, Florence, and several other people who had entered the house, were taken to a sheriff's office. The officer asked Bigelow if he had any more narcotics at the house. He said he did not; that he did not use narcotics; that Florence used a little.

The next day three officers returned to the house at 1134 East 127th Street with Bigelow and an agent of the Federal Bureau of Narcotics for the purpose of further searching the front bedroom because the officer in charge was not satisfied with the search of that room made the night before. They entered the house with a key. The testimony with respect to the key is as follows: "We used the key to the front door which had been placed in the defend-

ant's property at the County Jail the previous night when he was booked," and "We used the key that he had obtained from his property to gain admittance to the location and then we proceeded to search that bedroom that I hadn't searched the previous night." All of the doors and windows were still locked. The officers searched the house again and in so doing moved a vanity dresser in the front bedroom. On the floor under the dresser they found an aluminum tube containing 81 capsules of white powder. In a closet off this room there were numerous men's shirts. In another bedroom they found a cardboard box labeled "empty gelatin capsules." Ten of the capsules analyzed were heroin. After he found the capsules one of the officers asked Bigelow if the "stuff" he found belonged to him. Bigelow replied, "Well, you are a good detective, aren't you?" The federal agent asked Bigelow if the "stuff" belonged to him and he said, "I will tell you about that later."

Later the same day in the presence of Florence an officer asked Bigelow if the "stuff" found in the house was his and told him he did not want him to say it was his if it was not. Bigelow replied, "Well, the stuff is mine." The officer repeated the question and again said he did not want him to say it was his if it was not. Bigelow replied, "Well, I am not saying it just to be saying it, I am saying it because it is mine." In the same conversation the officer told Bigelow that he did not want him to take the blame for anything that did not belong to him, that if it did belong to him to say so. Bigelow said, "Yes, that is mine. She has a previous narcotic rap on her." The federal narcotic agent testified that the word "stuff" means a narcotic or dangerous drug of some kind to persons who use or possess narcotics.

Bigelow testified he had some of his clothes in the house at 1134 East 127th Street; that he had some suits in the closet off the front bedroom and some shirts locked in a compartment in the same room. He denied possession of any heroin and denied making the statements testified to by the officers. Bigelow and Florence had been seen at that house frequently during the preceding year and a half.

[1, 2] The evidence established the corpus delicti. It showed the illegal possession of heroin by someone. It is not necessary to prove a defendant's connection with the narcotic in order to establish the corpus delicti. People v. Chan Chaun, 41 Cal.App. 2d 586, 589, 107 P.2d 455.

[3–5] The evidence was also sufficient to establish that Bigelow "possessed" the narcotic, that he had knowledge of its presence, and that he knew the substance in his possession was a narcotic. " 'A person has "possession" of a chattel who has physical control with the intent to exercise such control, or, having had such physical control, has not abandoned it and no other person has obtained possession. (Restatement Torts, section 216).' " People v. Gory, 28 Cal.2d 450, 455, 170 P.2d 433, 436; People v. Noland, 61 Cal.App.2d 364, 366, 143 P.2d 86. Bigelow told the officers he lived at 1134 East 127th Street. He had the key to the house. He was seen frequently there. His clothing was in the bedroom where the 81 capsules were found. He was at first evasive in his answers to the officers. He later said the "stuff" was his. He knew at that time that "stuff" meant a narcotic. The evidence was ample to warrant the jury in inferring that Bigelow occupied the front bedroom, that the heroin found in that room belonged to him, that he knew it was there and that it was heroin. People v. Hoff, 84 Cal.App.2d 398, 190 P.2d 616; People v. Salo, 73 Cal.App.2d 685, 167 P.2d 269. In view of the fact that the evidence was sufficient to establish that Bigelow illegally possessed the narcotic, we need not consider his contention that it was insufficient to establish that he aided and abetted Florence.

[6, 7] On cross-examination the prosecutor asked Florence Ivery, "As a matter of fact, you were on the 13th of April the commonlaw wife—." She answered, "No, I am no commonlaw wife, uh-uh." After the answer Bigelow's objection to the question was sustained. He did not move to strike the answer or ask the court to dis-

regard the fragmentary question or the answer. Assuming without deciding that the question was improper, there was no error. The answer was favorable to Bigelow. An answer to an improper question that is favorable to the defendant is a complete reply to a claim of prejudicial error in asking the question. People v. O'Donnell, 11 Cal.2d 666, 671, 81 P.2d 939.

[8–10] On direct examination Florence Ivery was asked whether she knew what heroin was. She replied that she had seen it in the presence of officers but if someone showed it to her and asked her to identify it she would not know it. On cross-examination she testified that she did not know what heroin was until the officers showed her on April 14th what they supposedly found, and that never to her knowledge had she seen any before that. She was then interrogated as to whether she had not seen heroin in the Compton municipal court on March 13, 1950. The interrogation in full is set forth in the margin.[1] Bigelow asserts that the prosecutor was guilty of prejudicial misconduct in making this inquiry, that the court erred in overruling his objections and in denying his motion, and that the same was prejudicial to him. There was no error. Insofar as the prosecution was against Bigelow, Florence was a witness. A witness may be cross-examined as to any facts stated in his direct examination or connected therewith. Code Civ. Proc., § 2048. The fact that an inquiry on cross-examination may bring to light criminal conduct of a witness does not render such cross-examination erroneous when it is relevant to the subject matter of the direct examination. People v. Crow, 48 Cal.

1. "Q. Didn't you see some on the 13th of March? A. I didn't understand that question.

"Q. Didn't you see some on the 13th of March out in the Compton court? "Mr. Rubin: Just a moment. That is objected to as being incompetent, irrelevant and immaterial. A. No. I wasn't in the Compton court. "Mr. Rubin: Please, just a moment—object to that as being not in the issues of this case.

"The Court: Overruled.

"Mr. Rubin: I cite any reference to it as prejudicial misconduct on the part of the District Attorney and ask the jury be instructed to disregard it.

"The Court: The witness testified she has no knowledge of it, never seen any, can't tell it when she sees it.

"Mr. Carr: Q. You say that you did not? A. Not on the 13th, no. He didn't show me anything on the 13th.

"Q. Were you in the Municipal Court of the City of Compton, County of Los Angeles, State of California on the 13th of March, this year?

"Mr. Rubin: Object to that, your Honor,—A. No, not the 13th, sir.

"Mr. Rubin: — as being incompetent, irrelevant and immaterial.

"The Court: Overruled.

"Q. By Mr. Carr: Did you have a hearing out there at the Compton court on the 13th of March? A. Not the 13th, sir. It probably was after that because I think it was—of March? A. March. A. April? March or April, which?

"Q. I am talking about March. A. The 13th of March?

"Q. Just about a month before you were arrested on this charge. A. Oh, yes, yes.

"Q. And at that time there was about fourteen capsules in the bindle of Heroin there in the courtroom, was there? A. I believe it was, but I didn't—no, they didn't even show it to me that day. I didn't even see it.

"Q. They showed it to your attorney and you were sitting alongside of him, didn't they? A. I don't remember.

"Q. You heard them talking about it there in the court, didn't you? A. Yes, I remember.

"Q. And then there was a—some objects were shown to your attorney there in the court, weren't there? A. Yes, I do—yes, now I remember, yes. I do remember seeing him handling something.

"Q. And that something that he was handling was handed and shown—was Heroin, wasn't it? A. I guess it was but my attorney didn't show it to me, he was just looking at it in the courtroom and he didn't speak about it himself, and writing some notations and give it back to the fellow and that is all.

"Q. You heard it referred to as Heroin, didn't you? A. Certainly.

"Q. Did you look at it while your attorney had it? A. No, I didn't, because it was all kind of sealed-like and I couldn't see anything."

App.2d 666, 671, 120 P.2d 686. See People v. Dabb, 32 Cal.2d 491, 499, 197 P.2d 1.

[11, 12] On direct examination Bigelow was asked if he had ever been convicted of a felony. He said he had been in 1935. He was then asked if it was a narcotic conviction. He said it was not. On cross-examination he was questioned as set forth in the margin.[2] Bigelow asserts that the prosecutor was guilty of prejudicial misconduct in this cross-examination. A cross-examiner's inquiry is limited to the fact of conviction and the nature of the offense. He may not go into the details or circumstances surrounding the offense. People v. Braun, 14 Cal.2d 1, 6, 92 P.2d 402. While we cannot place a stamp of approval on the manner in which the cross-examination was conducted, we cannot say that the prosecutor was guilty of prejudicial misconduct. Bigelow was charged in the information with a prior conviction of robbery and one of assault with a deadly weapon. It would have been a simple matter for the prosecutor to have asked if those were not the prior convictions. See People v. Jacobs, 73 Cal.App. 334, 347, 350, 238 P. 770. No inquiry was made as to the details or circumstances surrounding the offenses. Other claims of prejudicial misconduct on the part of the prosecutor are wholly without merit.

[13] The federal narcotic agent who assisted in searching the house and in interrogating Bigelow testified that the word "stuff" means a narcotic or dangerous drug of some kind to persons who use or possess narcotics. Bigelow asserts that the court erred in admitting the evidence. As there was no objection to the question which elicited this evidence and no request made that the jury be instructed to disregard it, Bigelow cannot raise the point on appeal.

[14] Bigelow complains because the instructions were couched in the masculine gender. He says he was therefore improperly singled out by the court to his prejudice as his codefendant was a woman. The court instructed the jury that they were required to decide separately the question of the guilt or innocence of each of the two defendants.[3] We are unable to see how

2. "Q. You say that you were arrested in 1935? A. I was convicted in 1935, yes, sir.

"Q. And you were convicted of, let's see, a couple of counts of first degree robbery and a couple of counts of assault with a deadly weapon and carrying concealed weapons, is that right? A. No, sir, that isn't right. It all come out of one place, it was two counts against one man, supposed to have been two fellows there.

"Q. Those were first degree robberies, weren't they? A. Well, my car was involved in it, I think they were.

"Q. I am not asking what your car was involved in, I am asking you the nature of the offenses you were convicted of. A. If you want to ask me the question I have to answer like that.

"The Court: The only question is, what were you convicted of?

"Mr. Rubin: If the Court please, we will stipulate he was convicted of the crimes of robbery and of assault with a deadly weapon.

"Mr. Carr: I want this witness to answer. I won't accept the stipulation.

"Mr. Rubin: Very well.

"Mr. Carr: There is nothing funny about it.

"The Witness: No, sir, I paid for it, I will answer it, I paid for the crime, I will answer it.

"Mr. Carr: I don't want a dissertation either.

"The Court: Just a minute.

"Mr. Rubin: Just a moment, I am going to object, your Honor, to the tone of voice being used, and badgering of this witness by Mr. Carr. Mr. Carr indicating nothing was funny—

"The Court: I think both Mr. Carr and the witness raised their voices.

"Mr. Rubin: Let the record show Mr. Bigelow did nothing, I think, which is funny.

"Mr. Carr: When Mr. Rubin becomes the judge of it, then I will be bound by what he can see.

"Mr. Rubin: I object to the badgering of the witness.

"The Court: That remark is wholly unjustified, he is not badgering the witness. Let's have a question.

"Q. By Mr. Carr: The crimes of which you were convicted were first degree robbery, is that right? A. Yes, sir, I was convicted of first degree robbery and assault with a deadly weapon.

"Q. And you served a term of imprisonment therefor, didn't you? A. Yes, sir, I did."

Bigelow was prejudiced in the slightest in this respect.

[15, 16] The court defined "possession" of a narcotic to the jury.[4] It then defined "principals," [5] and "aiding and abetting." [6] Bigelow asserts that the instructions defining principals and aiding and abetting, and telling the jury that a person, "whether present or not," who advises and encourages the commission of the offense, are inconsistent with the instruction defining "possession" of a narcotic. His theory appears to be that one cannot aid and abet another in committing the offense denounced by Health and Safety Code section 11500, and that, in the commission of that offense, one cannot be a principal who, not being present, advises and encourages its commission. Section 11500 provides in part that "no person shall possess" a narcotic except upon prescribed conditions not present here. The possession may be individual, through an agent, or joint with another. People v. Graves, 84 Cal.App.2d 531, 534, 191 P.2d 32. All persons concerned in the commission of the crime, whether they commit the act constituting the offense or aid and abet in its commission, are principals. Pen. Code, § 31. We think it clear that one may aid and abet another in the possession of a narcotic, and that one who is not present may advise and encourage another in its commission. Cf. People v. Borrego, 211 Cal. 759, 297 P. 17; People v. Sinclair, 129 Cal.App. 320, 322, 19 P.2d 23. We find no inconsistency in the instructions.

[17, 18] Bigelow asserts that the court erred in not giving instructions on the law of confessions. He argues that the court failed to tell the jury "the circumstances under which a confession is 'voluntary'" and that the jury should have been told to disregard a false confession. The instructions given on confessions are set forth in the margin.[7] In a proper case where there

3. "In this case, you must decide separately the question of the innocence or guilt of each of the two defendants. If you cannot agree upon the innocence or guilt of both the defendants, but do agree as to the innocence or guilt of one of them, you must render a verdict as to the one upon whose innocence or guilt you do agree."

4. "Within the meaning of the law, a person is in possession of a narcotic when it is under his dominion and control, and, to his knowledge, either is carried on his person or is in his presence and custody, or, if not on his person or in his presence, the possession thereof is immediate, accessible, and exclusive to him, provided, however, that two or more persons may have joint possession of a narcotic if jointly and knowingly they have the dominion, control and exclusive possession I have described."

5. "All persons concerned in the commission of a crime who either directly and actively commit the act constituting the offense or who knowingly and with criminal intent aid and abet in its commission or, whether present or not, who advise and encourage its commission, are regarded by the law as principals in the crime thus committed and are equally guilty thereof."

6. "One who does not actively commit the offense, but who aids, promotes, or encourages its commission either by act or counsel or both, is not deemed by law to be guilty and shall not be found guilty of the crime unless he did what he did knowingly and with criminal intent. To abet another in the commission of a crime implies a consciousness of guilt in instigating, encouraging, promoting, or aiding the commission of such criminal offense."

7. "The law of this state admonishes you to view with caution the testimony of any witness which purports to relate an oral admission of the defendant or an oral confession by him."

"Evidence has been received in this case tending to show that on an occasion or occasions other than this trial defendant made a statement or statements tending to prove guilt of the alleged crime for which he is on trial.

"A statement thus made by a defendant may be either a confession or an admission.

"A confession is a statement that was made by one who is a defendant in a criminal trial, at a time when he was not testifying in that trial, by which he acknowledged certain conduct of his own that constituted a crime for which he is on trial, a statement which, if true, discloses his guilt of that crime and excludes the possibility of a reasonable inference to the contrary.

is an issue as to whether a confession was voluntary or involuntary, the court should instruct the jury as to when a confession is voluntary and when it is involuntary. In the present case there was no contention below that the statements of Bigelow to the officers were not voluntary. He denied making the statements. There was no evidence that force, violence, threats, duress, or intimidation was used; or that an offer or promise of reward or leniency was made; or that any hope of immunity was held out; or that the conduct of the officers in obtaining the statements was unlawful or even unfair. The fact that the statements were made in response to questions of officers of the law while the accused was under arrest does not in and of itself render the statements involuntary. People v. Rogers, 22 Cal.2d 787, 805, 141 P.2d 722. Bigelow was not prejudiced by the failure of the court to instruct the jury as to "the circumstances under which a confession is 'voluntary.'" There was no error in not directly telling the jury that they should disregard a false confession. Bigelow did not testify or contend that the statements which the officers testified he had made were false. He testified that he did not make them at all. Further, the instructions told the jury that a statement of a defendant was a confession only "if true"; that they were the exclusive judges as to whether or not it was true; and that, in deciding that question, they were to consider all the circumstances connected with the making of the statement. People v. Liss, 35 Cal.2d 570, 219 P.2d 789, and People v. Mehaffey, 32 Cal.2d 535, 197 P.2d 12, cited by Bigelow in this behalf, are not applicable. In Liss, the court condemned the following instruction: "(But even) if you (should) find that the confession was false either entirely or in part it remains nevertheless (evidence) for your consideration, to be given such significance as your judgment may determine under instructions." 35 Cal.2d 573, 219 P.2d 792. Mehaffey does not discuss the point made by Bigelow.

[19] Lastly, Bigelow asserts that "the use of the purported confession violated due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States." The contention is apparently predicated upon the fact that Bigelow was taken into custody on the night of April 13, 1950, remained in custody that night, was taken to the house at 1134 East 127th Street the next day, and then returned to the sheriff's narcotic division where he made the confession. We find nothing in these facts which rendered the use of the confession violative of the due process clause. As we have said, the fact that the statements were made in response to questions of officers of the law while the defendant was under arrest does not in and of itself render the statements involuntary or taken in violation of the due process clause. People v. Mehaffey, supra, 32 Cal.2d 535, 548, 552, 197 P.2d 12; People v. Rogers, supra, 22 Cal.2d 787, 805, 141 P.2d 722. We have examined McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819, Anderson v. United States, 318 U.S. 350, 63 S.Ct. 599, 87 L.Ed. 829, and Chambers v. Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716, relied on by Bigelow in this behalf, and find nothing in any of them which even suggests that the use of Bigelow's confession violated the due process clause. In McNabb, the court stated: "The mere fact that a confession was made while in the custody of the police does not render it inadmissible." 318 U.S. 332, 63 S.Ct. 615, 87 L.Ed. 827. People v. Simmons, 28 Cal.2d 699, 172 P.2d 18, cited at the oral argument, is not in point. That case discusses

> "If under my instructions you find that a voluntary confession was made, you are the exclusive judges as to whether or not the confession was true; and in deciding that question you should consider all the circumstances connected with the making of the statement, as shown by the evidence.
>
> "An admission is something less than a confession in that it does not concede so much pointing toward defendant's guilt, and does not alone, even if true, support a deduction of guilt. It may consist of any statement or other conduct by a defendant whereby he expressly or impliedly acknowledges a fact that contributes in some degree to the proof of his guilt of an alleged crime for which he is on trial, and which statement was made or conduct occurred outside of that trial."

at length the admissibility of accusatory statements and a defendant's responses thereto. No accusatory statements were made to Bigelow.

The judgment and order denying a new trial are affirmed.

SHINN, P. J., and WOOD, J., concur.

WEITZENKORN v. LESSER et al.
Civ. 17868.

District Court of Appeal, Second District, Division 2, California.

May 25, 1951.

Hearing Granted July 19, 1951.*

Action by Ilse Lahn Weitzenkorn, professionally known as Ilse Lahn, against Sol Lesser, individually, Sol Lesser Productions, Inc., a corporation, RKO Radio Pictures, Inc., a corporation, for damages on complaint stating three causes of action for misappropriation of plaintiff's literary composition. The Superior Court of Los Angeles County, Byron J. Walters, J., sustained demurrers to each of three counts in plaintiff's complaint and plaintiff appealed. The District Court of Appeal, McComb, J., held that complaint stated good cause of action in first count on express contract and in second count on implied contract.

Judgment reversed with directions.

1. Literary property ⇐9

Complaint which alleged that plaintiff was sole and exclusive owner of literary composition created by her and that she had submitted same to defendants pursuant to their requests and pursuant to express understanding and agreement whereby defendants promised and agreed to pay plaintiff reasonable value of such composition if defendants should in future use any portion of such composition, and that defendants thereafter produced motion picture and exhibited same, which was patterned upon, copied and used plaintiff's literary composition to plaintiff's damage, stated cause of action for breach of express contract.

2. Literary property ⇐9

Where plaintiff's complaint stated cause of action for breach of an alleged express contract whereby defendants agreed to pay certain sum for literary composition of plaintiff if such composition was thereafter used by defendants whether such contract had been entered into and whether defendants had breached it, regardless of whether composition was new, novel, common or open to public knowledge, was question of fact for determination of trier of fact.

3. Literary property ⇐9

Complaint which alleged that plaintiff was sole owner of literary and dramatic composition and that such composition was submitted at special instance and request of defendants for purpose of sale to or use by defendant upon payment to plaintiff of reasonable value therefor and that defendants thereafter patterned motion picture after such composition and produced and exhibited same to plaintiff's damage asserted good cause of action on implied contract.

4. Literary property ⇐7

Recovery may be had upon theory of implied contract to pay reasonable value for use of literary material furnished even though idea may be common or open to public knowledge.

5. Pleading ⇐189

When from all facts well pleaded in complaint only single inference and one conclusion may be drawn, general demurrer to complaint raises question of law whether complaint states cause of action, but if reasonable minds might reach different conclusion from such facts, then question of fact is presented for determination of trier of fact and demurrer should be overruled.

6. Pleading ⇐189

Where facts well pleaded in complaint for damages for plagiarism caused by alleged wrongful appropriation of plaintiff's literary composition by defendants to theme of motion picture were such that reasonable minds might reach different inferences and conclusions as to whether cause of action was stated, question of fact was

* Subsequent opinion 256 P.2d 947.

presented and demurrer to such count should have been overruled.

Harold A. Fendler, Beverly Hills, Daniel A. Weber and Robert W. Lerner, Beverly Hills, of counsel, for appellant.

Mitchell, Silberberg & Knupp and Arthur Groman, all of Los Angeles, for respondents.

McCOMB, Justice.

After a judgment of dismissal predicated upon the sustaining of defendants' demurrers without leave to amend to plaintiff's complaint on three alleged causes of action: (1) Upon an express contract by defendants Sol Lesser and Sol Lesser Productions, Inc. (hereinafter referred to as defendants Lesser) to pay plaintiff the reasonable value of her literary composition. (2) Upon an implied contract of defendants Lesser to pay plaintiff the reasonable value of her literary material. (3) Plagiarism arising out of defendants' unauthorized use of the literary material in a motion picture produced and distributed by defendants, plaintiff appeals.

Facts

The complaint in substance alleges as follows:

First Count:

That plaintiff was an author and writer and on or about November 25, 1944, originated, created, wrote and completed a literary and dramatic composition consisting of 19 pages entitled "Tarzan in the Land of Eternal Youth" and later called "Tarzan and the Fountain of Youth". A true copy of plaintiff's composition is attached to the complaint.

At all times prior to November 25, 1944, plaintiff was the sole and exclusive owner of said literary and dramatic composition and has at all times retained all common law rights of ownership and authorship therein; that on or about November 24, 1944, plaintiff submitted her literary composition to defendants Lesser at their special instance and request "pursuant to an express oral understanding and agreement wherein and whereby in consideration of said submission by plaintiff said defendants and each of them orally promised and agreed to pay to plaintiff the reasonable value thereof if said defendants or either of them should at any time in the future use the same or any portion thereof."

It was further alleged that defendants Lesser and each of them "promised and agreed to give usual and customary screen credit to the plaintiff as the author of said story" in the event of its use; that after accepting the literary composition of plaintiff said defendants on or about June 8, 1948, produced a motion picture photoplay entitled "Tarzan's Magic Fountain" which said defendants in conjunction with defendant RKO Radio Pictures, Inc., distributed, released and caused to be exhibited commencing about November 1, 1948, and continuously thereafter; that said motion picture is patterned upon, copies and uses plaintiff's literary and dramatic composition; that it is impractical to attach to the complaint a copy of the motion picture photoplay by reason of the nature and bulk of the same and that all of the negative and positive prints are in the possession and custody of defendants and plaintiff cannot procure a copy thereof; that by reason of the production and distribution of defendants' motion picture plaintiff alleged that her literary and dramatic composition of the reasonable value of $50,000 has been rendered valueless and that she had been damaged in such sum; that the value of the screen credit which plaintiff did not receive was likewise of a reasonable value of $50,000.

Second Count:

All of the allegations of the first count except the averments with respect to the express agreement of the parties are incorporated by reference and in addition thereto the following is alleged:

"That on or about the 25th day of November, 1944, plaintiff submitted to defendants Sol Lesser and Sol Lesser Productions, Inc., and each of them at their special instance and request plaintiff's said literary and dramatic composition entitled

'Tarzan in the Land of Eternal Youth' for the purpose of sale to or use by defendants upon payment to plaintiff of the reasonable value thereof; and said defendants and each of them thereupon accepted submission of said literary and dramatic composition by plaintiff and retained the same and became fully familiar with the contents thereof."

Third Count:

The third count incorporates by reference the material allegations of the first count except the averments respecting the express agreement of the parties and then alleges as follows:

"That on or about the 25th day of November, 1944, plaintiff submitted to defendants and each of them at their special instance and request, plaintiff's said literary and dramatic composition entitled 'Tarzan in the Land of Eternal Youth' for the purpose of sale to defendants and defendants and each of them retained the same in their possession for several months thereafter and became fully familiar with the contents thereof.

"That with full notice and knowledge of plaintiff's rights in the premises and in wilful and deliberate disregard thereof and without the knowledge, authority or consent of the plaintiff, defendants during the year 1948 did produce, distribute and release for public exhibition in the County of Los Angeles, State of California and elsewhere throughout the United States of America, a certain motion picture photoplay entitled 'Tarzan's Magic Fountain' substantially copying, using, embodying and misappropriating plaintiff's said original literary and dramatic composition entitled 'Tarzan in the Land of Eternal Youth'."

Damages in the sum of $100,000 are alleged as owing to plaintiff as a result of the facts alleged in the third count.

Pursuant to the provisions of section 426, subsection 3 of the Code of Civil Procedure,[1] an order was made by the trial judge directing that defendants' motion picture be exhibited to the court, "and that the contents of such production be deemed a part of the complaint to the same extent and with the same force as though such production had been attached to the complaint." After viewing the motion picture the trial court sustained defendants' demurrers to each count of the complaint without leave to amend

Questions

One: *Did the first count of the complaint state a cause of action against defendants Lesser?*

[1] *Yes.* The first count of the complaint contains all the essential allegations of an express contract whereby defendants Lesser agreed to pay plaintiff the reasonable value of her literary composition, and to give her screen credit therefor if used by defendants. This count also contained an allegation that defendants breached this express contract.

[2] It was a question of fact for the determination of the trier of fact whether or not such contract had been entered into, and whether or not defendants had breached it. This is true whether the composition submitted by plaintiff was new, novel, common or open to public knowledge. (High v. Trade Union Courier Pub. Corp. et al., Sup., 69 N.Y.S.2d 526, 529; Cole v. Phillips H. Lord, Inc., 262 App.

1. Section 426(3) of the Code of Civil Procedure reads in part as follows:

"If the demand be for relief on account of the alleged infringement of the plaintiff's rights in and to a literary, artistic or intellectual production, there must be attached to the complaint a copy of the production as to which the infringement is claimed and a copy of the alleged infringing production. If, by reason of bulk or the nature of the production, it is not practicable to attach a copy to the complaint, that fact and the reasons why it is impracticable to attach a copy of the production to the complaint shall be alleged; and the court, in connection with any demurrer, motion or other proceeding in the cause in which a knowledge of the contents of such production may be necessary or desirable, shall make such order for a view of the production not attached as will suit the convenience of the court, to the end that the contents of such production may be deemed to be a part of the complaint to the same extent and with the same force as though such production had been capable of being and had been attached to the complaint. * * *"

Div. 116, 28 N.Y.S.2d 404, 409 [3]; cf. Brunner v. Stix, Baer & Fuller Co., 352 Mo. 1225, 181 S.W.2d 643, 645 et seq.)

Therefore the trial judge erred in sustaining a demurrer to the first count of the complaint.

Two: *Did the second count of the complaint state a cause of action?*

[3] *Yes.* The second count of the complaint had all the essential elements of an implied contract with payment therefor to be made by defendants for the use of plaintiff's literary material furnished to them. It contained an allegation that plaintiff furnished to defendants at their special instance and request her literary material entitled "Tarzan in the Land of Eternal Youth" for the purpose of the sale of the same to defendants upon the payment to plaintiff of a reasonable value thereof, and that defendants accepted said literary composition, retained and used the same.

[4] A plaintiff may recover upon the theory of an implied contract if properly pleaded even though the idea may be common or open to public knowledge. (Yadkoe v. Fields, 66 Cal.App.2d 150, 159 [4], 151 P.2d 906. See also High v. Trade Union Courier Pub. Corp. et al., Sup., 69 N.Y.S. 2d 526, 529; Cole v. Phillips H. Lord, Inc., 262 App.Div. 116, 28 N.Y.S.2d 404, 409 [5].)

It is thus evident that since this count of the complaint stated a cause of action the trial court erred in sustaining the demurrer thereto.

Three: *Did the third count of the complaint state a cause of action?*

[5] *Yes.* If from all of the facts well pleaded only a single inference and one conclusion may be drawn, upon the filing of a general demurrer thereto a question of law arises for the trial court's determination, to wit, whether the facts thus pleaded state a cause of action in favor of plaintiff. If however reasonable minds may reach different inferences and conclusions from the facts well pleaded in the complaint, and if one inference and conclusion would support a judgment in favor of plaintiff while the opposite would support a judgment in favor of defendant, a question of fact is presented for determination of the trier of fact and a general demurrer to the complaint should be overruled. (See Golding v. R.K.O. Pictures, Inc., 35 Cal.2d 690, 695, 221 P.2d 95; Fetterley v. Brown, 204 Cal. 386, 387, 268 P. 643; Grant v. Sheerin, 84 Cal. 197, 200, 23 P. 1094. Cf. Perguica v. Industrial Accident Comm., 29 Cal.2d 857, 859; Yucaipa Farmers Co-op Ass'n v. Industrial Accident Comm., 55 Cal.App.2d 234, 238, 130 P.2d 146.)

[6] In the instant case there is a reasonable difference of opinion among reasonable minds as to whether the facts as pleaded in the third count of the complaint would sustain a judgment in favor of plaintiff. Hence under the above rule the demurrer to the third count should have been overruled.

The judgment is reversed with instructions to the trial court to overrule the demurrers and to permit defendants a reasonable time within which to answer should they be so advised.

MOORE, P. J., concurs.

WILSON, Justice.

I concur in the judgment of reversal and in the opinion of Mr. Justice McComb.

An additional question raised by defendants and not covered in Justice McComb's opinion should be determined now since it will undoubtedly arise again during the course of the litigation.

Defendant contends that (1) the court not only may but must consider facts of which judicial notice may be taken that are contrary to the express allegations in the complaint; (2) the court may properly take judicial notice of established literature; (3) when the matter is a proper subject of judicial notice the judge, in order to attain mental certainty, may require the assistance of the parties or may make his own investigation, or both; (4) if the court is able to find as a matter of law that there was no protectible material, or, if there were such, no substantial part of it was copied by defendants, then there would be no question of fact to be sub-

mitted to the jury and the case should be dismissed; (5) the court should read two books submitted by defendants, to wit, "She" by H. Rider Haggard, published in 1887, and "Tarzan's Quest" by Edgar Rice Burroughs, published eight years prior to plaintiff's conception of her own theme; (6) such reading will disclose that plaintiff has pirated her entire story, characters, names, theme, plot, locale and sequence from "Tarzan's Quest" and additional material from "She." Hence, argue defendants, the court must take judicial notice that plaintiff cannot advance the claim of originality or protectibility for her story, nor can she make any claim of similarity between her story and defendants' picture, or of appropriation by them of her material. Defendants acknowledge that the court should be cautious in taking judicial notice of matters that refute plaintiff's claim of originality and state they do not emphasize unduly the matter of judicial notice of specific literature in passing on the issue of originality.

It is not necessary to decide whether judicial notice may be taken of literature in general or of the above mentioned books in particular, since for the purpose of this decision it may be conceded without deciding that plaintiff's plot is so similar to those in the books mentioned that it appears to have been lifted from them; but such circumstance, if it be a fact, does not admit of a decision on demurrer that plaintiff obtained her material from those publications.

It has been said that there is nothing new under the sun and that plots of all modern stories are merely revamped versions of old ones or combinations of two or more. Plaintiff may have obtained her material from one or both of the books mentioned; on the other hand the plot may have originated in her own mind. The question cannot be settled on demurrer merely by reason of the similarity of the plots. An adjudication can be made only by judge or jury after hearing the evidence. If plaintiff is able to establish to the satisfaction of the trier of facts that she had never read or heard of either book, or the plot of either, she may be freed from the charge of plagiarism. Neither the trial court nor this court has the power to read plaintiff's mind and ascertain the source of her material, whether her own inventive brain or the books referred to by defendants.

The mythical fountain of youth and the effect of its waters have been the subject of writers for hundreds of years. Ponce de Leon was in search of the fountain when he discovered Florida. Other explorers were equally optimistic in their search and equally unsuccessful. The fabulous Isle of Bimini was supposed by some to be the location of the youth preserving waters; others placed it in the heart of Africa. The fact that the legendary lost continent, Atlantis, Bimini and the fountain of youth have long been the subjects of folklore, song and story in many languages does not foreclose a modern writer from using the same situations and locales for the purpose of symbolization or for the manifestation of his imagination. While similarity of theme may be deemed to be strong evidence of copying it must be considered along with evidence of other facts in determining the issue of plagiarism.

The question of originality is not one of law to be determined by the court but is one of fact for the jury. Stanley v. Columbia Broadcasting System, 35 Cal.2d 653, 665, 221 P.2d 73; Kovacs v. Mutual Broadcasting System, Inc., 99 Cal.App.2d 56, 63, 221 P.2d 108, 112.

Even if, as contended by defendants, the theme of the fountain of youth is in the public domain it cannot be determined on a hearing on demurrer that there is not in plaintiff's material any new dramatic situation, new incident, new sequence, or new dialogue not found in any other book, scenario or play. A writing which is the production of the author cannot be copied. He may have derived his material from other sources but "The prior art is only relevant as bearing on the question whether an alleged infringer has copied the author or has taken his material directly from the prior art." Detective Comics, Inc., v. Bruns Publications, Inc., 2 Cir., 111 F.2d 432, 433; Sheldon v. Metro-

Goldwyn Pictures Corp., 2 Cir., 81 F.2d 49, 53. The fact that the plan of plaintiff's narrative is similar to themes of previously published stories does not defeat her claim of originality since it is not essential that any production, to be original within the meaning of the copyright law, shall be different from another—" 'the true test of originality is whether the production is the result of independent labor or of copying.' " Golding v. R.K.O. Pictures, Inc., 35 Cal.2d 690, 697, 221 P.2d 95, 99. It is of no consequence that defendants *could have* obtained their story from another source when there is strong evidence from which a jury may reasonably conclude that their scenario was copied from plaintiff's story. Idem. One is free to copy the original but he is not free to copy the copy. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249, 23 S.Ct. 298, 47 L.Ed. 460, 462.

Similarity alone is not such absolute and incontestable proof of pirating that the court may make a finding of fact upon a hearing on demurrer. Hence, even though this court should be able to take judicial notice of the books mentioned, a point not necessary to be decided now, the court would not be in a position to determine as a fact at this stage of the case whether plaintiff pirated her story from the books or the plot and theme of the material submitted to defendants was the original product of her inventive genius.

104 Cal.App.2d 490

PEEBLER et al. v. DANZIGER et al.
Civ. 18210.

District Court of Appeal, Second District, Division 2, California.

May 29, 1951.

Upon a money judgment in favor of Byron Peebler and another against J. M. Danziger and others, an execution was issued and levied upon defendant's tools and equipment. The Superior Court, Los Angeles County, Elmer D. Doyle, J., sustained defendant's claim of exemption and plaintiffs appealed. The District Court of Appeal, Wilson, J., held that tools and equipment were exempt.

Affirmed.

See also 231 P.2d 895.

1. Exemptions ⇐45

Lawn mowers, iron bar, shovels, spades, picks and adze, and grave lowering device of sexton of cemetery, who maintained grounds, dug graves, and built boxes for graves, were exempt from execution under statute as "tools and implements" of a mechanic or artisan. Code Civ.Proc. § 690.4.

See publication Words and Phrases, for other judicial constructions and definitions of "Tools and Implements".

2. Exemptions ⇐45

Term "tools and implements" within statute exempting from execution tools and implements of mechanic or artisan necessary to carry on his trade, includes any implement needed and used for purpose of carrying on the trade or business. Code Civ.Proc. § 690.4.

Roland Maxwell, Paul H. Marston, Pasadena, for appellants.

A. Brigham Rose, Los Angeles, for respondents.

WILSON, Justice.

Plaintiffs obtained a money judgment against defendants, including defendant Hutchinson. An execution was issued and levied upon the latter's tools and equipment consisting of three lawn mowers—one hand mower, a circular power mower, and a Gravely tractor mower—an iron bar, shovels, spades, picks and adze, and a grave lowering device. Defendant filed with the sheriff a claim that the property under levy consisted of "The tools or implements of a mechanic or artisan, necessary to carry on his trade", and were exempt from execution as provided in section 690.4 of the Code of Civil Procedure. Upon a hearing before the court for the determination of the validity of the claim of exemption the court granted the claim and plaintiffs have appealed from the order.

[1] Defendant testified that he is sexton at Graceland Cemetery and has no other business or occupation; that he is not employed by anyone other than himself; that his duties are to water and mow the lawn, open, close and fill in the graves and remove the extra dirt therefrom; to place pipes for flowers, and to make and furnish redwood boxes and place them in the graves. For such work it is necessary for him to have the use of all the tools and implements upon which the writ of execution was levied.

[2] The term "tools and implements" includes any implement needed and used for the purpose of carrying on one's trade or business. In re McManus' Estate, 87 Cal. 292, 294, 25 P. 413, 10 L.R.A. 567; In re Robb, 99 Cal. 202, 203, 33 P. 890.

Order affirmed.

MOORE, P. J., and McCOMB, J., concur.

104 Cal.App.2d 491

PEEBLER et al. v. DANZIGER et al.
Civ. 18250.

District Court of Appeal, Second District, Division 2, California.

May 29, 1951.

Hearing Denied July 26, 1951.

Upon a money judgment in favor of Bryon Peebler and another against J. M. Danziger, and others, an execution was issued and levied upon defendant's cemetery property. The Superior Court, Los Angeles County, Roger Alton Pfaff, J., entered order that denied exemption and defendant appealed. The District Court of Appeal, Wilson, J., held that the real property not occupied by graves of human beings was not exempt.

Affirmed.

See also, 231 P.2d 894.

1. Exemptions ⇐51

Portion of private property designated as cemetery, which did not contain graves of human beings and which evidence did not show to have been dedicated as cemetery in compliance with exemption statute, was not exempt from execution. Code Civ.Proc. §§ 690.16, 690.26.

2. Appeal and error ⇐169

Issue raised for first time on appeal will not be considered by appellate court.

3. Exemptions ⇐51

Property occupied by graves of human beings cannot be sold under execution. Code Civ.Proc. § 690.16.

A. Brigham Rose, Los Angeles, for appellants.

Roland Maxwell, Paul H. Marston, Pasadena, for respondents.

WILSON, Justice.

Upon a money judgment in favor of plaintiffs against defendants an execution was issued and levied upon property belonging to defendant Edith W. Danziger, referred to as "cemetery property." Defendant filed with the sheriff an objection to the proposed sale of the property on the ground that it "is a cemetery in which there are numerous buried persons," and that it is exempt from sale by reason of section 690.16 of the Code of Civil Procedure.

Upon a hearing of the claim of exemption the court entered an order declaring that the real property levied upon is not exempt from execution and denying the claim of exemption. Defendant has appealed from the order.

[1] The property consists of approximately five acres. A witness testified that about 750 bodies are buried in the tract. Defendant asserts that because it is denominated a cemetery and bodies of human beings are buried therein it is exempt. Section 690.16 provides among other things that "all cemeteries, * * * owned or held by any town or incorporated city, or dedicated by such town or city to health, ornament or public use, * * *" are exempt from execution. The evidence is that the property in question is privately owned and is not owned or held and has not been dedicated by any town or city. Section 690.26 provides that "At the hearing had for the purpose of determining the claim to

exemption, the party claiming the exemption shall have the burden of proof." Since there is no evidence that the property is owned or has been dedicated as provided in section 690.16 the claim of exemption thereunder must fail.

[2] Defendant further contends that the property is exempt from execution by reason of sections 8550 to 8561 inclusive of the Health and Safety Code. No evidence was offered at the hearing to show the exemption of the property by reason of those sections. This point is raised for the first time on appeal and will therefore not be considered by the court. Grimes v. Nicholson, 71 Cal.App.2d 538, 543, 162 P.2d 934; Engleman v. Malchow, 91 Cal.App.2d 341, 205 P.2d 413.

[3] Obviously that portion of the property levied upon that is occupied by graves of human beings cannot be sold under execution. There is no impediment to the sale of such portion of the tract as is not so occupied and was owned by defendant Edith W. Danziger at the time of the levy.

Order affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; SCHAUER, J., dissenting.

104 Cal.App.2d 402

PEOPLE v. ALLEN et al.

Cr. 4556.

District Court of Appeal, Second District, Division 3, California.

May 24, 1951.

Rehearing Denied June 5, 1951.

Hearing Denied June 18, 1951.

James S. Allen and Marie O'Neil were convicted in the Superior Court, Los Angeles County, Clement D. Nye, J., of procuring and aiding an abortion and of conspiracy to violate the statute making it unlawful to procure an abortion, and they appealed from the judgments and from orders denying motions for new trials. The District Court of Appeal, Bartlett, J. pro tem., held that there was sufficient corroborating evidence and that the evidence supported the convictions.

Judgments and orders affirmed.

1. Abortion ⇐11

In prosecution for procuring of or aiding in abortion, even though evidence corroborating that of prosecuting witness be slight and, if standing alone, entitled to little consideration, if it creates more than suspicion, it is sufficient Pen.Code, §§ 274, 1108.

2. Abortion ⇐11

Testimony relating to one count of information may be considered by trier of fact in corroboration with testimony of aborted woman referred to in another count. Pen.Code, §§ 274, 1108.

3. Abortion ⇐11

In prosecution of doctor for procuring abortion, inferences from doctor's own testimony could be considered in corroboration of testimony of victim. Pen.Code, §§ 274, 1108.

4. Abortion ⇐11

In prosecution of nurse for procuring abortion, nurse's own statement to arresting officers and inferences to be drawn from them could be taken into account as evidence in corroboration of victim's testimony. Pen.Code, §§ 274, 1108.

5. Abortion ⇐11

In prosecution of nurse for procuring abortion, surrounding circumstances as testified to by other witnesses and inferences which could be drawn from them were sufficient corroboration of victim's testimony. Pen. Code, §§ 274, 1108.

6. Abortion ⇐11

In prosecution for procuring or aiding abortion, testimony of woman allegedly aborted as to use of instruments does not need special corroboration. Pen.Code, §§ 274, 1108.

7. Abortion ⇐11

In prosecutions for procuring abortion, non-necessity of operation may be shown by circumstantial evidence. Pen.Code, § 274.

8. Abortion ⇐11

In prosecutions for procuring and aiding abortion, evidence that each of victims was, except for fact that each was pregnant, a normal healthy woman, sufficiently showed non-necessity of alleged operations. Pen.Code, § 274.

9. Criminal law ⇐260(11)

Whether corroborating evidence by itself is as compatible with innocence as it is with guilt is a question for trier of fact, not for reviewing court.

10. Criminal law ⇐1160

Jury in first instance and trial court after verdict must determine when facts are established by evidence.

11. Criminal law ⇐1160

Before verdict of jury approved by trial court can be set aside on appeal on ground of insufficiency of evidence, it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support conclusion reached in court below.

12. Criminal law ⇐511(2)

Evidence corroborative of testimony of accomplice may be sufficient if it connects defendant with crime in such a way as reasonably satisfies fact-finding body that accomplice is telling truth, and corroborative evidence need not prove independently either that defendant is guilty of offense or that he is guilty beyond reasonable doubt.

13. Abortion ⇐11

Evidence supported convictions for procuring and aiding abortion. Pen.Code, § 274.

14. Abortion ⇐11

In prosecutions for procuring and aiding abortion, so far as proof of corpus delicti was concerned, testimony of each of victims was sufficient if adequately corroborated by competent fact circumstances or reasonable inferences to be drawn from evidence.

15. Abortion ⇐11

In prosecutions for procuring and aiding abortion, evidence was sufficient to establish proof of corpus delicti. Pen. Code, § 274.

16. Criminal law ⇐562

Difficulty of proof will not excuse lack of proof in criminal proceeding.

17. Conspiracy ⇐47

Usually conspiracy can only be proved by circumstantial evidence, and it is not necessary to prove actual agreement to work together to perform unlawful acts charged.

18. Conspiracy ⇐23

Conspiracy may result from actions of parties from which intent is shown to carry out common purpose to violate law.

19. Criminal law ⇐260(11)

In criminal prosecution, it is for the trier of fact to say whether defendant's story should be believed.

20. Conspiracy ⇐47

Evidence supported conviction for conspiracy to violate statute making it unlawful to procure abortion. Pen.Code, §§ 274, 1108.

21. Criminal law ⇐1159(2)

Whether there is insufficient evidence to support conviction must depend upon circumstances of particular case under review.

22. Criminal law ⇐427(2)

Generally, proof of existence of conspiracy should precede introduction of evidence of conversations with codefendant outside of his presence.

23. Criminal law ⇐427(2)

Where facts from which conspiracy is to be inferred are so intimately blended with other facts going to constitute crime that it is difficult to separate them, it is not necessary to introduction of evidence of acts and declarations of one of the conspirators that evidence be first introduced to establish prima facie the fact of conspiracy.

24. Criminal law ⇐255

In prosecution before court without jury, order of proof is within court's discretion.

25. Criminal law ⇐422(6)

In prosecution of doctor and nurse for conspiracy to violate statute making it un-

lawful to procure abortion permitting prosecuting witnesses to testify to conversations with nurse outside of doctor's presence was not abuse of discretion. Pen. Code, §§ 274, 1108.

26. Criminal law ⇨422(1)

In prosecution of doctor and nurse for conspiring to violate statute making it unlawful to procure abortion, receiving evidence as to extra-judicial acts and declarations of nurse was not abuse of discretion. Pen.Code, §§ 274, 1108.

27. Criminal law ⇨442

In prosecution of doctor and nurse for conspiring to violate statute making it unlawful to procure abortion, where prosecuting witnesses had testified and conspiracy had been established, and there was evidence showing doctor's telephone number, phone calls by nurse making appointments to see him at address given on calling card, that card was found in nurse's purse and that no doctor of name listed on card was licensed to practice in the state, there was foundation for introduction of calling card with defendant's name stricken out and fictitious name inserted which was brought to printer who reproduced them and charged job to defendant. Pen.Code, § 274.

28. Criminal law ⇨415(1)

In prosecution for procuring abortion, testimony of another doctor, who was victim's physician, to certain statements made by patient both before and after her trip to city at which abortion was performed, including statement that victim had had such an operation, was properly received for purpose of showing medical history only. Pen.Code, § 274.

Stahlman & Cooper, Grant B. Cooper, Percy V. Hammon and Robert E. Ford, all of Los Angeles, for appellant James S. Allen.

Martin S. Ryan, Los Angeles, for appellant Marie O'Neil.

Edmund G. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., William E. Simpson, Dist. Atty., Jere J. Sullivan, Deputy Dist. Atty., Los Angeles, for respondent.

BARTLETT, Justice pro tem.

The appellants, Dr. James S. Allen and Marie O'Neil, were each charged in an information filed by the District Attorney of Los Angeles County with the crime of abortion in three counts and, in a fourth count, with the crime of conspiracy which count alleged that the appellants conspired together to violate section 274 of the Penal Code. In regard to this count six overt acts in furtherance of the alleged conspiracy were alleged: (1) that the appellant blindfolded Patsy Kelley; (2) that they blindfolded Anne Ulicsnu; (3) that they blindfolded Lorraine Ashley; (4) that the appellants occupied an office at 4809 Coldwater Canyon Road in the County of Los Angeles, State of California; (5) that the appellants caused to be printed professional cards under the name of Dr. A. L. Hammond; (6) that the appellants received certain sums of money as compensation for their illegal acts. Appellants waived trial by jury and the court adjudged the appellant Marie O'Neil guilty as charged in each count of the information and found the appellant Allen not guilty as to counts I and II of the information and guilty as charged in counts III and IV. Each appellant made a motion for a new trial which was denied. Each has appealed from the judgments and the orders denying motions for new trials. The transcript is lengthy and we will not attempt to set forth a resumé of all the testimony in the transcript. On account of the contentions made by the appellants it is necessary to call attention to the following testimony.

The woman named in count I of the information, Patsy Kelley, testified that in the early part of February, 1949, she was pregnant and went to see a Dr. Ketridge regarding the matter and that following her conversation with him she went to 4811 Coldwater Canyon Road in Los Angeles County, California. Upon going there and entering the reception room, she talked to a receptionist and later on had a conversation with the appellant Marie O'Neil. The appellant told her not to worry about any-

thing. They then went back into one of the offices and Marie O'Neil asked her to undress. Marie O'Neil then went away for a few moments, came back and asked the witness if she had any money with her. She told the appellant that she had $250 and asked her for a receipt as she had an insurance policy that would pay off anything that she paid on a doctor bill. Marie O'Neil said she would sure try to give her a receipt, went away and came back and said that was impossible. The witness then gave Marie O'Neil the $250 in cash. Marie O'Neil took her into another little room where there was a table and blindfolded her and then her legs were put up in stirrups of some kind on the table. She felt water poured between her legs and felt some cold metal in her vagina and after that she felt terrific pain. After feeling these sensations on the table, she went back to the anteroom and laid down for a long time. At the time of the operation, other than Marie O'Neil, she knew there was a man in the room by his voice but she did not get a glimpse of him. After that Marie O'Neil told her if she had any trouble to contact them. After she had been there about an hour, Marie O'Neil told her not to go out in the hall because the doctor was very strict about not having anybody see him. While she was resting in the other room she heard a girl come in who said she was scared and they told her not to be frightened. Then she heard a door slam and heard Marie O'Neil ask her to disrobe. This girl was in the room about a full hour. Marie O'Neil did not stay with the witness during that time. Marie O'Neil was with this girl and she heard the same man's voice in there also. She heard the man's voice ask for an anaesthetic. Other than the fact that she was pregnant, the witness testified that she was in good health at the time she made this visit on February 10th. She noticed the name of Dr. James S. Allen on the window of this particular building.

Anne Ulicsnu, mentioned in count II of the information, testified that in the early part of February, 1949, she was pregnant. She went to an office in the Valley on February 10, 1949, about a quarter of twelve and saw the appellant Marie O'Neil after having talked to a receptionist. A friend named Julia Molnar accompanied her and when she was asked for money, Julia Molnar handed $250 in cash to Marie O'Neil. Marie O'Neil asked the witness how far she was along and she told her three months. She was taken to another room and Marie O'Neil told her to undress. She left her clothes in that room and went into another room where there was a doctor's table. She noticed instruments and metal things were in the room. She was told by Marie O'Neil to get on the table and Marie O'Neil put a mask on her. Then a man came in whom she could feel examining her. Her legs were strapped up. The appellant Marie O'Neil was very nice and stayed with her. While she was lying on the table the nurse was holding her hands and she could hear a man's voice from the foot of the table. She was there for about an hour and a half. She felt uncomfortable and there was a scraping inside her vagina and she does not know with what instrument. She was then taken out of the room and laid on a cot where Marie O'Neil took off the blindfold. Marie O'Neil gave her instructions not to take a bath for two weeks and not to douche for two weeks and then pressed her stomach from the outside. Other than being pregnant she was not in ill health.

Julia Molnar next testified and said that she went to an office building in Coldwater Canyon with Anne Ulicsnu. She noticed the name of Dr. Allen on this building. After seeing a receptionist she met the appellant Marie O'Neil and Anne went inside and then came out and asked her for the money and she took in $250. She asked this nurse why she had to give the money to her before the operation was performed. The nurse said "that would be putting the cart before the horse." Anne Ulicsnu went into the room about five minutes to twelve and came out about twenty minutes before two.

Lorraine Ashley, who is named in count III of the information, testified that prior to the morning of February 15, 1949, she was pregnant but was otherwise in good health. She stated that she talked to some-

body about her pregnancy and her attention was directed to Los Angeles by the person to whom she talked. She took a taxi to an office building and saw a receptionist in a front office and then met a person who appeared to be a nurse. She had a friend with her named Laura Ashley who had come with her from San Francisco and who held the money. She then went to another room and was told to take off her clothes which she did. She was then blindfolded and laid down on a table, and was told to put her feet in stirrups which pulled her knees up. There was a man's voice and a woman's voice in the room and she felt a hard instrument in her vagina. Afterwards she was taken into another room and told to lie down and the blindfold was removed. When she was on the table she heard some buzzing and heard a nipping sound like scissors. Afterward she saw the appellant Dr. Allen on the premises and heard and saw him talking on a telephone. That was while the police officers were in the room.

Lois Shively, a police woman of the City of Los Angeles, testified that she went to 4811 Coldwater Canyon Road on February 15, 1949. At about 9 o'clock she entered the building which had the name of Dr. James S. Allen on the outside. She went into the reception room where there were several people. Prior to that on February 13th she had called Sunset 20988 which was identified as Dr. Allen's telephone number and a female voice answered. She had asked to speak to Dr. Hammond and the voice said that she handled his appointments. The witness told her she was in trouble and the voice answered "I know". She then made an appointment and was asked who had referred her. Upon her reply that a friend of a friend of hers had referred her she was told that she would have to find out who referred her, bring that information with her and, upon asking how much it would cost, was told that her friend would tell her everything. In a subsequent conversation with the appellant O'Neil, Miss O'Neil identified herself as being the person with whom the witness had had the conversation. The witness entered the doctor's office at a few minutes before ten and was told that she would have to wait a short time. Two other police officers entered a few minutes before 10:40 and she motioned them to go out which they did. Immediately the receptionist came back into the reception room and she and another woman went to the door and looked outside about which time Officers Jokisch and Burton entered. The receptionist pushed the buzzer and there was a lengthy ring. The receptionist was then stopped by the officers and Sergeant Jokisch forced his way through a door. The witness stated that three of the ladies tried to run out the door the officers had entered and she jumped up and identified herself and asked them to be seated. The witness was then shown a card appearing to be a business card with the name Dr. A. L. Hammond on it and identified it as a card which she had taken shortly after this from the purse of the appellant Marie O'Neil. When she was searching the purse the witness told Marie O'Neil she was looking for some type of record or a sheet of paper with the name she had given to Marie O'Neil, Lois Anna Clark, to show her appointment for that day and Marie O'Neil said that she would not find any; that she kept no record for appointments for that day, she just kept them in her head. Sergeant Burton asked Marie O'Neil where she got this card of Dr. Hammond's and she said that she used to work for him. She saw Lorraine Ashley lying on a little bed in the first small office and had a conversation with the appellant O'Neil in the presence of Lorraine Ashley and Dr. James Allen. Dr. James Allen was the only man on the premises until the raid took place. Later at another conversation Lorraine Ashley asked Marie O'Neil whether she should buy some suppositories or something and Marie O'Neil gave her what she called "some post instructions". The witness took Lorraine Ashley to the Receiving Hospital where Lorraine Ashley saw Dr. Lloyd E. Overholtz.

Officer Burton, one of the arresting officers, testified that he went to 4811 Coldwater Canyon Road at about 7:30 a. m. on February 15th and parked where he could view the three doors to the office. A little

before 9 o'clock the receptionist arrived and about five minutes later two girls came out and went to a drug store. About 9:15 the appellant Allen entered the rear door of the office. The girls that had gone to the drug store had entered the front door. At 9:45 another girl entered. In the meantime Officers Jokisch and Shively arrived and he and Jokisch entered the waiting room at about 10 o'clock. They saw Lois Shively sitting there with other women. They went out and returned to the parking lot and a woman came out of the office and looked at them and went back in. The officers again entered the building and as Jokisch entered the door the receptionist started ringing the buzzer which could be heard in the back lot. The witness went through the hallway in back of the office where he could see the appellant Allen taking off his smock. Dr. Allen was the only male person on the premises. He also saw Lorraine Ashley there. She was the first girl he had seen enter the office.

Edwin W. Jokisch testified that he was a police officer of the City of Los Angeles. That as a police officer he went to 4811 Coldwater Canyon Road on several occasions and that the name on the window was that of Dr. James S. Allen. He further stated that he had the place under observation on February 10, 1949, and upon that occasion saw Patsy Kelley arrive there and also saw Anne Ulicsnu and Julia Molnar come. He had also observed the appellant James S. Allen arrive carrying a bag and walk in the back door. He observed that anyone in the front reception room could not see a person from that particular door. He again had this office under surveillance on February 15, 1945 and saw Lorraine Ashley arrive and enter the building sometime between 9 and 9:30. When he entered the building at the time of the arrest Lorraine Ashley was lying on a couch or bed. She was covered up with a blanket. That was after 10:45 a. m. Going into the place he identified himself, said that he was a police officer and started over to a door and told the receptionist if she did not open it he would break it down. He put his shoulder to the door and the door opened and he saw the appellant Marie O'Neil in the hallway. As he turned the corner to the right he saw the appellant Allen removing his white jacket and told him he was under arrest. The witness then proceeded to the back door, opened it and admitted Inspector Ruppers of the State Board of Osteopathic Examiners. During the course of his examination of the office he took into his possession certain sets of surgical instruments, certain antiseptics and bundles containing towels with a piece of cotton padding folded inside of them. He also found an operating table equipped with stirrups. He had a conversation with the appellant O'Neil during the course of which she told him she had worked for Dr. Allen for about three or four months and that he paid her about $300 per month. Prior to that time she had been working for Dr. Ketridge. She identified one of the towels that he showed her as the blindfold that had been used on Lorraine Ashley. He also removed some wet bloodstained cotton from a waste receptacle. Dr. Allen was the only male person on the premises up until the time of the raid. He asked the appellant Marie O'Neil about Dr. A. L. Hammond whose name he found on a card and she said there was a doctor she used to work for by that name. He testified that he asked the appellant Allen if he had treated anyone that morning and he said that he had but that she was a patient of another doctor who rented that portion of his office. He further stated that he did not know the name of the other doctor but that that doctor paid him $150 rent.

George E. Ruppers, the Inspector of the State Board of Osteopathic Examiners, testified that he accompanied Officers Jokisch and Burton to 4811 Coldwater Canyon Road at the time of the raid. He also testified that he had examined the records of those licensed to practice osteopathy and found no person named A. L. Hammond licensed to practice osteopathy in the State of California. Dr. Lloyd E. Overholtz was the doctor to whom Lorraine Ashley was taken at the Van Nuys Emergency Hospital after the raid. He gave her a pelvic examination and found rather profuse vaginal bleeding. The particular uterus of this person was larger than it should be for a

female not pregnant. He could not tell whether she was pregnant at the time he examined her and did not ascertain the origin of the bleeding any more than it was due to some treatment she had received. He was shown drugs taken from the office by Officer Jokisch and identified some of them as local anaesthetics used to allay pain and one as a lubricating jelly used on the speculum to insert it. He was shown the three sets of instruments found by Officer Jokisch in Dr. Allen's office and his testimony was that they were the type of instruments that could be used for an abortion, that they are the type of instruments found in the offices of general practitioners but that ordinarily a doctor does not have three sets unless he is doing genito-urinary work. The witness testified that he had practiced 20 years and had but one set.

Dr. Robert A. Loehr was a physician practicing in San Jose, California. Lorraine Ashley was his patient and he saw her several times in December, 1948, and examined her also on the 29th of January, 1949, and was under the impression that she was pregnant. She was a normal girl. He saw her again on February 18th when she had a temperature of 99 and again on February 21st when the vaginal discharge had nearly stopped and she was feeling better.

The defendant Allen took the stand in his own behalf and among things that he testified to were the following: That he occupied the office located at 4809–11 Coldwater Canyon Road in the County of Los Angeles and that he was in his office on February 10, 1949 and February 15, 1949. He denied that he had performed any operations upon Patsy Kelley or Anne Ulicsnu. He testified that he rented the building where his office was located and that on February 15, 1949, he told Marie O'Neil to prepare the patient Lorraine Ashley and put on his white smock; that he "treated" Lorraine Ashley and that the instruments he used upon this patient were his; that Marie O'Neil assisted him on that occasion. While he said Marie O'Neil was not in his employ he did state that she had assisted him in preparing patients on a few other occasions. He further testified that after Miss Ashley left the table, he heard the buzzer and the door burst open and that the officers came in while he was removing his white smock. Marie O'Neil did not take the witness stand.

[1–11] The appellant Marie O'Neil contends that the evidence is insufficient to sustain the conviction of appellant as to the charges set forth in the first three counts of the information and also that the corpus delicti of each of the offenses charged was not proven. The appellant Allen makes the same contentions as to himself in regard to count III. The burden of the argument of appellants is that section 1108 of the Penal Code requires that upon a trial for the procuring of or aiding or assisting in an abortion, the defendant cannot be convicted upon the testimony of the woman upon whom the offense was committed unless she is corroborated by other evidence. It is urged that this corroborating evidence does not exist. In considering the evidence in the record other than that of the woman upon whom the abortion was committed there are certain legal principles to be taken as a guide. In the first place even though the corroborating evidence be slight and if standing alone entitled to little consideration, if it creates more than a suspicion, it is sufficient. People v. Wilson, 25 Cal.2d 341, 347, 153 P.2d 720. Testimony relating to one count of the information may be considered by the trier of fact in corroboration with the testimony of an aborted woman referred to in another count. People v. Malone, 82 Cal.App.2d 54, 63, 185 P.2d 870. In relation to the appellant Allen as to count III of the information, inferences from his own testimony may be considered in corroboration of the testimony of Lorraine Ashley. People v. Malone, supra, 82 Cal.App.2d 54, 63, 185 P.2d 870. Also, as to the appellant O'Neil, her own statements to the arresting officers and the inferences to be drawn from them may be taken into account as evidence in corroboration. The surrounding circumstances as testified to by other witnesses and inferences which may be drawn from them, are corroboration. People v. Wilson, supra, 25 Cal.2d 341, 347, 153 P.2d 720. The same case states that the testimony of the woman

alleged to have been aborted as to the use of instruments does not need special corroboration and, in the case we have here, three sets of surgical instruments by use of which abortions could be performed were found on the premises and introduced in evidence as well as pain alleviating drugs, sterilizing drugs and also a blindfold which appellant O'Neil stated she had used. There is no intimation in any of the testimony that any one of the operations was necessary to preserve life and non-necessity may be shown by circumstantial evidence. People v. Ramsey, 83 Cal.App.2d 707, 718, 189 P.2d 802. The evidence in this case shows that each of the women in question was, except for the fact that each of them was pregnant, a normal, healthy woman. "Whether the corroborating evidence by itself is as compatible with innocence as it is with guilt, is a question for the trier of fact, not for the reviewing court." People v. Estes, 99 Cal.App.2d 745, 222 P.2d 454. In People v. Newland, 15 Cal.2d 678, on page 681, 104 P.2d 778, on page 779, it is said: "'* * * For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. * * *'"

[12] In considering this question of corroboration, the appellant Allen under the heading *"Rules Governing the Determination of the Sufficiency of Evidence Offered for Corroboration"* states as his major premise, *"The Testimony of the Prosecutrix Must Be Eliminated from the Record."* (Italics are appellant's.) In support of this statement he cites People v. Reingold, 87 Cal.App.2d 382, 197 P.2d 175. What the court said in that case is set forth as follows, 87 Cal.App.2d on pages 392, 393, 197 P.2d on page 181:

"As to what constitutes sufficient corroboration of the testimony of an accomplice, we have the following rule enunciated by our Supreme Court in the case of People v. Morton, 139 Cal. 719, 724, 73 P. 609, 611, wherein the following language taken from Welden v. State, 10 Tex.App. 400, is quoted with approval:

"'* * * Eliminate from the case the testimony of the accomplice, and then examine the evidence of the other witness or witnesses with the view to ascertain if there be inculpatory evidence—evidence tending to connect the defendant with the offense. If there is, the accomplice is corroborated; if there is no *inculpatory* evidence there is no corroboration, though the accomplice may be corroborated in regard to any number of facts sworn to by him.'"

This case and all California cases upon the same subject are analyzed at length in the later case of People v. Griffin, 98 Cal.App.2d 1, at pages 23 to 28, 219 P.2d 519, 535, inclusive, and the court there comes to this conclusion: "In view of these more recent decisions of the Supreme Court we conclude that the test suggested in People v. Morton, supra, and followed by People v. Reingold, supra, is not an exclusive method of analyzing the sufficiency of evidence corroborative of the testimony of an accomplice. We conclude further that such evidence may be held sufficient if it connect the defendant with the crime in such a way as reasonably to satisfy the fact-finding body that the accomplice is telling the truth." This court also says, 98 Cal.App.2d at pages 24, 25, 219 P.2d at page 533: "It is not necessary that the corroborative evidence prove independently either that the defendant is guilty of the offense or that he is guilty beyond a reasonable doubt. People v. Ames, 39 Cal. 403; People v. Rose, 42 Cal.App. 540, 183 P. 874; People v. Blunkall, 31 Cal.App. 778, 161 P. 997; People v. Thompson, 16 Cal.App. 748, 117 P. 1033; People v. Leavens, 12 Cal.App. 178, 106 P. 1103; People v. Melone, 71 Cal.App.2d 291, 162 P.2d 505; People v. Baskins, 72 Cal.App.2d 728, 165 P.2d 510. If this were not true and if it were required that a complete case for the prosecution be established without reference to the testimony of the accomplice, there would then be no occasion to offer the accomplice as a witness."

[13] We have set forth testimony that was before the court in regard to these counts of the information. It is not necessary to repeat that testimony here as an examination of it discloses that, guided by the principles of law we have heretofore set forth and construing it in the light most favorable to respondent it is ample to sustain the conviction of the appellant O'Neil as to the first three counts of the information and as to the appellant Allen on the third count.

[14, 15] So far as proof of the corpus delicti is concerned the testimony of each of the women named in the first three counts of the information was sufficient if it was adequately corroborated by competent facts, circumstances, or reasonable inferences to be drawn from the evidence. People v. Ramsey, 83 Cal.App.2d 707, 717, 189 P.2d 802. In this case that corroboration was present.

[16–18] Both appellants contend that the evidence is insufficient as a matter of law to sustain the conviction of the offense set forth in count IV which charges that a conspiracy existed between this doctor and this nurse. We agree with appellants that the nature of a conspiracy renders it difficult of proof but that difficulty of proof will not excuse lack of proof in a criminal proceeding. What we have said with reference to the other three counts and much of the law which we have cited is applicable to this count of the information. Usually a conspiracy can only be proved by circumstantial evidence and it is not necessary to prove an actual agreement to work together to perform the unlawful acts charged. It may result from the actions of the parties in which an intent is shown to carry out a common purpose to violate a law. People v. Steccone, 36 Cal.2d 234, 223 P.2d 17; People v. Griffin, supra, 98 Cal.App.2d 1, 43, 44, 219 P.2d 519.

[19–21] We have reviewed the situation regarding the overt act charged as to Lorraine Ashley. The appellant testified and he asserts that his explanation of the Ashley incident was wholly compatible with his innocence on that count. That is a matter of opinion, but assuming it to be true, although the appellant's own story exculpates him, it is for the trier of fact to say whether that story should be believed. People v. Borrego, 211 Cal. 759, 765, 297 P. 17. Also we have set forth in detail the testimony of the non-accomplice witnesses and it would serve no useful purpose to repeat it here. The combined and cumulative weight of all this testimony and the exhibits admitted in evidence demonstrated that the act was done as a result of a common design between the physician, Dr. Allen, and the nurse, Marie O'Neil. We are not unmindful of the cases cited by appellants in their briefs but whether there is insufficient evidence to support a conviction, must depend upon the circumstances of the particular case under review.

[22–26] Appellant Allen contends that the court committed error in permitting the prosecuting witnesses to testify to conversations with his co-defendant, Marie O'Neil, outside of his presence. These questions were objected to on the grounds that they were incompetent and hearsay, there being no proof of the conspiracy. Appropriate motions to strike this testimony were made. It is the general rule that, ordinarily, proof of the existence of a conspiracy should precede the introduction of such evidence. It can be said of this case as was said in People v. Matthew, 68 Cal. App. 95, 107, 228 P. 417, 422: "Thus where, as here, the facts from which the conspiracy is to be inferred are so intimately blended with other facts going to constitute the crime that it is difficult to separate them, it is not essential to the introduction of evidence of the acts and declarations of one of the conspirators that evidence should first be introduced to establish *prima facie,* in the opinion of the court, the fact of conspiracy." This case was tried by the court without a jury. The order of proof was within the discretion of the court, People v. Ferlin, 203 Cal. 587, 599, 265 P. 230, and its rulings in regard thereto will not be disturbed on appeal except upon clear proof, which we do not have here, that the court abused that discretion. People v Griffin, 98 Cal.App.2d 1, 47, 48, 219 P.2d 519. The same situation exists in regard to the rulings of the court admitting evidence as to the extra judicial acts and declarations of the alleged co-conspirator Marie O'Neil.

[27] The appellant Allen contends that the court erred in admitting into evidence several exhibits relating to cards bearing the name of "Dr. A. L. Hammond". These cards are referred to in the allegations concerning one of the overt acts set forth in count IV of the information.

Otto Riggin, a printer of Van Nuys, testified that he knew the appellant Allen who was a regular customer of his. A card was shown to him which read as follows:

"SUnset 2-0988 SUnset 15141
(Written in ink)
A. L. HAMMOND
(Printed in ink)
Dr. ~~James~~ ~~Stratford~~ ~~Allen~~
(Line drawn through name in ink)
4809 Coldwater Canyon Avenue,
Van Nuys, California."

Both telephone numbers shown thereon are those of Dr. Allen and the address given is that of Dr. Allen. Mr. Riggin testified that he had no independent recollection of the event or by whom the order was given, but that it was a card which was brought to his office for reproduction and one of the telephone numbers was in his handwriting. Such cards printed in his shop were also received in evidence. His records, kept in the ordinary course of business, showed the job was charged to Dr. James S. Allen. Appellant said: "*The record* is devoid of any testimony that the cards were ordered by Dr. Allen or anyone authorized to order them on his behalf. There is no evidence connecting him in any way with having ordered the cards or possessing them. That being so there is utterly no foundation for their introduction into evidence." To make that statement is to ignore the testimony of Lois Shively and Officer Jokisch and the statements made to them by Dr. Allen's co-conspirator Marie O'Neil. These cards were received in evidence after all of the prosecuting witnesses had testified and the conspiracy had been established. Lois Shively had testified she called Dr. Allen's telephone number, asked for Dr. Hammond and made an appointment to see him at the address given on the card. Marie O'Neil told Lois Shively and the other officer that she was the one with whom the conversation was had and who made the appointment for Dr. Hammond. A card of Dr. Hammond's printed by Mr. Riggin's establishment was found in the purse of Marie O'Neil and was one of the exhibits. The Inspector of the State Board of Osteopathic Examiners testified the record showed no A. L. Hammond was licensed to practice osteopathy in California. It will be seen that there was ample foundation for the introduction of these cards.

[28] Finally, the appellant Allen complains of the admission of the testimony of Dr. Loehr of San Jose who was Lorraine Ashley's physician. He testified to certain statements made by his patient both before and after her trip to Los Angeles including her statement that she had had an abortion performed. The court strictly limited the testimony of Dr. Loehr to statements which were part of the case history obtained from his patient. All other statements were stricken by the court and, as to those admitted, counsel for appellant requested that they be received merely for the purpose of the history and it was as such only that they were received. There was no error in admitting this evidence. People v. Shattuck, 109 Cal. 673, 678, 679, 42 P. 315.

The judgments and orders are affirmed.

SHINN, P. J., and VALLÉE, J., concur.

WEST KEY NUMBER SYSTEM
104 Cal.App.2d 497

KIRKER et al. v. SHELL OIL CO.
Civ. 17954.

District Court of Appeal, Second District, Division 1, California.
May 31, 1951.
Rehearing Denied June 25, 1951.
Hearing Denied July 26, 1951.

Action by W. C. Kirker, Jr., also known as William C. Kirker, Jr., and another, against the Shell Oil Company, a corporation, for termination of a community oil lease. The Superior Court of Los Angeles County, Julius V. Patrosso, J., entered a judgment for defendant and plaintiffs appealed. The District Court of Appeal, Hanson, J., held that where granting clause of lease granted the premises for a term of 20 years with a pro-

viso for an extension thereof, a subsequent clause in the lease, which was not a part of the granting or habendum clauses, requiring the lessee to commence drilling operations prior to a specific date, was not a specific limitation of the lease and did not automatically end the lease for breach thereof.

Affirmed.

1. Landlord and tenant ⇐81½

A lease granting premises for a term of 20 years with a proviso for an extension of the term created a determinable fee.

2. Mines and minerals ⇐78(2)

Where granting clause of community oil lease granted the premises for a term of 20 years with a proviso for an extension, provision of lease, which was not a part of the granting or habendum clauses, requiring the lessee to commence drilling operations prior to a specific date therein was either a condition subsequent or a covenant and did not cause an automatic reverter to the grantor of the lease upon failure to commence drilling by the date.

3. Deeds ⇐97

Language in a deed, subsequent to granting and habendum clauses, may not modify, cut down or control those clauses, unless such clauses incorporate additional language required by express reference.

4. Mines and minerals ⇐78(3)

Where community oil lease contained a covenant requiring the lessee to commence drilling operations prior to a specific date, and a provision stating that the lease shall not expire for failure to conduct any operations on the land until 90 days after written notice has been made the lessors demanding the performance of operations, until such notice of default had been given by the lessors to the lessee, the lessors had no cause of action for an adjudication that the lease was at an end.

5. Mines and minerals ⇐78(1)

Where community oil lease required lessee to commence drilling operations before a specific date but lease also contained a provision expressly providing for delay or suspension of performance for so long a period as lessee was hindered or prevented from performance by operation of law, the fact that lessee was prevented from drilling on land by a zoning regulation was sufficient to excuse commencement of drilling before the date required in lease.

6. Evidence ⇐265(15)

In action to terminate a community oil lease, where there was no ambiguity in language of the lease, any alleged admissions of interest by the lessee concerning a legal interpretation of lease contract were properly excluded.

7. Mines and minerals ⇐78(7)

In action to terminate a community oil lease, offer by the lessors to prove that the lessee had represented that the obligations to drill on or before a specific date was absolute, was properly excluded by trial court as it was not made an issue by the pleadings.

8. Fraud ⇐49

Fraud of the grossest character may not in any way be proved unless it is alleged.

Dolley, Knight, Woods & Hightower, James M. Hall and Adolph H. Levy, all of Los Angeles, for appellants.

O'Melveny & Myers, Homer I. Mitchell and Howard J. Deards, all of Los Angeles, for respondent.

HANSON, Justice pro tem.

The decision of this case turns primarily upon the question whether in a community oil lease, granted for a period of 20 years "and for so long thereafter as Lessee shall conduct drilling * * * or producing operations on the leased land, or be excused therefrom, as hereinafter provided; * * *," a provision *not a part of the granting or habendum clauses,* requiring the lessee to commence drilling operations prior to a date therein named, is a *special limitation,* which automatically ended the lease for a breach thereof or whether it is a *covenant or condition subsequent* requiring by the terms of the lease a 90-day notice to make it effective. A subsidiary question is whether parrol evidence was admissible to show the intent of the parties on that particular point on the theory that the terms of the lease not only are ambiguous, but that such intent

accords with representations made by lessee to lessor-appellants.

The trial court ruled the parol evidence was inadmissible and that the provision in the lease was not a special limitation, but merely an obligation or covenant requiring the 90 days' notice. We agree with the holding of the trial court.

Turning to the language of the lease we find, first, that the lessors granted their lands to the lessee for a period of 20 years for the purpose of prospecting and drilling for oil [and other substances] and producing it, and for so long thereafter as lessee shall conduct drilling or producing operations on the leased land, or be excused therefrom, as hereinafter provided; *and the parties hereto agree as follows:* [We state the numbered articles and their language only so far as is material.]

"1. On or before the expiration of three years from the date hereof [March 15, 1944] Lessee shall commence operations for the drilling of a well on some portion of the leased land and shall thereafter prosecute such operations and the drilling of such well to completion, that is, until oil, * * *, is discovered in such well and it is put upon production, or until Lessee deems further drilling unprofitable. * * *

"2. The Lessee has paid to Owner rental in full hereunder for the period commencing on the date hereof [March 15, 1944] and ending March 15, 1945. In the event Lessee has not commenced operations for the drilling of a well on the leased land on or before the date last above mentioned, Lessee shall further pay to the owners of each parcel hereby leased, in person, rental at the rate of $50.00 per acre of such parcel per year, commencing on that date and *payable thereafter yearly in advance.* If Lessee shall commence operations for a well on the leased land prior to the expiration of the maximum time during which it is permitted to delay such operations under Article 1 hereof, it may during the remainder of said time, prior to the discovery of oil or any of the aforesaid other substances in paying quantities on the leased land, suspend or resume such operations at will, except operations for the drilling of an offset well; but whenever Lessee shall so suspend such operations during any period for which rental as aforesaid has not been paid, it shall, except for the time herein allowed it between wells, pay to the Owner rental at the rate above specified prorated for that portion of said period during which such operations shall be so suspended. All rentals hereunder shall cease upon the commencement or resumption of any drilling operations hereunder or when Lessee surrenders its rights under this lease.

* * * * * *

"5. * * * The parties have expressed herein their entire understanding and agreement, and it is expressly stipulated that no implied covenant or condition whatsoever shall be read into this lease relating to the drilling or producing of any wells, offset or other, or to any other operations of Lessee hereunder or the measure of diligence therefor, or to any thing to be done hereunder by Lessee.

* * * * * *

"7. The performance of any of the obligations of Lessee hereunder may be delayed or suspended at any time while, but only so long as, Lessee is hindered in or prevented from performance by * * *, operation of law, or any cause, whether similar or dissimilar, beyond the reasonable control of Lessee. * * *

* * * * * *

"9. Lessee at any time whatsoever may, by written notice, surrender all or any part of the leased land and thereby and thereupon be released from all obligations accrued or to accrue respecting the land so surrendered, excepting accrued pecuniary obligations.

"Notwithstanding anything to the contrary herein contained, this lease shall not expire or be terminated as a result of any failure of Lessee *to conduct any operations* on the leased land until ninety (90) days after written notice from Owner demanding the performance of operations and failure of Lessee to comply therewith; * * * in case of failure of Lessee to comply with any of its obligations hereunder and the continuance of such failure for ninety (90) days after written notice and demand of

Owner * * *, then at the election of Owner this lease shall be forfeited * * *." (Italics supplied.)

In view of the terms of the lease as quoted above, we turn first to the salient facts which are stipulated and, therefore, are undisputed. The predecessor of respondent, a subsidiary corporation by the same name, sought and obtained the master community lease here involved by procuring separate counterpart leases executed by some 200 landowners. The master community lease was fully executed by March 23, 1945, but thereafter on October 9, 1945, the premises were rezoned and accordingly could not be drilled without an application for, and the granting of, a zone variance. Despite the fact that under the zoning ordinance the lessee could not drill the premises it paid to all the signatories the advance rental required on March 15, 1946. This latter payment extended the lease for all purposes to March 15, 1947. Prior to that date the lessee obtained from 90% of the signatories and of ownership, under date of February 6, 1947, a written amendment of the lease, which substituted the words "four years" in lieu of "three years" in Article 1 and an acknowledgment of payment of advance rental for the period March 15, 1947, to and including March 15, 1948. The appellants, however, refused to execute the agreement. No advance rental was thereafter tendered or paid to appellants. On or prior to March 15, 1947, the lessee had not commenced drilling operations on the premises nor had it made any application to the proper city authorities for any zoning variance. Likewise no such application had been made by any of the lessors. However, almost a year later, on February 2, 1948, the lessee filed such an application which was granted on April 27, 1948, and pursuant thereto the lessee on April 30, 1948, proceeded to drill on property covered by the lease other than that leased by appellants the first, out of four wells which was completed in August, 1948, as a producer. On November 3, 1948, employees of lessee called on appellants requesting they procure a quitclaim deed against a cloud that was preventing the payment of royalties to them under the provisions of the community lease. The deed was left with appellants who procured its execution and then forwarded it to the lessee. Thereupon beginning with February 23, 1949, and monthly thereafter respondent mailed its royalty checks to appellants. None of these checks were cashed. Instead on September 7, 1949, appellants served a notice on respondent which averred that respondent had breached the lease and demanded that it remedy such breaches and at the same time it declared the lease had ceased to exist on March 15, 1947. The appellants after the service of this notice instituted the present action less than 90 days thereafter.

Appellants contend, *first*, that the provision in Article 1 requiring the respondent "to commence drilling" the leased premises within three years from the date of the execution of the lease is a *special limitation* upon the term set forth in the granting and habendum clauses of the lease, and as it was a special limitation it automatically terminated the lease; that Article 9 requiring a 90-day notice to terminate is not applicable because it deals only with obligations, and not limitations on the term of the estate. In support of this contention appellants argue that as Article 1 requires respondent "to commence" drilling the premises within three years of the execution of the lease (which was executed on March 15, 1944), the article is not controlled by the provisions of Article 9 as that article refers only to "a failure to conduct operations" or "a failure to comply with its obligations" neither of which, so the argument runs, applies to or encompasses the phrase "commencing drilling." In further support of the contention appellants argue that if the 90-day provision found in Article 9 be held applicable it extends the term for drilling in Article 1 to 3 years and 90 days whereas the term itself is only for three years. Hence, appellants argue it should not be held applicable or controlling. This, and additional arguments which we do not take time to state, leads us quite too far afield from the basic rules of law which must control our judgment. We turn to a statement of those rules and their application to the facts.

[1, 2] Initially, it will be observed from a reading of the lease that the granting

and habendum clauses of the lease grant the premises for a term of 20 years with a proviso for an extension of the term, if a particular stated event should ensue. Such a grant created a determinable fee. Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S.W. 290, 29 A.L.R. 566; see also 1 Tiffany, Real Property (3rd Ed.) sec. 220, p. 385, n. 88; Dabney v. Edwards, 5 Cal.2d 1, 11, 53 P.2d 962, 103 A.L.R. 822; Callahan v. Martin, 3 Cal.2d 110, 120, 43 P.2d 788, 101 A.L.R. 871. The lease is not a grant for three years (the drilling period set forth in Article 1) and thereafter for 17 years (with the proviso annexed) if drilling operation should be begun prior to the expiration of three years. Instead the grant is of a leasehold estate determinable at the end of 20 years with a proviso extending it, if a stated event occurs, at or before the end of the 20 years. Accordingly, the provision found in the lease requiring that the lessee shall commence operations for the drilling of a well on the premises on or before the expiration of three years from the date of the lease, i. e., on or before March 15, 1947, is necessarily either a condition subsequent or a covenant. While it seems to us plain it is a mere covenant the rules that govern, if it is a condition subsequent, are here the same. Accordingly, under well-established rules in the law of future interests the failure to drill within three years of the date of the lease, i. e., March 15, 1944, did not cause an automatic reverter to the grantor of estate granted.

[3] In arguing to the contrary appellants cite Section 23, Restatement of Property, reading as follows: "The term 'special limitation' denotes that part of the language of a conveyance which causes the created interest automatically to expire upon the occurrence of a stated event, and thus provides for a terminability in addition to that normally characteristic of such interest." The phrase "that part of the language of a conveyance" refers not to any language whatsoever found in the deed, but to the operative language of the conveyance, i. e., the granting and habendum clauses. Cf. 4 Tiffany, Real Property, 3d Ed., sec. 966, p. 29. What we here say is fully borne out by the illustrations and comments which immediately follow the quoted section of the Restatement. See also, 2 Powell on Real Property, sec. 187, p. 34. Moreover, it is a long-established rule of law that any language in a deed, subsequent to the granting and habendum clauses, may not modify, cut down or control those clauses, unless such clauses incorporate the additional language by express reference. In 1 Devlin on Real Estate (Deeds), 3d Ed., p. 310, quoting Ray v. Spears Ex'r, 64 S.W. 413, 23 Ky.Law Rep. 814, it is said: "'It is well settled that the granting clause in a deed must prevail over the *habendum,* unless a contrary intention is shown by the deed. In this case both the granting and *habendum* clauses of the deed convey the fee for ever, in as strong language as could be used. And after certain other property is conveyed the addition to or condition is added, which, it is claimed is a limitation, or which converts the title into a defeasible fee. It seems to us that the attempt to so limit the absolute grant is null and void, because utterly inconsistent with both the granting and *habendum* clauses of the conveyance.'"

Likewise in Barnett v. Barnett, 104 Cal. 298, 300, 37 P. 1049, 1050, it is said: "The rule that, if the *habendum* is repugnant to the premises [the granting clause], it is to be disregarded, is only another form of the rule that, 'if several parts of a grant are absolutely irreconcilable, the former part prevails.' Civ.Code, § 1070."

In the lease before us the operative words, by express reference, provide that the term may be further extended by reason of any excuses "hereinafter provided" in favor of the lessee, but otherwise none of the articles are included. Moreover, as the operative words of the conveyance are followed by the phrase "and the parties hereto agree as follows:" which in turn is followed by the nine articles, it is apparent that the articles are mere covenants or, to use the phraseology of the lease, "obligations." Accordingly, the two appellants, as lessors in the community lease of their own property not being possessed of the lessee's estate, by an automatic reverter of the property leased by them, were in the

same position as if there had been no breach, if such there was, of the failure of lessee to drill on or prior to March 15, 1947.

As the case of the appellants is rested squarely on the contention that the three-year provision in the lease is a limitation upon a defeasible estate, and not a condition subsequent or a covenant, we have in reality no occasion to enlarge further upon the facts of the case or the law applicable thereto. However, we think it permissible to say a few words more.

[4, 5] If, as we have said, the three-year provision is not a limitation it follows from the language of the lease that if there was a breach by the lessee of its failure to drill on or before March 15, 1947, that such a default could be taken advantage of by the lessors only by serving a 90 days' notice as provided by Article 9. No such notice was served. Until such notice was served—and there was a failure to properly act upon it within 90 days, the lessors had no cause of action for an adjudication that the lease was at an end so far as appellants' property was concerned. Swigert v. Stafford, 85 Cal.App.2d 469, 193 P.2d 106. Moreover, we think there was no breach of the provision requiring that the property should be drilled on or before March 15, 1947, for the reason that a zoning regulation, not shown to be invalid, prohibited the lessee from drilling. Such a regulation it is altogether clear falls within the scope of Article 7 which expressly provides for the delay or suspension of performance of lessee's obligations (and drilling was an obligation) for so long a period as lessee was hindered or prevented from performance "by operation of law." Cf. Stockburger v. Dolan, 14 Cal. 2d 313, 94 P.2d 33, 128 A.L.R. 83. To be sure the zoning regulations in a proper case could be varied upon an application filed long prior to the time the application was filed, but the lease placed no duty on either the lessee or the lessors to make such application and procure, if they could, the necessary variance. Possibly, a point we do not decide, the lessee upon service of notice requiring it to drill within 90 days might have been under an implied duty to seek such a variance, but it committed no breach in failing to do so in the absence of such a notice. Hence, when it did begin to drill its action was timely under Article 1 in view of Article 7 which, in effect, amends the prior article.

[6–8] The ruling of the court in excluding the proffered parol evidence is patently correct. There is no ambiguity in the language of the lease as applied to the facts of the case. The so-called admissions against interest which appellants sought to prove were not admissions of fact but of law (i. e., a legal interpretation of the contract) and so were properly excluded. Tritsch v. Ayer Tanning Co., 316 Mass. 598, 56 N.E.2d 11. Moreover, they were irrelevant and immaterial as the meaning of the language of the lease was for the court. The offer to prove that the lessee had represented to appellants at and prior to the execution of the lease that its obligation to drill on or prior to March 15, 1947, was absolute, and not subject to any qualification, was rightly excluded by the trial court as it was not made an issue by the pleadings. Fraud, of the grossest character, may not in any case be proved unless it is alleged.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied; SCHAUER, J., dissenting.

104 Cal.App.2d 417

HERBOLD v. HARDY et al.

Civ. 14513.

District Court of Appeal, First District, Division 2, California.

May 25, 1951.

Earnest L. Herbold sued Gerald Hardy, Piedmont Theatre Company, Inc., and others for an injunction to compel the removal of a marquee from the front of a building owned by plaintiff and containing premises leased to defendant for use as theatre. The Superior Court, Alameda County, Thomas J. Ledwich, J., rendered judgment for plaintiff, and Hardy Theatres appealed. The District Court of Appeal, Goodell, J., held that the lease provision giving the lessee the right

to erect upon the building "suitable" electric or other signs advertising the theatre business did not give the lessee the right to erect any type of sign "suitable" for theatre advertising without reference to the particular building in question or the rights of others.

Affirmed.

1. Landlord and tenant ⇐124(1)

Where theater lease gave lessee right to erect upon building suitable electric or other signs advertising theater business and provided that any damage caused by erection or maintenance of such sign should be paid for by lessee, language of lease could not be stretched to mean any and every type of sign as long as it was suitable for theater advertising without reference to particular building in question or rights of others. Civ.Code, § 3514.

2. Landlord and tenant ⇐124(1)

Where theater lease, which authorized lessee to erect new marquee, instead of giving theater's own dimensions, gave overall boundaries of lessor's property, and then excepted "all store rooms, flats and apartments", choice of such roundabout description did not tend to prove that theater was to have position of dominance over rest of building so as to justify lessee in erecting marquee in derogation of other occupants' rights. Civ.Code, § 3514.

3. Landlord and tenant ⇐124(1)

Where theater lease covenant designed to prevent obstruction of tenant's signs was obviously in aid of tenant's right given tenant to erect upon building suitable electric or other signs advertising theater business, such covenant indicated no intention to establish dominance over other occupants so as to give theater owner right to erect marquee in derogation of other occupants' rights. Civ.Code, § 3514.

4. Injunction ⇐128

In suit by lessor for injunction to compel lessee of theater premises to remove new marquee, where lessee contended that lessor should be estopped because he had consented to erection of marquee, evidence failed to prove lessee's allegation that detailed sketches and drawing showing width, depth and height of sign in marquee had been submitted to lessor for his approval, and established that sign had been installed over lessor's objection and under police guard rather than with his consent. Civ. Code, § 3514.

5. Evidence ⇐461(1)

In suit by lessor of theater premises for injunction to compel lessee to remove new marquee from front of building in which theater was located, where it appeared that lease had been drafted by lessee's attorney and that it contained clause giving lessee right to erect upon building electric sign or other signs advertising theater business, trial court did not err in excluding evidence as to the intention and understanding of the parties in regard to language of lease. Civ.Code, § 1625.

6. Evidence ⇐441(1)
Trial ⇐46(1)

In suit by lessor of theater premises for injunction to compel lessee to remove new marquee from front of building in which theater was located, trial court did not err in excluding evidence as to negotiations prior to execution of lease, where lease itself showed in clear language, lessee's right to erect new marquee, provided it was suitable, and there was no offer of proof to enlighten trial court as to what lessee expected to show.

7. Injunction ⇐127

In suit by lessor of theater premises for injunction to compel lessee to remove new marquee from front of building in which theater was located, trial court did not err in excluding evidence as to surrounding circumstances which existed at time of negotiations and execution of lease, where record showed that premises already had been occupied as theater by another tenant, that lessor knew that old marquee had to be replaced by modern one, and that lessor was agreeable to new marquee provided it was suitable and did not obstruct view.

8. Injunction ⇐130

In suit by lessor of theater premises for injunction to compel lessee to remove new marquee from front of building in which theater was located, where there was conflicting testimony as to whether lessor had expressed, during conference on proposed construction, his indifference

with respect to whether central portion of new marquee might come higher than window sills of second story windows, trial court's finding that lessor had not consented to interference with view from second floor windows settled whatever conflict there was on question.

9. Trial ⇐375

Where trial judge has viewed premises involved in case being tried by him, information so obtained is independent evidence that can be taken into consideration in determining issues of case, even though there is no way of making it part of record.

10. Injunction ⇐189

In suit by lessor of theater premises for injunction to compel lessee to remove new marquee from front of building in which theater was located, where trial court awarded lessor damages at rate of $50 per month until compliance with judgment and ordered lessee to remove offending sign board and tubing within 30 days, trial court did not go too far in compelling removal of sign, in view of fact that there was no way in which court could change physical situation or abate nuisance other than by ordering signs removed.

11. Nuisance ⇐37

In suit to abate nuisance by injunction, court should go no further than is necessary.

Maurice J. Bleuel, Oakland, Paul Staniford, Fresno, for appellant.

Granville T. Burke, Albert M. Hardie, Oakland, for respondent.

GOODELL, Justice.

Respondent owns the property at the northeast corner of Piedmont and Linda Avenues in Oakland with a two-story building thereon. The ground floor consists of the "Piedmont" moving picture theatre and three stores. On the second floor there are five apartments, one of which is occupied by respondent.

On January 20, 1941 respondent leased the theatre to defendant Gerald Hardy for 15 years ending January 31, 1956. In 1946 Hardy assigned the lease to appellant Hardy Theatres, Inc., a corporation of which he is president.

The leased premises had been occupied before 1941 as a moving picture threatre, and over its entrance hung a marquee. In 1947 appellant contracted with a sign company for a new, modernized marquee, the installation of which gave rise to this litigation. Respondent's complaint prayed for an injunction compelling appellant to remove the new marquee and restore the place to its original condition, and for damages. From a judgment in respondent's favor this appeal was taken.

The old marquee had two wings, one parallel with the Piedmont Avenue face of the building, the other with the Linda Avenue face, each with two lines of letters. Connecting these wings, and running in a curve around the corner of the building above the theater entrance was a central member or unit containing the name "Piedmont Theatre", the apex of which reached a little higher than the tops of the wings. However, no part of the marquee extended above the sills of the second story windows except said apex which was well out from the building and did not materially interfere with the windows.

After Hardy had decided on a new marquee he visited respondent, accompanied by the witness Davis, of the sign company, who brought pencil sketches or preliminary studies showing five different designs of marquees. This meeting was held in respondent's apartment on the corner of the building directly above the marquee. Respondent took his two visitors to the window, told them that the new marquee could come no higher than the window sills and for emphasis laid a yardstick across the sill. They acceded, stating that they would confine the wings to two horizontal lines of lettering (as in the old marquee) instead of three as planned.

The two wings were set in place without protest, since they were clearly below the sills. A gap was left between them, and when the central sign was hoisted into that space, temporarily suspended by ropes,

it was evident that it would cover the corner windows. Respondent, under threat of using his shot-gun, promptly ordered it down. It was left up, however, and when it was permanently affixed two or three police officers stood guard over the operation and told respondent he would be "run in" if he interfered.

The court found that without respondent's consent and over his objection appellant affixed to the marquee "a large vertical signboard approximately 10 feet x 20 x 3 feet in dimensions, and illuminated by seven bands of neon tubing, extending across the face of said sign and to the back thereof for approximately two feet" which sign is directly in front of the corner windows "and extending in height to approximately the top of said windows."

The sign contains within its rectangular frame five horizontal lines to hold large letters displaying the names of moving pictures and the stars thereof, and is surmounted by the name "Piedmont" in still larger letters, faced with neon tubing. Extending out from each end of the sign are two arms, each carrying eight horizontal lines of neon tubing, curving around to the back of the sign.

Respondent testified that the sign has cut off about 25% of his light and that the flashing on and off of the neon lights during three or four hours every night is extremely disturbing. Photographs taken from the apartment show the sign blocking the view from the corner windows. Respondent testified to other consequences but enough has been said to show that the use and enjoyment of the apartment have been seriously impaired.

The lease provides that "Lessee shall have the right to erect upon the building suitable electric or other signs advertising the theatre business, but any damage caused by the erection or maintenance of such signs shall be repaired or paid for by Lessee."

The court found "That it is not true that said neon sign * * * was or is suitable for advertising the theatre business at said Piedmont Theatre within the meaning and terms of said lease * * *."

Appellant's counsel attack this finding, contending "that the contract provided for the erection of signs in keeping with the advertising medium of other theatres *without reference to the particular building in question*" (emphasis added) and that any finding "to the effect that the sign in question was not suitable in this sense, is not supported by the evidence." They argue that the parties "intended 'suitable' to mean suitable for advertising in the competitive and specialized world of the theatre to which both lessor and lessee belonged."

[1] This position is untenable because such interpretation collides head-on with the principle that "One must so use his own rights as not to infringe upon the rights of another", § 3514, Civ.Code. The lease certainly gave the right to erect a new sign, but its language cannot be stretched to mean any and every type of sign as long as it is suitable for theatre advertising "without reference to the particular building in question" or the rights of others.

The inconsistency of appellant's position appears from its argument that "It is obvious that the parties did not mean *suitable to respondent, lessor.* If that were the interpretation, the provision would be a nullity and serve no purpose at all." (Emphasis added.)

Appellant introduced the photographs of signs and marquees on seven other Oakland theatres and draws a comparison between them and the Piedmont Theatre sign, to show that the latter was suitable *per se* as a theatre sign (wholly "without reference to the particular building in question"). Thus appellant claims that *suitability means suitability for itself, and its own purposes.*

It goes without saying that a sign might be a suitable one in the eyes of an advertising man or a theatre owner for their particular purposes, but it by no means follows that the same sign would be suitable where you have, as in this instance, a building devoted to several different uses. The court's decision indicates that it so concluded.

The word "suitable" has been held to be synonymous with "fit", "adapted to", "designed", "appropriate", "likely to suit", "convenient", "proper", "reasonable", 40 Words and Phrases, pages 664–674.

In Evans v. Reading Chemical & Fertilizing Co., 160 Pa. 209, 28 A. 702, 710, the court said: "The latter is, therefore, not a suitable or convenient one [place] for this business, in the legal sense of those words, meaning 'not a place which may be convenient to the party himself, looking at his interest merely, but a place suitable and convenient when the interests of others are considered.' Bamford v. Turnley, 3 Best & S. 65, 75, per Williams, J., quoted in Cooley, Torts, 597." Followed in Wellington v. Crowley, 1918, 230 Mass. 107, 119 N.E. 744.

The language of the finding speaks as to suitability with relation to the situation "at said Piedmont Theatre" which, of course, is and must be the criterion, if the rights of the other occupants are to be given any consideration at all.

The court's interpretation was not only reasonable, § 1643, Civ.Code, but it gave the language its ordinary and popular meaning, § 1644, Civ.Code, and the meaning given in Evans v. Reading C. & F. Co., supra.

[2] Appellant contends that the theatre was to have a position of dominance over the rest of the building. In doing so counsel point to the description in the lease which, instead of giving the theatre's own dimensions, gives the over-all boundaries of respondent's property (110′ x 103′) and then excepts "all store-rooms, flats and apartments". This was probably the easiest way to do it but, after all, nobody claims that anything more than the theatre was intended to be leased, and the choice of such roundabout description does not tend to prove any dominance.

[3] Appellant points also to the covenant designed to prevent the obstruction of the theatre's signs. This obviously is in aid of the lessee's "right to erect upon the building suitable electric or other signs advertising the theatre business." However it indicates no intention to establish a dominance over other occupants.

Lastly it is argued that the lease was to yield considerable profit to respondent, the inference being that he was prepared to sacrifice his own comfort and convenience in favor of the theatre's signs. This is no more convincing than the other two contentions.

Appellant's third point is that the changes were made with respondent's consent and that an estoppel was proved, since appellant expended for the sign and marquee $11,886.47 in reliance on such consent.

It is difficult for appellant to now argue that respondent consented, since its counsel conceded in their opening statement that the sign was put up under police guard. Counsel then said "Mr. Tracy gave us some protection and the sign was installed over the objection of Mr. Herbold." Mr. Tracy was chief of police.

[4] Consent can hardly be based on the sketches exhibited at the first meeting, since appellant failed to prove the allegations of its answer that "a detailed sketch and drawing showing the width, depth and height" of the sign and marquee was submitted to respondent. At that meeting the witness Davis, representing the sign company, had six pencil sketches which he characterized as "thought studies" or "preliminary ideas" representing five different designs. He admitted that the sign as completed was not in accordance with any one of them. It is true one of the sketches showed the proposed central "Piedmont" sign higher than the side wings, but there were no dimensions thereon, and in the absence of figures or a scale drawing there was no way of telling how much higher it was to be, or where it would come with relation to the windows. Even without figures, a glance at the sketch shows the "Piedmont" sign nowhere near the height of the sign as completed. None of these "thought studies" pretends to be a detailed sketch, and accordingly the court found it to be untrue that "a detail sketch and drawing, showing the width, depth and height" of the sign and marquee was submitted.

Appellant assigns as error the exclusion of evidence of (a) the intention and understanding of the parties in regard to the language of the lease; (b) the negotiations

prior to the execution of the lease, and (c) the surrounding circumstances which existed at the time of the negotiations and execution of the lease.

[5] The lease, *which was drafted by an attorney then employed by appellant,* contains the clause: "Lessee shall have the right to erect upon the building suitable electric or other signs advertising the theatre business." If there had been any "intention and understanding of the parties in regard to the language of the lease" additional to or more specific than that clause, it certainly would have found its way into the lease itself since the same draftsman—not content to rely on § 1625, Civ.Code—was careful to provide that "This lease supersedes any and all other and prior agreements of every kind and character heretofore entered into between the Lessors and the Lessee, and it is agreed that all of such prior agreements have been cancelled and rendered null and of no effect."

[6, 7] Moreover, when respondent's objections were sustained to the questions respecting negotiations, there was no offer of proof to enlighten the trial court as to what appellant expected to show (see 2 Cal.Jur. p. 275). And at the oral argument we still gave appellant's counsel an opportunity to point that out, but from their response it does not appear that parol testimony could have made any clearer "the intention and understanding of the parties" than does the lease itself which shows (in what the trial court thought, and we think, is clear language) the lessee's right to erect a new marquee provided it was suitable. Finally, the record *even as it stands* shows the surrounding circumstances. The premises already had been occupied as a theatre by another tenant, and the old marquee hung over the entrance; Hardy knew that the marquee had to be replaced by a modern one; and the lessor was agreeable to that, provided it was suitable and did not obstruct the view. We find no merit in this point.

[8] The only apparent conflict in this record arises from the conversation wherein respondent, at the window, told appellant and the witness Davis that the new marquee could come no higher than the window sills. There is testimony that respondent then expressed his indifference with respect to the central member or unit, but appellant himself testified that respondent "then outlined that the thing he wanted most was to keep his windows clear * * *. I asked Mr. Herbold if it made any difference if it went a few inches above. He said, well, as long as it didn't interfere with his view." The central member is not only part of the marquee, but its most dominant part, extending, as found, "to approximately the top of said windows". It was for the trial court to determine as a question of fact whether, when respondent laid his yardstick on the window sill and spoke of interference with the view, he did not intend (and appellant did not understand him to intend) such limitation to apply *to every part* of the new marquee since no part of the old one (except the small apex) had reached above the sills, and since there would be no point in requiring the wings to be kept below the sills while at the same time permitting the central member to reach high above the sills and obstruct the corner windows. The court's finding that respondent did not consent, settled whatever conflict there was on this question.

[9] The trial judge, on stipulation, viewed the premises. The photographs seem to give a clear idea of the situation, but whatever the judge saw on his own inspection might have given him impressions beyond those given by the pictures. Information so obtained "is independent evidence to be taken into consideration * * in determining the issues of the case," Gibson Properties Co. v. City of Oakland, 12 Cal.2d 291, 297, 83 P.2d 942, 945; see, also, Noble v. Kertz & Sons Feed & Fuel Co., 72 Cal.App.2d 153, 159, 164 P.2d 257 and cases cited, although there is no way of making it part of the record.

The prayer of the complaint was for $10,000 damages on the first count and $3,500 on the second; also for an injunction restraining defendants from maintaining, using and operating the sign, requiring them to remove it, and replace, repair

and restore the marquee to its original condition.

The decree awarded no lump-sum damages but did award damages at the rate of $50 a month from June 17, 1947 (when the sign was erected) until compliance with the judgment. The principal part of the decree is that "defendant is hereby ordered to remove said signboard and tubing within thirty days * * *."

[10, 11] Appellant contends that the court went too far in compelling the removal of the sign. However, the theory on which the case was prosecuted was that the sign constitutes a continuing nuisance and invasion of respondent's rights. There is no way in which the court can change the physical situation or abate the nuisance other than by ordering the sign's removal, and the lease has almost five years more to run. The court cannot modify the judgment by designing a new, "suitable" sign; it can say, and has adjudicated, that the present one is not suitable. It is true that a court should go no further than is necessary in such a situation, but it is difficult to see how respondent can get complete and adequate relief unless the sign be removed. The lessee still has the right to erect a suitable sign and it would appear that this must be done at its own peril unless the parties can reach an agreement, but that is something which the court cannot force or control.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

104 Cal.App.2d 392

PEOPLE v. HECTOR.

Cr. 4587.

District Court of Appeal, Second District, Division 1, California.

May 24, 1951.

Carl Tony Hector was convicted in the Superior Court of the County of Los Angeles, Edwin L. Jefferson, J., for lewd and lascivious acts upon a child under 14 years and defendant appealed. The District Court of Appeal, Drapeau, J., held that the failure of the trial court to follow the provisions of the sexual psychopath law and find whether defendant was a sexual psychopath before sentencing the defendant was error.

Judgment reversed in part and cause remanded with direction.

Doran, J., dissented.

1. Infants ⇐20

Evidence sustained conviction for lewd and lascivious acts upon a child. Pen. Code, § 288.

2. Criminal law ⇐625

The provision of the Welfare and Institutions Code requiring that when any person is convicted of a sex offense involving a child under 14 years of age, the court should adjourn the proceedings and certify the person for examination to determine whether the person is a sexual psychopath is mandatory and must be followed. Welfare and Institutions Code, § 5500 et seq.; § 5501 (c), as amended by St. 1950, 1st Ex. Sess., p. 440.

3. Constitutional law ⇐70(3)

Whether the policy of a particular statute is sound or not must be determined by the legislature, and not the judicial branch of government.

4. Criminal law ⇐625

Where defendant was convicted of lewd and lascivious acts upon a child under 14 years of age, the refusal of the trial court to follow the provisions of sexual psychopath law and find out whether defendant was a sexual psychopath before sentencing him, was improper. Pen. Code, § 288; Welfare and Institutions Code, § 5501 et seq.; § 5501 (c), as amended by St.1950, 1st Ex.Sess., p. 440.

Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

The father, grandfather, and a friend, took a ten-year-old boy and an eight-year-old girl to the beach on a Sunday morning. The men saw the children safely seated on the beach, and drove away in their car, to purchase some candy bars for them. In a few minutes they came back with the candy bars. Then they left again on some business of their own. This time they were gone for a half hour or so.

Before they left, the men noticed defendant walking up and down the beach. Defendant was clad in blue overalls and a brown shirt, and had a bucket in his hand. The men thought he was a fisherman.

When they came back the second time, the men saw defendant kneeling on the sand in front of the little girl, with his hands on her legs. In the meantime defendant had discarded his pants and brown shirt, and was clad in t-shirt and shorts. The rest of his clothing and his bucket were in a little pile a short distance away on the beach.

The grandfather ran toward defendant's clothing, thinking to intercept him there. When defendant saw the grandfather, he too ran for his clothing, and sure enough the two men met near the clothing and the bucket. The grandfather hit defendant with his fist, and called the police. Defendant said: "* * * all at once, like a bolt of lightning hit me, I was caught in the mouth and I was knocked back into the water."

Defendant was arrested, charged with, and convicted by the court of violation of Penal Code Section 288. He admitted a prior conviction in Mississippi, and imprisonment in that state, for the same type of offense. On his trial, on cross-examination, he admitted another conviction and imprisonment, in Arizona, for the same type of crime.

On the trial, the boy and girl testified to criminal acts upon the girl by defendant. Their testimony, along with the testimony of the father and grandfather, amply supports the verdict of the trial court.

Defendant testified that what he did was done with no unlawful intent; and he denied that he had his pants and brown shirt off.

[1] Defendant's first contention on appeal, that the evidence does not support the verdict, is untenable. The substantial-evidence rule here applied needs no extended citation of authority. People v. Jones, 36 Cal.2d 373, 224 P.2d 353.

Defendant's second contention is that the trial court was required to follow Section 5500 et seq. of the Welfare and Institutions Code, relative to sexual psychopaths.

In 1950 the Legislature amended Section 5501 to read, in part, as follows: "(c) When a person is convicted of a sex offense involving a child under 14 years of age and it is a felony, the court shall adjourn the proceeding or suspend the sentence, as the case may be, and shall certify the person for hearing and examination by the superior court of the county to determine whether the person is a sexual psychopath within the meaning of this chapter." St.1950, 1st Ex.Sess., p. 440.

[2] Instead of doing this, the trial court sentenced defendant to the state prison, and denied his request to file a petition in sexual psychopathy. It does not appear from the record that the amendment was brought to the court's attention. However, the law is mandatory and must be followed. People v. Barnett, 27 Cal.2d 649, 166 P.2d 4; People v. Thompson, Cal.App., 227 P. 2d 272.

Apparently the social objective of the Legislature is to keep men like defendant sequestered from further contact with society for so long a time as they remain a menace to children. Experience has shown that such men, with their unnatural mentality, are unable to refrain from molesting children, and sometimes kill them in fear of being found out and punished. Therefore, a state policy designed to make sure that sexual psychopaths are put away for good, if necessary, is to be commended. See "Sane Laws for Sexual Psychopaths," 1 Stanford Law Review 481.

To confine such men in prisons of maximum security has long impressed penologists as not solving the problem. For some time past it has been urged before

the Legislature that some method of sequestration in mental hospitals should be adopted which will afford not only confinement for the individual so affected and consequent protection of society, but possibility of proper treatment and rehabilitation.

In this case, defendant has been found guilty and adjudged to be imprisoned in one of the state institutions for men. The law requires that before such imprisonment is carried into effect, the court shall follow the provisions of the sexual psychopath law; find whether defendant is a sexual psychopath; and, if it so finds, commit him to a state institution for the mentally ill.

Society is protected, because defendant will be where he can do no harm to children until the director of the mental institution and the court shall both conclude that he has ceased to be a menace to children, and the court shall grant him probation; or until he has served his sentence.

If he comes back to court for further disposition of his case, he may be committed to the state prison. People v. Tipton, 90 Cal.App.2d 103, 202 P.2d 330. If the director of the mental institution thinks he is cured and the trial court doesn't, defendant may be sent to state prison for the term required by the judgment.

[3] The statute with which we are here concerned was adopted by the legislature, and until it is modified or repealed the courts are without power to do other than apply the plain terms thereof. The policy of the state in matters of this kind is committed by the people to the legislature; and whether such policy is sound or not must be determined by the legislative, and not the judicial, branch of the government.

[4] The judgment of conviction is reversed only in so far as it commits defendant directly to imprisonment in a state prison, and is otherwise affirmed. The cause is remanded to the trial court with directions "to suspend sentence for the purpose of hearing and determining whether or not the defendant * * * is a sexual psychopath," to grant defendant the requested hearing, and after such hearing to commit the defendant to the Department of Institutions or to a state prison as may be determined according to law, and to make such other orders in the premises as may be meet. People v. Barnett, supra.

WHITE, P. J., concurs.

DORAN, Justice.

I dissent.

In my opinion the record reveals definitely that appellant is not the type entitled to any consideration whatever under the provisions of section 5501 of the Welfare and Institutions Code.

Appellant's contentions and, the judgment and attitude of the trial judge, may be summarized by quoting the discussion between counsel and the court at the time the matter came up for pronouncing judgment at which time the motion or request of defendant was made. It appears that counsel did not represent defendant at the trial but was substituted on the day fixed for pronouncing judgment. At that time the following discussion, in part, occurred:

"Mrs. Root: In this case I feel the Court should appoint a psychiatrist. It is my belief that this man is a sexual psychopath, and I would like, your Honor, if the psychiatrists' findings are as I believe them to be, to file further a petition under the sexual psychopathy section.

"The Court: There is one report in the file already under section 1871 [Code Civ. Proc.], a report from Dr. Crahan.

"Mrs. Root: I have not seen that, if your Honor pleases. I did not get a copy of it nor did I see it. That must have been previous to my coming into the case. * * *"

The case was continued for a week at which time the following occurred:

"Mrs. Root: If your Honor pleases, since being in court last—your Honor will recall that I did not try this charge originally but came into it at the time of the application for probation—it seems as though Dr. Crahan does not reach the point of coming in with a diagnosis of a sexual psychopathy, but states that the defendant was sane. That isn't the question at this particular moment. I feel, from the past record of this defendant and from his own state-

ments, that this defendant should file under the sexual psychopathy act and have psychiatrists appointed to determine that factor, and the defendant is desirous of having that help and that treatment if your Honor sees fit under the psychiatric examination to make him a sexual psychopath. I would therefore ask the matter be continued a week, with permission to file a petition under the sexual psychopathy act.

"The Court: I have read the doctor's report here, as well as the probation report. The Court does not feel that that motion should be granted.

"Mrs. Root: Well, if your Honor pleases, apparently Dr. Crahan did not consider the question as to whether he was a sexual psychopath, * * *. If the other psychiatrists do not hold him to be a sexual psychopath, certainly your Honor has wide discretion one way or another; but sending this man to the penitentiary has not helped him, and they all admit he belongs in an institution where they can take care of him.

"The Court: Is that an institution of maximum security?

"Mrs. Root: Well, 'maximum security' is hospitals relative to sex offenders. The new hospital, which is at Norwalk, treating sexual psychopaths is with the greatest of maximum security, and that is the leading hospital in the State of California. Certainly to send this man to the penitentiary among men, if he has this sexual deficiency, is not the answer, and your Honor has wide discretion after he returns from the hospital to then send him to the penitentiary if your Honor sees fit.

"The Court: His problem seems not to be with bothering men but with children. * * * His whole record going back to 1939 is apparently the same pattern. In Arizona, three to five years on a charge of lewd and lascivious conduct, attempted rape; and he traveled from Arizona down to the State of Mississippi, and in 1944 they have it here 'violating the person of a six-year-old female child.' He goes to the State Prison at Parchman, which is a pretty rugged place, so I have been informed, for three years.

"Mrs. Root: Then, isn't the answer hospital care? Everything else has failed. In other words, let us give him an opportunity with doctors who are trained to take care of people.

"The Court: I have read this doctor's report here.

"Mrs. Root: You will note, if your Honor pleases, that he does not touch upon the fact as to whether or not he is a sexual psychopath. Apparently he was appointed and he did not realize that the Court was interested in that phase. He goes upon the idea of insanity.

"The Court: Did you read the evaluation?

"Mrs. Root: Yes, I did, if your Honor please, but I cannot feel that that evaluation is a sound evaluation as predicted upon the past. In other words, here is this defendant in every institution, three at least. San Quentin could offer no more. In other words, if your Honor sees fit, and he is found to be a sexual psychopath by other psychiatrists, send him to the hospital, give him a chance to be cured, and then he is returned for the Court to do with as the Court sees fit. The Court is not bound by any recommendation from the State hospitals but certainly it is an answer. I am merely asking the right and the permission to come to your Honor under the sexual psychopathy act.

"The Court: The motion will be denied."

It will be seen from the foregoing that the argument before the trial judge was based on the contention that defendant was a "sexual psychopath" and the same contention is urged on appeal.

The prevailing opinion herein recites that, "Experience has shown that such men, with their unnatural mentality, are unable to refrain from molesting children, and sometimes kill them in fear of being found out and punished. * * *

"To confine such men in prisons of maximum security has long impressed penologists as not solving the problem. For some time past it has been urged before the Legislature that some method of sequestration in mental hospitals should be adopted which will afford not only confinement for

the individual so affected and consequent protection of society, but possibility of proper treatment and rehabilitation."

I do not share the sentiment expressed in the foregoing nor am I concerned about sexual perverts at all from a sentimental standpoint. My chief concern is the safety and protection of children who are continually exposed to the activities and dangerous proclivities of these sexual perverts. It is the welfare of the children in such circumstances that is most important, for children form the nucleus of the American family and the welfare of the American family is the equivalent of the public welfare. And so far as "treatment and rehabilitation" of these sexual perverts is concerned, there is no treatment and their "rehabilitation" is but a notion that exists only in the minds of fanatical social workers.

The prevailing opinion also recites that the court shall "find whether defendant is a sexual psychopath; and, if it so finds, commit him to a state institution for the mentally ill.

"Society is protected, because defendant will be where he can do no harm to children until the director of the mental institution and the court shall both conclude that he has ceased to be a menace to children, and the court shall grant him probation; or until he has served his sentence." In as much as these perpetually menacing sexual perverts are not mental cases the foregoing is not the law and society is not protected.

Section 5501 of the Welfare and Institutions Code obviously must be contrued and interpreted with relation to section 5500 which immediately precedes it. Section 5500 is as follows: "As used in this chapter, 'sexual psychopath' means any person who is affected, in a form predisposing to the commission of sexual offenses * * * and in a degree constituting him a menace to the health or safety of others, with any of the following conditions:

"(a) Mental disease or disorder.

"(b) Psychopathic personality.

"(c) Marked departures from normal mentality."

There is not the slightest evidence in the record or even a suggestion that defendant suffered any mental disease. Psychopathy means mental disease or disorder and psychopathic means "Of or pertaining to, of the nature of, or characterized by, psychopathy". "Sexual psychopath" is just a coined phrase but, even as such, defendant does not come within its conditions as mentioned in a, b, and c of section 5500. It follows therefore that section 5501 does not apply.

Moreover, it is well known that these sexually abnormal acts are purely physical and in no sense mental. They have existed since the dawn of history, and history records brilliant mental achievements of men who were known to be victims of such offensive, obnoxious and repulsive sex abnormalities in some form or another. And there is no cure for these abnormal sex tendencies, psychiatrists to the conrary notwithstanding. Is there a cure for normal but unlawful sex tendencies? And incidentally, are they mental?

Until recent years mental afflictions were treated by physicians; now they are treated by the psychiatrists who also are members of the medical profession but who specialize in mental disorders They seldom, if ever, have occasion to refer to their knowledge of medicine or pathology. Psychologists perform the same function.

In my opinion sections 5500 and 5501 apply only to the insane and that the legislature and the governor who signed the amendment to section 5501 on April 14, 1950 never intended otherwise. To hold otherwise would mean that law enforcement in connection with such offenses and the protection of innocent children in such circumstances would be turned over to the psychiatrists.

Moreover, it is noteworthy that the title of the amendment to section 5501 which added paragraph (c) as quoted in the prevailing opinion, is as follows, "An act to amend Sections 5501, 5502, and 5503 of the Welfare and Institutions Code, *relating to sexual psychopaths*". (Italics added.)

When such matters come before the court the questions are addressed to the discretion of the court. Construing paragraph (c) with relation to the balance of section 5501, and section 5500 as above noted and also in the light of the title to the amendment, the trial court was called upon to determine whether the defendant was a "sexual psychopath". This was done and there is nothing in the record to even suggest that because the court found that defendant was not insane, an abuse of discretion resulted. The mere violation of section 288 of the Penal Code justifies neither a presumption nor an inference that insanity exists. See People v. Smith, Cal.App., 223 P.2d 82.

In my opinion it is incredible that the legislature ever intended that the authority to determine the place and term of confinement of these sexual perverts should be vested in psychiatrists.

When insanity is a defense to the commission of a crime the law provides the procedure and unless waived, a jury may determine the issue. And even when no offense has been committed and an individual is charged with insanity a jury may be demanded. And in such circumstances it is common knowledge that usually as many psychiatrists testify on one side as the other; and the jury decides the issue, not the psychiatrists. Indeed, the layman is usually the first to detect insanity in an individual which later is merely confirmed by the psychiatrist.

The prevailing opinion cites People v. Barnett, 27 Cal.2d 649, 166 P.2d 4. The issue considered in this dissenting opinion however was not raised in the Barnett case, nor was it mentioned. The Barnett case therefore has no application to the above argument in the circumstances.

Moreover, the provisions of the Welfare and Institutions Code herein referred to clearly grant privileges and advantages to these so-called sexual perverts that are denied to others charged with crime. The age, "under fourteen", as provided in paragraph (c) is an arbitrary line drawn without reason. If the child is fourteen or older the defendant is in an entirely different category. Article XIV of the Constitution of the United States provides no State shall "deny to any person within its jurisdiction the equal protection of the laws"; Article XIV is still in effect.

It was unnecessary to certify the defendant "for hearing and examination by the superior court" as provided by paragraph (c) of section 5501; the defendant was already before the Superior Court. Apparently, therefore, the section does not apply; there is only one Superior Court. If it does apply, the proper court determined that defendant was not a "sexual psychopath". Thus section 5501 was complied with and defendant cannot now be heard to complain.

In the light of the record the action of the trial court was not only correct under the law but wise and just and should be upheld without qualification.

SPAULDING v. CAMERON.

Civ. 17910.

District Court of Appeal, Second District, Division 2, California.

June 4, 1951.

Rehearing Denied June 19, 1951.

Hearing Granted Aug. 2, 1951. *

Action by Mrs. Sumner Spaulding against Arthur A. Cameron to recover damages resulting to the property of plaintiff because of defendant's negligent excavations upon his property resulting in damage to the property of plaintiff from flooding due to a heavy rainfall. From a judgment for plaintiff in the Superior Court of Los Angeles County, Otto J. Emme, J., the defendant appealed. The District Court of Appeal, McComb, J., held that the evidence established that the negligence of the defendant in constructing fills on his property was the proximate cause of damage to the property of plaintiff, and that defendant was not relieved of liability on the ground that heavy rainfall constituted an "act of God" but that the judgment should be modified on the ground that an improper award of damages was made.

Modified and affirmed.

* Subsequent opinion 239 P.2d 625.

1. Negligence ⇐28

Generally owner of realty is liable for negligent use thereof which causes injury to another. Civ.Code, § 3514.

2. Waters and water courses ⇐126(2)

Evidence justified finding that defendant was negligent in constructing fills on his property and that his negligence was the proximate cause of damage to property of plaintiff when as result of such construction due to heavy rainfall flood waters were backed up on a portion of plaintiff's property.

3. Evidence ⇐570

If there is evidence to sustain the trial court's finding that witnesses testifying are qualified as experts, weight to be given their testimony lies within the sound discretion of the trial court.

4. Evidence ⇐536

Evidence established the qualifications as experts of witnesses testifying for plaintiff with respect to proper method of constructing fills on the lands of defendant.

5. Negligence ⇐63

A rain storm which is merely of unusual intensity is not an "act of God".

See publication Words and Phrases, for other judicial constructions and definitions of "Act of God".

6. Waters and water courses ⇐126(2)

Evidence was not sufficient to relieve defendant property owner of liability for negligence in constructing fills on his property which resulted in flood waters backing up on the lands of plaintiff on the ground that the heavy rainfall constituted an "act of God".

7. Appeal and error ⇐1010(1)

If a judgment is sustained by one of several counts in complaint which is supported by substantial evidence it will not be reversed because of insufficiency of evidence as to other counts of the complaint.

8. Appeal and error ⇐1010(1)

Where evidence sustained trial court's finding as to count one of the complaint that damage to plaintiff's property resulted as a proximate cause of the defendant's negligent use of his property, it was unnecessary to consider whether a second count of the complaint was supported by the evidence or the legal theory upon which it was predicated.

9. Injunction ⇐197

A plaintiff may not recover depreciation in value of his property and at the same time have the cause of depreciation in value ordered removed.

10. Injunction ⇐197

Where plaintiff obtained an injunction for removal of the cause of depreciation of her property due to the construction of fills on the property of defendant resulting in the flooding of plaintiff's property, plaintiff was not entitled to an award of damages on the theory of depreciation of her property, since effect thereof would be to unjustly enrich the plaintiff.

11. Injunction ⇐197

In action for damages resulting when defendant constructed a fill on its property and caused flooding of the property of plaintiff due to a heavy rainfall, plaintiff was not entitled to recover as damages, the sum representing the damages to her property because of the fill, and at the same time compel defendant to remove the cause of damage, thereby restoring plaintiff's property to its original undepreciated value.

Martin H. Easton, Los Angeles, Overton, Lyman, Prince & Vermille and Donald H. Ford, Los Angeles, of counsel, for appellant.

Samuel A. Rosenthal, Los Angeles, Prinzmetal & Grant, Beverly Hills, Leonard G. Ratner, Los Angeles, of counsel, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover damages resulting to plaintiff's property because of defendant's negligent excavations upon his own property, defendant appeals.

Facts: Plaintiff owned and occupied a lot situated at 1454 San Ysidro Drive, Los Angeles. Approximately across the street from plaintiff is another house and lot known as the Griffin property. These two

residences are the last improved properties at the head of the street which ends at the outlet of Pea Vine canyon. The street ends at the boundaries of the two properties, and the canyon is fenced off from the road by a heavy wire fence and an iron gate. This fence and gate are located on what is known as the Bingham property. The Bingham property is at the bottom of Pea Vine canyon and separates that of defendant Cameron from plaintiff Spaulding's house and lot by some 300 feet. The fence and gate created an effective dam during the period involved in this litigation by catching debris and mud which were washed against it.

Plaintiff's property is at the bottom of the canyon and is on the easterly side, the slope behind it being extremely steep. The Bingham property adjacent to it on the west takes up nearly all of the bottom land. Defendant's property line coincides with the Bingham line on the westerly hillside where the grade leads up gradually to the hills above, increasing the slope as the top is reached. The bottomland or canyon floor includes the natural water course which has flowed for many years and escapes in the city street within a foot or two of plaintiff's curb line.

Defendant is the owner of approximately 30 acres of land on the westerly slope of Pea Vine canyon which originally embraced three knolls. This property continues on up to the upper or top flat area and down the next slope. Commencing in May, 1946, with a plan to develop this property and possibly subdivide, defendant constructed a road into his property being a reconstruction and extension of Beverly Estates Drive. To make a flat area suitable for building, the three knolls mentioned were leveled off at the top and approximately one fifth of the excess dirt pushed over the east side, forming cast-over slopes of a wedge or cone shape. The side of the wedges were buttressed against the shoulders of the three knolls. In leveling off the slopes, the procedure was to create a drainage away from plaintiff's side towards the center or west to the extent that the flat area was widened and the natural drainage into Pea Vine canyon was reduced because of the fact that from this new line at the top of the canyon lessening the width of the canyon, all water drainage was diverted and moved by constructed drainage into an entirely new watershed.

The work commenced in May of 1946 was completed by the end of October. A shoulder was made along the road at the easterly edge of defendant's property to divert water away from Pea Vine canyon and down into the other watershed. A contract had been let for the finishing of the operation by the construction of bulkheads and baffles at the top of each slope. This work had not been finished before heavy November rains started.

During the month of November, 1946, the are suffered the second heaviest rainfall for the month of November ever recorded. As a result the flood waters which were dirty reached an elevation of about 26 inches on the portion of plaintiff's property nearest the streets.

As a result plaintiff's property suffered damage in the amount of $1,221.65; the cost of cleaning rugs and drapes amounted to $72.25; $100 was necessary for replacing shrubs; a car stored in plaintiff's garage was damaged in the sum of $415.39; and clothing belonging to plaintiff's daughter stored in plaintiff's garage was damaged in the amount of $923. The trial court found that plaintiff's property was depreciated in the amount of $24,000, and gave judgment in favor of plaintiff for a total of the foregoing sums, $26,732.29, and ordered defendant to remove deposits of dirt from his property or in lieu thereof to "place protective structures around said loose dirt in such manner that the property of the plaintiff will not be endangered or threatened by the existence of deposits of loose dirt."

The judgment was predicated upon two causes of action, (1) that defendant's negligence in moving the dirt on his property had resulted in the damage to plaintiff, and (2) that defendant was absolutely liable for the manner in which he used his property causing damage to plaintiff.

Questions: First: *Was there substantial evidence to sustain the trial court's finding that defendant used his property in a*

negligent manner thus causing damage to plaintiff?

[1] *Yes.* It is the general rule that the owner of real property is liable for the negligent use thereof which causes injury to another. (Sec. 3514, Civil Code.) In the present case the evidence disclosed that in March, 1946, defendant began to level off the top of his hillside property; that he rented bulldozers and other equipment and proceeded to push loose earth and debris over the sides onto the slopes of his property; that these operations continued for a period of six months under his direction and control; that the bushes, trees and underbrush growing on the sides of the hills were not removed in the areas where the dirt was dumped; that the natural earth beneath the fills was not plowed up or scarified to make possible a closer adhesion with the loose dirt of the fills; that no effort was made to solidify or compact the fills thus created; that no jetting, which consists of forcing streams of water into the loose dirt, was carried on when the dirt was deposited; nor was bithulitic material added to the dirt for greater cohesion. The evidence also showed that a sheepsfoot roller, which is an iron roller with short iron pegs attached, specifically designed for the purpose of compacting loose fills of earth, was not used to go over the layers of dirt, although such a roller was available, but that the only pressure applied to the fills was the weight of the bulldozers passing over the upper edge to deposit additional dirt.

The evidence disclosed that defendant was warned during the course of operation by an engineer and by a letter from a lower property owner that such methods might result in damage to lower property owners after a rainfall; that after damage had resulted to plaintiff's property defendant attempted by jetting, by planting ice plant and small trees and by the erection of barricades to protect plaintiff's property.

In addition expert witnesses testified that the proper procedure for constructing such fills requires, (1) clearing the surface of the slope upon which the fill is to rest of all vegetable matter and scarifying such surface to effect a bond with the fill, (2) laying down the fill in layers of 6 to 9 inches, (3) compacting such layers by the use of a sheepsfoot roller or other compacting equipment, and (4) adding moisture to the layers at the time they are deposited by the process of jetting.

[2] From such evidence the trial court was justified in concluding that defendant was negligent in constructing the fills on his property and that his negligence was the proximate cause of the damage to plaintiff's property.

[3, 4] There is no merit in defendant's contention that plaintiff's expert witnesses should not be considered. It is the rule that if, as in the instant case, there is evidence to sustain the trial court's finding that witnesses are qualified as experts, the weight to be given to their testimony lies within the sound discretion of the trial court. In the present case there is ample evidence to establish the qualifications as experts of the witnesses upon whose testimony plaintiff relies.

[5, 6] Likewise there is no merit in defendant's contention that the heavy rainfall constituted an act of God. A rain storm which is merely of unusual intensity is not an act of God. (Southern Pacific Co. v. City of Los Angeles, 5 Cal.2d 545, 549, 55 P.2d 847; Mitchell v. City of Santa Barbara, 48 Cal.App.2d 568, 569, 120 P.2d 131.)

Second: *Did the trial court err in holding defendant liable on the doctrine of absolute liability as set forth in Fletcher v. Rylands,* 3 *H.L. 330*?

[7] This question need not be answered by us. If a judgment is sustained by one of several counts in the complaint which is supported by substantial evidence it will not be reversed because of the insufficiency of the evidence as to other counts of the complaint. (Gogo v. Los Angeles etc. Flood Control Dist., 45 Cal.App.2d 334, 342 [4], 114 P.2d 65; Kains v. First Nat. Bank, 30 Cal.App.2d 447, 451, 86 P.2d 935.)

[8] In the present case, as pointed out above, the evidence sustained the trial court's finding as to count I of the complaint, to wit, that the damage to plaintiff resulted as a proximate cause of defendant's negligent use of his property. Hence it is immaterial whether the second count of the complaint is supported by the evidence or legal theory upon which it was predicated.

Third: *Did the trial court err in awarding plaintiff $24,000 as damages for the depreciation of her property and at the same time ordering defendant to either remove the loose dirt which was the cause of the depreciation in the value of plaintiff's property or to place protective structures above it so as to prevent its endangering plaintiff's property?*

[9–11] *Yes.* A plaintiff may not recover the depreciation in the value of his property and at the same time have the cause of the depreciation in value ordered removed. (Meek v. De La Tour, 2 Cal.App. 261, 265, 83 P. 300. Cf. Severy v. Central Pacific R. R. Co., 51 Cal. 194, 197; Hopkins v. Western Pacific R. R. Co., 50 Cal. 190, 194.) Having obtained an injunction for the removal of the cause of the depreciation of her property plaintiff is not entitled to an award of damages on the theory of its depreciation, since the effect of such an order would be to unjustly enrich plaintiff. She would receive the sum representing the damage to her property because of the existence of the alleged nuisance which depreciated it, and at the same time defendant would be compelled to remove the cause of the damage, thus restoring plaintiff's property to its original undepreciated value.

The judgment is modified by striking from the second paragraph thereof, "1. For the sum of $26,732.29," and substituting in lieu thereof, "1. For the sum of $2,732.29." As thus modified it is affirmed.

MOORE, P. J., and WILSON, J., concur.

MONOGRAM CO. OF CALIFORNIA et al. v. KINGSLEY et al.

Civ. 14645.

District Court of Appeal, First District, Division 2, California.

May 29, 1951.

Hearing Granted July 26, 1951.*

Action by Monogram Company of California, a corporation, and others, against Mr. Lewis A. Kingsley, and others, for damages for libel and slander. The Superior Court in and for the County of Alameda, James R. Agee, J., denied motions of two groups of defendants for change of place of trial from Alameda County to County of Los Angeles, and defendants appealed. The District Court of Appeal, Dooling, J., held that venue was properly laid in county of residence of particular defendant who was joined in complaint in 12 of 20 counts even though such defendant had consented to transfer of cause to another county.

Order affirmed.

Schottky, J., dissented.

1. Venue ⇐22(1), 41

It is general rule that if any one of several necessary party defendants resides within particular county and such county is otherwise proper place for trial, venue in such county is proper, and even though all other defendants reside in another county they may not have place of trial changed to county of their residence against will of plaintiff. Code Civ.Proc. § 395.

2. Venue ⇐22(1)

In case in which venue depends upon residence of defendant, consent of resident defendant to transfer of cause to county in which other defendant or defendants reside cannot deprive plaintiff of his right to have action tried in county of consenting defendant's residence. Code Civ.Proc. § 395.

3. Venue ⇐22(1)

Where complaint in 20 counts against group of defendants for libel and slander joined particular defendant in 12 of such counts and venue was laid in county of residence of such defendant, even though such defendant consented to change of

* Subsequent opinion 237 P.2d 265.

venue to county in which other defendants resided, plaintiff was not deprived of right given by statute to have matter tried in county of consenting defendant. Code Civ. Proc. § 395.

Hagar, Crosby, Crosby & Vendt, Oakland, O'Melveny & Myers, Los Angeles, for appellants Lewis A. Kingsley and Mrs. Lewis A. Kingsley et al.

J. H. Sapiro, San Francisco, Wolfson & Essey, Beverly Hills, for appellants S. Arthur Donner, Max Rattner and Maurice B. Tyson.

Freed, Gebauer & Freed, Eli Freed, Emmett Gebauer and Scott Fleming, all of San Francisco, for respondents.

DOOLING, Justice.

Defendants appeal from an order denying motions of two groups of defendants, all residing in Los Angeles County, for a change of place of trial from Alameda County to the County of Los Angeles. One defendant, Lewis, is admittedly a resident of Alameda County, the county in which plaintiffs commenced their action. All of the other defendants reside in Los Angeles County. The complaint is in twenty counts in twelve of which Lewis is joined as a defendant and in eight of which Lewis is not joined. It alleges in separate counts as to each plaintiff several acts of libel and slander allegedly committed against them, in some counts by all of the defendants, in others by only some of them. On the hearing of the motions the defendant Lewis, through his counsel, expressly consented to the transfer to Los Angeles County.

The case is governed by that portion of section 395, Code of Civil Procedure, which reads: "In all other cases * * * the county in which the defendants, or some of them, reside at the commencement of the action, is the proper county for the trial of the action."

[1] The general rule is not disputed that where a case properly falls within this quoted provision if any one necessary party defendant resides within a particular county that county is a proper county for the trial of the action and even though all of the other defendants reside in another county they may not have the place of trial changed to the county of their residence on that ground. Independent Iron Works v. American President Lines, 35 Cal.2d 858, 221 P.2d 939; 25 Cal.Jur., Venue, sec. 21, pp. 879, 880. Defendant Lewis, being properly joined as a necessary party in twelve of the twenty counts, the rule just stated fully supports the order here appealed from, unless the rule is inapplicable in this case by reason of the fact that in eight of the counts Lewis is not joined and that fact coupled with the consent of Lewis to the transfer of the case takes this case out of the general rule.

Appellants rely on one case which supports this position, Hagan v. Gilbert, 83 Cal.App.2d 570, 189 P.2d 548. In that case however there was no hearing sought in the Supreme Court. In the later case of Stokes v. Newsom, 89 Cal.App.2d 147, 200 P.2d 17, the complaint was in four counts. Three of the counts sounded in contract and the fourth in fraud. The first three counts stated no cause of action against the defendant Coffee, who resided in the county where the action was brought, but the fourth did. In affirming an order denying a motion to change the place of trial to the county of the other defendant's residence the court said: "It is readily apparent from an examination of the complaint that if it went no further than the first three causes of action * * it would be fatally defective * * *. However, by virtue of the fourth cause, which is based upon an alleged fraud of the resident defendant Coffee and the nonresident defendant and appellant Newsom the action is properly triable in Stanislaus County, it being 'the county in which the defendants, or some of them, reside at the commencement of the action', and therefore the trial court properly denied the motion." 89 Cal.App.2d at pages 149–150, 200 P.2d at page 19.

In this case a petition for hearing was denied by the Supreme Court and the case has since been cited with apparent approval in Independent Iron Works v. American

President Lines, supra, 35 Cal.2d at page 863, 221 P.2d 939.

Similarly in Kraft v. Innis, 57 Cal.App. 2d 637, 135 P.2d 29, three physicians were sued in separate counts for malpractice, two of the defendants being residents of Kern County in which the action was commenced, and the third being a resident of Los Angeles County. A motion of the Los Angeles defendant for change of place of trial to the county of his residence was denied and the order of denial affirmed. A petition for hearing in the Supreme Court was likewise denied in this case.

[2, 3] Appellants seek to distinguish these two cases from the one before us on the ground that in those cases the resident defendants did not consent to the transfer while in the case before us such consent was expressly given. The distinction lacks validity. In those cases in which venue depends upon the residence of a defendant it is now well settled, although language suggesting the contrary rule may be found in earlier cases, that the consent of the resident defendant to the transfer cannot deprive the plaintiff of his right to have the action tried in the county of the consenting defendant's residence. The rule was restated in Independent Iron Works v. American President Lines, supra, 35 Cal.2d at page 860, 221 P. 2d at page 941, quoting with approval White v. Anderson, 50 Cal.App.2d 634, 636, 123 P.2d 543: "Even when all of the defendants join in a demand for or consent to a change of venue the cause will be retained if the complaint attempts in apparent good faith to state a cause of action against a defendant who resides in the county where the action was commenced."

In view of this rule the following statement found in Hagan v. Gilbert, supra, 83 Cal.App.2d at page 578, 189 P.2d at page 554, for which that court cited no authority (as an examination of the recent cases satisfies us that it could not have done) must be taken as an unwarranted and mistaken statement of the law: "It will be noticed that defendant Stone (the resident defendant) took no part in the proceeding, by opposing the motion or otherwise. No question as to his right to have the action retained for trial in Los Angeles County as against the right of the other defendants to have it transferred to the City and County of San Francisco was involved or decided."

We conclude that the case before us is ruled by Kraft v. Innis, supra, and Stokes v. Newsom, supra, and that Hagan v. Gilbert, supra, should not be followed.

The Hagan case strongly relied upon an entirely different rule of law, that where all of the defendants are non-residents of the county in which the action is brought the defendants are entitled to have the place of trial changed to the county of their residence, even though one cause of action is properly triable in the county where commenced under some other provision of the codes, if it is joined with another cause of action which is transitory. This is the rationale of Bardwell v. Turner, 219 Cal. 228, 25 P.2d 978; Turlock Theatre Co. v. Laws, 12 Cal.2d 573, 86 P. 2d 345, 120 A.L.R. 786; and Goossen v. Clifton, 75 Cal.App.2d 44, 170 P.2d 104 cited and relied on in the Hagan case. 83 Cal.App.2d at page 574, 189 P.2d 548. This rule has never, except in the Hagan case, been applied where any of the defendants was resident in the county wherein the action was commenced.

The order is affirmed.

GOODELL, J., concurs.

SCHOTTKY, Justice pro tem.

I dissent. I am unable to agree with the majority opinion as I have reached the conclusion that the order should be reversed.

Appellants rely chiefly upon two decisions which they contend are decisive of the propositions to be determined on this appeal. The first is Goossen v. Clifton, 75 Cal.App.2d 44, 170 P.2d 104, 107. The action was brought in Santa Clara County. The complaint contained two counts—(a) first count to recover upon a mutual, open and current book account in the sum of $17,500.08; and (b) second count, that an account was stated in the office of plaintiff in Santa Clara County, and upon such statement there was found due from de-

fendants to plaintiffs the sum of $17,500.08. The two Cliftons (defendants) were residents of Los Angeles County at the time of the commencement of the action. Defendant Vollmer was a resident of Alameda County and joined with the Cliftons in a motion for change of venue to Los Angeles County, which was denied by the Superior Court of Santa Clara County.

In reversing the order denying the motion for change of venue, Presiding Justice Peters in a clear and well considered opinion, said:

"Before directly discussing the facts of this case there are certain well settled rules that must be kept in mind. The general rule is that a defendant is entitled to have actions tried in the county of his residence. The right of the plaintiff to have the action tried elsewhere is the exceptional right, and must find its justification in the terms of some statute. It is the duty of a plaintiff to bring himself within some exception if he can—otherwise, the defendant's right is to have the case tried in the county of his residence. See cases collected 25 Cal.Jur. p. 866, § 13. Actions in contract, except as provided in § 395 above quoted, are personal actions triable in the county of defendant's residence. See 25 Cal.Jur. p. 869, § 15. It has been held that § 396b of the Code of Civil Procedure conferring on defendants the right to have the action tried in the county where they, or some of them, reside, is remedial in nature and should be liberally construed to the end that defendants may not be unjustly deprived of that right. Lyons v. Brunswick-Balke-[Collender] Co., 20 Cal.2d 529, 582, 127 P.2d 924, 141 A.L.R. 1173. The same case on page 584 of 20 Cal.2d, page 927 of 127 P. 2d, states: 'The right of the defendant to have certain actions tried in the county of his residence "is an ancient and valuable right, which has always been safeguarded by statute and is supported by a long line of judicial decisions. 'The right of a plaintiff to have an action tried in another county than that in which the defendant has his residence is exceptional, and, if the plaintiff would claim such right, he must bring himself within the terms of the exception.' Brady v. Times-Mirror Co., 106 Cal. 56, 39 P. 209." Brown v. Happy Valley Fruit Growers, 206 Cal. 515, 522, 274 P. 977, 979.

"* * * It is obvious, therefore, that so far as the first count is concerned, were it the only count, plaintiff, having failed to bring himself within the exceptions contained in § 395 (C.C.P.), the defendants, upon a proper showing, would be entitled to have the cause transferred under § 396b to the county where they, or some of them, reside. * * *

"As to the second cause of action, it is alleged that in Santa Clara County an account was stated. * * * It follows that if the second count stood alone, Santa Clara County would be a proper county in which to try the action.

"This brings us to the specific problem here involved—when a plaintiff joins in one complaint two causes of action based on contract, in one of which defendants are entitled to a change of venue, and in one of which they are not, what are the rights of the respective parties? Neither counsel has referred us to any case, and we have found none, involving two contract actions. This is probably because the exception providing for trying the action where the contract was entered into or to be performed, found in § 395, was added as of a relatively recent date. Prior to the amendment all contract actions, being personal in nature, were triable in the county of defendant's residence. But although there seem to be no contract cases directly in point, there are many cases, other than contract cases, holding that if a plaintiff unites in one complaint two causes of action, in one of which the defendant has the right to have it tried in the county of his residence, in the other of which he is not, the defendant is entitled to have the cause tried in the county of his residence. There are many cases holding, for example, that where a cause of action in personam is joined with a local action, the defendant is entitled to the change of venue, although, had the local action been sued upon alone, no such right to a change would exist. This has been the rule since 1891 when Smith v. Smith, 88 Cal. 572, 26

P. 356 was decided, and the rule has been reaffirmed many times. (Citations.)

"The rule is fundamental. The important right to protect is that of the defendant to have the cause tried in the county of his residence. For the plaintiff to be entitled to the exceptional right of having the cause tried in some other county, he must clearly bring himself within a statutory exception. If, by joining several causes of action, the defendant could be deprived of his right, the right would be lost in many cases. It is for that reason that the courts hold that the test is whether on any one of the causes of action the defendant is entitled to a change to the county of his residence. If there is one such cause, then defendant is entitled to the change no matter how many other causes may be set forth in which he is not entitled to the change. That is the situation here presented."

The second case relied on by appellant is the case of Hagan v. Gilbert, 83 Cal. App.2d 570, 189 P.2d 548, in which the superior court of Los Angeles County granted a motion for change of venue to the City and County of San Francisco. The complaint, which purported to allege four causes of action based on contract to recover money, named eight defendants. Seven of the named defendants filed a demurrer to the complaint, and at the same time served and filed a notice of motion for change of venue, which notice stated that the motion would be made upon the grounds that those seven defendants were residents of the City and County of San Francisco, and that the alleged contract was entered into and was to be performed in the City and County of San Francisco. In affirming the order granting the motion for change of venue, the District Court of Appeal said 83 Cal.App.2d at page 573, 189 P.2d at page 551:

"It is alleged in the complaint that Tom Stone is a resident of the county of Los Angeles. Plaintiff contends that the county of Los Angeles is, therefore, the proper place for the trial of the action. When a defendant resides in the county where an action is commenced, that county is a proper place for trial of the action. Code Civ.Proc., sec. 395. If, however, such resident defendant is not a necessary party, and his residence is the only ground for retaining jurisdiction in the county where the action was commenced, a defendant who resides in another county is entitled to have the place of trial changed to the county of his residence. See Hays v. Cowles, 60 Cal.App.2d 514, 519, 141 P.2d 26. Respondents contend, in effect, that the resident defendant Tom Stone is not only not a necessary party to the action, but that he is not a proper party and no cause of action is stated against him in the third cause of action. * * * No cause of action was stated therein (third cause) against Stone.

"Appellant contends, in effect, that irrespective of whether the asserted third cause of action stated a cause of action against Stone, there were three causes of action in the complaint against Stone, and that the nonresident defendants, therefore, were not entitled to a change of venue. This contention is not sustained. When a nonresident defendant is entitled to a change of venue, upon one cause of action stated in a complaint, he may not be deprived of tha rght because plaintiff included other causes of action in the same complaint upon which such defendant is not entitled to a change of venue. See Bardwell v. Turner, 219 Cal. 228, 25 P.2d 978; Turlock Theatre Co. v. Laws, 12 Cal 2d 573, 86 P.2d 345, 120 A.L.R. 786. In the case of Goossen v. Clifton, 75 Cal.App. 2d 44, 170 P.2d 104, that rule was held to apply to causes of action based on contracts. The court therein stated, 75 Cal. App.2d at page 49, 170 P.2d at page 108: (The court then quotes the language verbatim which we have hereinbefore quoted from the Goossen case, supra, so that it will be unnecessary for us to again repeat the same)." And 83 Cal.App.2d at page 578, 189 P.2d at page 554: "It will be noticed that defendant Stone took no part in the proceeding, by opposing the motion or otherwise. No question as to his right to have the action retained for trial in Los Angeles County as against the right of the other defendants to have it transferred to the City and County of San Francisco was involved or decided."

Respondents in reply argue that the authorities cited by appellants are neither applicable to nor decisive of the instant case. Respondents state that they rely on the fundamental venue rule and not on any exception thereto or special venue provision. I shall first review briefly the principal authorities relied on by respondents as controlling decisions which they assert establish that the action is properly triable in Alameda County.

Respondents first cite Stokes v. Newsom, 89 Cal.App.2d 147, 200 P.2d 17, which was an action commenced in Stanislaus County against Newsom, a resident of San Francisco County, and Coffee, a resident of Stanislaus County. The parties in said action were Jake Stokes and C. L. Coffee, copartners, etc. against William L. Newsom and C. L. Coffee. The complaint was based on an oral agreement alleged to have been made by Stokes and Coffee, copartners with defendant Newsom, and it was alleged that Coffee had refused to join Stokes as a plaintiff and was therefore joined as a defendant. The first three causes of action alleged a breach of contract between Newsom and the copartnership and state no cause of action against Coffee other than that he refused to join Stokes as a plaintiff in the action; and the fourth alleged fraud and conspiracy on the part of Newsom and Coffee. In order that the ruling in Stokes v. Newsom may be better understood we quote from the opinion, 89 Cal.App.2d at page 149, 200 P.2d at page 18, as follows:

"Separate demurrers were filed by Coffee and Newsom and the latter also filed a demand for a change of venue on the grounds that he was at all times a resident of the City and County of San Francisco and that Coffee was improperly joined as a defendant solely for the purpose of having the action tried in Stanislaus County where Coffee resides. After a hearing on the motion the court made its order denying the same and defendant thereupon appealed to this court. Two contentions are made, first that the allegations of the complaint relative to the oral agreement between the parties was insufficient to deprive the nonresident of his right to have the place of trial changed to the county of his residence under section 395 of the Code of Civil Procedure, and, second, that where a resident plaintiff is made a nominal defendant under the circumstances shown in this case a court may not consider the fact of such residence where the non-resident moves for a change of venue to the county of his residence.

"The portions of said section 395 of the Code of Civil Procedure pertinent to this controversy provide as follows:

" 'When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary.'

"It is readily apparent from an examination of the complaint that if it went no further than the first three causes of action which are predicated upon an alleged breach of contract it would be fatally defective in that there is no allegation as to the 'county in which such obligation is incurred', nor is there any allegation that the purported agreement was a 'special contract in writing' as provided in said section 395. Armstrong v. Smith, 49 Cal.App.2d 528, 532, 122 P.2d 115. However, by virtue of the fourth cause, which is based upon an alleged fraud of the resident defendant Coffee and the nonresident defendant and appellant Newsom the action is properly triable in Stanislaus County, it being 'the county in which the defendants, or some of them, reside at the commencement of the action', and therefore the trial court properly denied the motion. Section 395, C.C.P.

"Even if it be assumed, as appellant contends, that the allegations of the fourth cause are defective, nevertheless if such allegations do 'no more than shadow forth

the semblance of a cause of action' they would be sufficient against such an attack upon a motion for a change of venue. McClung v. Watt, 190 Cal. 155, 160, 211 P. 17".

I have read the record and briefs in Stokes v. Newsom and it appears that defendant Coffee filed a demurrer prior to the filing of defendant Newsom's demurrer and motion for change of venue, and that Coffee did not join in or consent to Newsom's motion.

Respondents next contend that the "clinching authorities" in support of their position are the companion cases of Kraft v. Innis, 57 Cal.App.2d 637, 135 P.2d 29, and Kraft v. Smith, 24 Cal.2d 124, 148 P.2d 23.

In Kraft v. Innis the action as originally commenced in Kern County, contained four separate causes of action: by Wanda Kraft (1) against Dr. Joseph Smith of Kern County for negligence in administering medical treatment; (2) against Dr. Samuel Smith of Kern County for negligence in administering dental treatment; (3) against Dr. Innis of Los Angeles County for negligence in administering medical treatment, said alleged negligence of Dr. Innis having occurred in Newhall Community Hospital, Los Angeles County; (4) by Roy Kraft, apparently the husband of Wanda Kraft, for consequential damages alleged to have followed from the alleged malpractice of the dentist and the two physicians.

Dr. Innis moved for a change of venue to Los Angeles and demurred on the grounds of misjoinder of parties and misjoinder of causes of action. The defendant residents of Kern County did not join in the motion for a change of venue and did not consent to the granting of the motion. Dr. Innis appealed from the order denying his motion for change of venue and in affirming the order the court said, 57 Cal.App.2d at page 640, 135 P.2d at page 31:

"Had Doctor Innis been the only defendant in the action, his right to have the place of trial changed to Los Angeles County could not be doubted. In Brown v. Happy Valley Fruit Growers, Inc., 206 Cal. 515, 274 p. 977, 979, it was said: 'The right of a defendant to have an action brought against him tried in the county in which he has his residence is an ancient and valuable right, which has always been safeguarded by statute and is supported by a long line of judicial decisions. "The right of a plaintiff to have an action tried in another county than that in which the defendant has his residence is exceptional, and, if the plaintiff would claim such right, he must bring himself within the terms of the exception." Brady v. Times-Mirror Co., 106 Cal. 56, 39 P. 209.'

"While this is true, defendants Joseph Smith and Samuel Smith have the same right to have the case against them tried in Kern County, the place where they reside, as defenant Innis has to have the case against him tried in Los Angeles County, the place of his residence. Taff v. Goodman, 41 Cal.App.2d 771, 107 P.2d 431."

Kraft v. Smith, supra, was an appeal by plaintiffs from an order sustaining the demurrer of defendant Innis without leave to amend in the action next hereinbefore discussed in which said defendant's motion for change of venue was denied. No question of venue was involved but merely the question of whether the causes of action were properly joined.

Respondents have cited a number of other cases in which there was one cause of action and all of the defendants were named in such cause of action, and in all of those cases it was held that the plaintiff had a right to have the action tried in the county in which any of the defendants resided. Appellant argues, and, we think, correctly, that such cases are no authority for or against the question here involved.

Respondents in a supplemental memorandum filed after the oral argument argued that appellants' contention that the fact that said appellants are not joined in certain causes of action requires that the motion for change of venue be granted is refuted by section 379b of the Code of Civil Procedure which provides: "It shall not be necessary that each defendant shall be interested as to all relief prayed for, or as to every cause of action included in

any proceeding against him; but the court may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest." Appellants in reply contend that said subsection is not applicable to the question here involved, and point out that it deals exclusively with parties to civil actions and is not included within Part II, Title IV, which title deals with the subject of Place of Trial of Civil Actions.

Respondents in said supplemental memorandum also cite the recent case of Independent Iron Works v. American President Lines, 35 Cal.2d 858, 221 P.2d 939. This was an action to quiet title to personal property against a carrier in possession and two other defendants. The carrier, with its principal place of business in the City and County of San Francisco disclaimed all interest in the personal property involved except for a possessory lien. The other two defendants, residents of Los Angeles County, moved for a change of venue to Los Angeles County upon the ground of their residence and on the further ground that the carrier was not an interested party. The order granting the motion for change of venue was reversed by the Supreme Court upon the ground that the carrier was a necessary and proper party to the action and that therefore plaintiff was entitled to have the action tried in the City and County of San Francisco. Appellants point out that in the Independent Iron Works case there was but a single cause of action naming all parties defendant, whereas in the instant case it is conceded by respondents that in a number of causes of action contained in the complaint no cause of action was stated against the defendant Lewis, the only resident of Alameda County.

The question presented upon this appeal is not free from difficulty because of apparently conflicting language in numerous cases. Appellants have relied principally upon Goossen v. Clifton and Hagan v. Gilbert, supra, and respondents with equal confidence have relied principally upon Stokes v. Newsom and Kraft v. Innis, supra. I have carefully considered and analyzed all of the decisions cited and all of the code sections involved and believe that the true rule to be derived from the composite holdings of all of them is as follows:

Where a complaint states a single cause of action against a number of defendants against each and all of whom a cause of action is stated, plaintiff is entitled to have such cause tried in the county in which it is filed if one of the defendants is a resident of such county. Where in a complaint a plaintiff states a number of causes of action which may be properly joined in the same complaint under the liberal provisions of section 427 of the Code of Civil Procedure as amended in 1931, and in a number of said causes of action a resident defendant is joined with the other defendants, but in other causes of action only nonresidents are joined as defendants, in such a case the nonresident defendants are entitled to a change of venue to the county of their residence where the resident defendant in the other causes of action joins in the request or consents thereto.

I believe that Stokes v. Newsom, properly analyzed in the light of the issues there involved, is only authority that so far as the first three causes of action were concerned, if they were the only causes of action set forth, the defendant Newsom would be entitled to a change of venue because no cause of action was stated therein against a resident defendant, but that by virtue of the fourth cause of action being based upon the alleged fraud of resident defendant Coffee and nonresident Newsom, the action was properly triable in Stanislaus County.

I believe also that Kraft v. Innis, supra, so strongly relied on by respondents, is only authority for the following proposition: Where there are several defendants joined and there are several causes of action, in each of which only one defendant is named, one or more of said defendants being residents of the county wherein the suit was brought, a defendant or defendants who might have the right to remove, were they the only defendants, can not

prevail on a motion for a change of venue unless the resident defendants join in the motion or consent thereto. In Kraft v. Innis the right of the nonresident defendant Innis to transfer the cause to the county of his residence could not prevail over the right of the resident defendant to have it retained in the county of his residence, but we believe that if the resident defendants had joined in or consented to the granting of the motion, the motion should have been granted.

Upon the oral argument counsel for respondents conceded that the case of Hagan v. Gilbert, supra, is in point but argued that it should not be followed. I believe that Hagan v. Gilbert is not only in point but that it should be followed. If a plaintiff desires to have a case tried in a particular county he may do so if the complaint only contains causes of action in which a resident defendant is joined but if he chooses to include in the complaint other causes of action in which only nonresidents are joined as defendants, he cannot defeat a motion for change of venue by such nonresident defendants if the resident defendant in the other causes of action joins in or consents to the granting of such motion.

In the instant case respondents chose to include in the complaint eight causes of action in which only nonresident defendants are joined. Their reasons for doing so are of no importance but, as I view the matter, having done so they were not entitled to defeat the motion of the nonresident defendants for a change of venue when such motion was joined in by the resident defendant named in the other causes of action. For as hereinbefore quoted from Goossen v. Clifton, supra, 75 Cal.App.2d 44, 170 P.2d 108: "The important right to protect is that of the defendant to have the cause tried in the county of his residence. For the plaintiff to be entitled to the exceptional right of having the cause tried in some other county, he must clearly bring himself within a statutory exception. If, by joining several causes of action, the defendant could be deprived of his right, the right would be lost in many cases. It is for that reason that the courts hold that the test is whether on any one of the causes of action the defendant is entiled to a change [of venue] to the county of his residence. If there is one such cause, then defendant is entitled to the change no matter how many other causes [of action] may be set forth in which he is not entitled to the change." See also Sexton v. Simondet, 97 Cal.App. 2d 894, 218 P.2d 1021.

In view of the foregoing I would reverse the order

104 Cal.App.2d 541

PEOPLE v. WOCHNICK.

Cr. 4598.

District Court of Appeal, Second District, Division 2, California.

June 1, 1951.

Rehearing Denied June 12, 1951.

Hearing Denied June 28, 1951.

Wallace A. H. Wochnick was convicted in the Superior Court of Los Angeles County, Stanley Mosk, J., of murder of the second degree, and from the judgment of conviction and an order denying his motion for a new trial, defendant appealed. The District Court of Appeal, McComb, J., held that proof of motive was not essential and that the evidence was sufficient to sustain conviction of second degree murder.

Judgment and order affirmed.

1. Homicide ⇐233

Proof of motive is not necessary to sustain a conviction of murder.

2. Homicide ⇐233

Failure to prove claimed motive would not justify reversal of conviction of second-degree murder.

3. Homicide ⇐254

Evidence sustained conviction of murder of the second degree.

4. Criminal law ⇐1159(2)

Where there is evidence that a crime has been committed and that defendant was the perpetrator thereof, the court on appeal will not attempt to determine the weight of the evidence, but will decide on-

ly whether upon the face of the evidence, it can be held that sufficient facts could not have been found to warrant inference of guilt.

5. Criminal law ⇐1160

It is the function of jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before verdict of jury, which has been approved by trial court, can be set aside on appeal on the ground of insufficiency of the evidence, it must be made clearly to appear that upon no hypothesis is there sufficient substantial evidence to support the conclusion reached in trial court.

6. Criminal law ⇐562

The determination of a charge in a criminal case involves proof that the offense charged was committed and that it was perpetrated by the person or persons accused thereof.

7. Criminal law ⇐1144(13)

Appellate Court must assume in favor of verdict in a criminal case the existence of every fact which the jury could have reasonably deduced from the evidence and then determine whether such facts are sufficient to support the verdict.

8. Criminal law ⇐1159(6)

If the circumstances reasonably justify the verdict of jury, opinion of reviewing court that such circumstances might also reasonably be reconciled with the innocence of defendant will not warrant interference with the determination of the jury.

9. Courts ⇐91(2)

A statement of District Court of Appeal apparently in conflict with rule announced by Supreme Court must be disregarded by District Court of Appeal in another case.

10. Criminal law ⇐560

A conviction will not be sustained merely upon suspicious circumstances or conjecture.

Ellery E. Cuff, Public Defender of Los Angeles County, Noel B. Martin, Deputy Public Defender, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of murder of the second degree after trial before the court without a jury, defendant appeals. There is also an appeal from the order denying his motion for a new trial.

This cause has heretofore been before us in the case of People v. Wochnick, 98 Cal.App.2d 124, 219 P.2d 70. The judgment was reversed because of error of the trial court in the admission of evidence.

The only ground of appeal assigned by defendant is that the judgment and order denying his motion for a new trial "are against the law and the evidence in that the evidence being wholly circumstantial, when considered in the light most favorable to the people [a] disproves the claimed motives and the theories urged by the prosecution; and [b] there is no other tenable hypothesis upon which" the judgment and the order are warranted by the evidence.

This proposition is untenable.

[1, 2] [a] Proof of motive in the commission of the crime of murder is not necessary to sustain a judgment of conviction. (People v. Greig, 14 Cal.2d 548, 561, 95 P.2d 936.) Hence, assuming the first part of defendant's contention to be correct it would not afford a basis for a reversal of the judgment in this case.

[b] The evidence upon which defendant was convicted is succinctly set forth in the opinion prepared for this court by Mr. Justice Wilson in People v. Wochnick, supra, thus:

That James Kibrick, the deceased, "received the injuries which caused his death in his liquor store on the corner of Temple and Fremont streets in the city of Los Angeles. He had been severely beaten and cut, apparently with broken liquor bottles, about his face, head and hands and although those injuries alone would have probably caused his death, the immediate

cause was a wound from a knife which had been plunged into his chest, piercing his heart. The knife belonged to the victim and was customarily kept beside the cash register.

"Philip Anast testified he called at the liquor store to make a delivery and saw the victim lying on his back behind the counter in a pool of what seemed to be blood and other liquid; that defendant was straddling the legs of the victim in a more or less squatting position and it appeared to him as if defendant was just releasing the shirt front of the person on the floor. Defendant told the witness the man had been beaten and Anast ran out to call the police. When he returned to the store the victim was sitting in a chair between the counter and the shelves. He arose as they entered and Anast noticed what seemed to be a cigar butt protruding from the victim's shirt. He later identified the object as the taped handle of a knife.

"Defendant testified that when he entered the store he saw no one; he turned to look back whereupon a man brushed by his right side and hit his shoulder and went past him toward the open door; he heard a moan which came from behind the counter; he looked over the counter and saw a man lying in the alleyway between the counter and the shelving and he went around to assist; he straddled and kneeled on one knee over the man and brushed the glass from under his hands and from his neck and endeavored to lift the victim to a sitting position; as he did so he noticed a big gash in the man's neck and decided it was a matter for the police and a doctor; as he stood up he noticed Anast.

"At the time of trial defendant testified he did not see the knife protruding from the vicinity of Kibrick's heart as he bent over him but in a statement previously given to one of the officers he said that when he brushed the glass off Kibrick he felt an instrument."

The evidence in addition disclosed that defendant had two long diagonal cuts upon the palm of his right hand which appeared to have been made by some sharp instrument; there was blood on his fingernails and generally on his hands and clothing, and his clothes were in a disheveled condition; defendant's wallet was found behind the counter in the liquor store and its contents were scattered near it; there was wedged between the welt and upper part of defendant's right shoe material corresponding to that which was found in the garbage room at the back of the liquor store. In addition the decedent described his assailant as a tall, skinny man wearing a dark blue suit and a gray hat. At the time defendant weighed 136 pounds, was dark and slender and when apprehended was wearing a dark blue suit and gray hat.

[3–8] The foregoing evidence clearly sustains the trial judge's finding that defendant was the perpetrator of the crime, and it would serve no useful purpose to set forth further incriminating facts which are disclosed by the record since the rule by which we are bound is set forth in People v. Newland, 15 Cal.2d 678, at page 681, 104 P.2d 778, at page 779, by Mr. Justice Shenk as follows:

"The rule applicable where there is evidence, circumstantial or otherwise, that a crime has been committed and that the defendant was the perpetrator thereof, has been many times reiterated by the reviewing courts of this state as follows: The court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. The determination of a charge in a criminal case involves proof of two distinct propositions: First, that the offense charged was committed, and second, that it was perpetrated by the person or per-

sons accused thereof. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury."

People v. Staples, 149 Cal. 405, 86 P. 886, and People v. Lamson, 1 Cal.2d 648, 36 P.2d 361, relied on by defendant, are not here applicable for the reason that in People v. Newland the Supreme Court held that the Lamson case decided nothing except "that the judgment be reversed" (See People v. Newland, supra, 15 Cal.2d 681, 104 P.2d 778, 779), and the rule announced in the Staples case was to be strictly confined to situations where the reviewing court as a matter of law must conclude that there is no evidence circumstantial or otherwise to show that a crime had been committed. (People v. Newland, supra, 15 Cal.2d 681, 104 P.2d 778.) Clearly this rule is not applicable for the reason that there was ample evidence as pointed out above to sustain the finding of defendant's guilt.

People v. Solloway, 98 Cal.App.2d 350, at page 357, 219 P.2d 801, at page 805, contains the following statement:

"The evidence is entirely circumstantial and cannot be held to be both consistent with the idea of guilt and inconsistent with any other rational hypothesis. It does not meet this test with respect to the time element or the identity of the killer, even if it could be deemed sufficient as to the place where the killing occurred. Not being sufficient to establish the essential facts, beyond a reasonable doubt, it does not sustain the judgment."

[9] This statement appears to be in conflict with the rule announced by the Supreme Court in People v. Newland, supra, and therefore must be disregarded by this court. However in People v. Solloway it was also stated, 98 Cal.App.2d at page 357, 219 P.2d at page 805, "While some suspicious circumstances appear, a conviction cannot rest upon mere suspicion or conjecture."

[10] It would thus appear that the decision in People v. Solloway was predicated upon a sound statement of law that a conviction will not be sustained merely upon suspicious circumstances or conjecture. In the present case it is obvious that the evidence did not consist of merely suspicious circumstances or conjecture but facts which fully sustained the trial court's finding of guilty.

The judgment and order are and each is affirmed.

MOORE, P. J., and WILSON, J., concur.

CALIFORNIA REPORTER

232 PACIFIC REPORTER

SECOND SERIES

104 Cal.App.2d 536

KARRELL v. FIRST THRIFT OF LOS ANGELES et al.

Civ. 18284.

District Court of Appeal, Second District, Division 2, California.

June 1, 1951.

Rehearing Denied June 19, 1951.
Hearing Denied July 26, 1951.

Barbara Karrell sued First Thrift of Los Angeles and others for declaratory relief and injunction against attempt by purchaser of trustee's sale under trust deed securing note to take possession of the property or proceed with unlawful detainer action against plaintiff. The Superior Court of Los Angeles County, J. A. Smith, J., rendered judgment for plaintiff and defendants appealed. The Court of Appeal, McComb, J., held that defendant purchaser was protected as a bona fide purchaser for value without notice and could bring unlawful detainer against plaintiff in the Municipal Court.

Judgment reversed with directions.

1. Mortgages ⇐45

Under statute authorizing record of fictitious mortgages and deeds of trust, trust deed properly incorporated by reference provisions of previously recorded "master deed of trust." Civ.Code, § 2952.

2. Evidence ⇐383(3)

A sale under trust deed securing notes was not vitiated by irregularities, where deed of trust provided that recitals in trustee's deed should be conclusive upon trustor, and the trustee's deed recited that all proper steps precedent to sale had been taken. Civ.Code, § 2924b.

3. Mortgages ⇐372(1)

In absence of showing that purchaser at trustee's sale under trust deed securing note had any knowledge of agreement or transactions between landowner and trustee or mortgagee, he was a bona fide purchaser for value without notice and not chargeable with fraud against mortgagor.

4. Mortgages ⇐369(3)

Mere inadequacy of price is not sufficient ground for setting aside a trustee's sale which is legally conducted, in absence of proof of fraud.

5. Mortgages ⇐369(3), 372(1)

The rules that bona fide purchaser for value without notice is not chargeable with fraud and that mere inadequacy of price is not sufficient ground for setting aside trustee's sale are applicable to equitable as well as legal actions.

6. Courts ⇐188(10)

Municipal court had jurisdiction of unlawful detainer action against mortgagor by purchaser at trustee's sale under trust deed securing note, wherein purchaser alleged reasonable rental value to be $100 per month and sought damages for less than two months. Code Civ.Proc. §§ 89, 1161a.

Macfarlane, Schaefer & Haun, Henry Schaefer, Jr., and E. J. Caldecott, Los Angeles, for appellant First Thrift of Los Angeles.

Jones & Wiener, Los Angeles, for appellant Kessler.

Lawrence M. Cahill and John W. Preston, Los Angeles, for respondent.

McCOMB, Justice.

This action was instituted by plaintiff against three separately appearing defendants: First Thrift of Los Angeles (hereinafter called First Thrift); Great Western Title Company (hereinafter called Great Western); and Howard M. Kessler (hereinafter called Kessler).

The action sought declaratory relief and an injunction.

Facts: On January 21, 1948, plaintiff executed and delivered her promissory note in favor of First Thrift in the amount of $1,450. At the same time she executed and delivered a deed of trust to secure the note by the terms of which trust deed Great Western was named trustee and First Thrift beneficiary. This trust deed was duly recorded and by reference certain provisions contained in paragraphs A and B of another deed of trust recorded in the county of Los Angeles were incorporated. This latter deed of trust will be hereinafter referred to as the "master deed of trust."

Thereafter plaintiff became in default in payment of the note and deed of trust. A notice of default and an election to sell was executed by First Thrift and duly recorded on January 20, 1949. A copy of the notice of default was sent by registered mail to plaintiff to the address supplied by her in the trust deed. However it was not received by her but was returned to the sender.

A copy of the notice of sale was posted on the front door of the property which was to be sold and this notice plaintiff found. The property was noticed for sale on May 16, 1949, which was thereafter continued until 10 a. m. June 1, 1949.

Plaintiff and First Thrift agreed that in consideration of the payment of $700 to First Thrift by plaintiff, the time for payment of the remaining balance of principal, interest and costs was to be extended to and including June 1, 1949, and that no sale of the property would be made if such payments took place on or before June 1, 1949.

The property was in fact sold on June 1, 1949, at 10 a. m. to Kessler for the sum of $925, and thereafter Great Western executed and delivered to Kessler a trustee's deed to the property. Kessler was not acquainted with any of the officers of Great Western or with any of the personnel of First Thrift. He originally learned of the proposed sale either by seeing the notice printed in a legal newspaper or posted at the entrance to the Hall of Justice. There is no evidence that he had any knowledge or notice of any of the transactions between plaintiff and Great Western or plaintiff and First Thrift.

After acquiring title to the property Kessler instituted an unlawful detainer action in the Los Angeles municipal court against plaintiff Karrell therein alleging the reasonable rental value of the property to be $100 per month and seeking damages at the rental rate for less than two months.

The trial court ordered Kessler to convey the property to plaintiff upon condition that she refund to him the price he paid for it, quieted title in the property in plaintiff and enjoined Kessler from taking possession of the property or proceeding with the unlawful detainer action pending against Karrell in the Los Angeles municipal court.

From this judgment defendants Kessler and First Thrift appeal.

A. *Kessler Appeal.*

These are the questions necessary for the determination of the Kessler appeal:

[1] First: *Did the original trust deed properly incorporate by reference provisions of the previously recorded "master deed of trust"?*

Yes. Such procedure is expressly provided by section 2952 of the California Civil Code which reads in part as follows: "Any person may record in the office of the county recorder of any county fictitious mortgages and deeds of trust of real property. Such fictitious mortgages and deeds of trust need not be acknowledged, or proved or certified to be recorded or entitled to record. Such mortgages and deeds of trust shall have noted upon the face thereof that they are fictitious. The county recorder shall index and record such fictitious mortgages and deeds of trust in the same manner as other mortgages and deeds of trust are recorded, and shall note on all indices and records of the same that they are fictitious. Thereafter, any of the provisions of any such recorded fictitious mortgage or deed of trust may be included for any and all purposes in any mortgage or deed of trust by reference therein to any such provisions, without set-

ting the same forth in full; provided such fictitious mortgage or deed of trust is of record in the county in which the mortgage or deed of trust adopting or including by reference any of the provisions thereof is recorded. * * *"

In the present case the record discloses that the requirements of section 2952 of the Civil Code were complied with.

[2] Second: *Were there any irregularities in the sale which vitiated it?*

No. The deed of trust provided that recitals in the deed given by the trustee should be conclusive upon the trustor.

In the instant case the deed to Kessler recited that all proper steps precedent to the sale had been taken. Therefore in the absence of fraud which is not here claimed such recital is conclusive pursuant to section 2924b of the Civil Code which provides in part as follows:

"A recital in the deed executed pursuant to the power of sale of compliance with all requirements of law regarding the mailing of copies of notices for which requests have been recorded shall constitute prima facie evidence of compliance therewith and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice."

[3] Third: *Was Kessler a bona fide purchaser for value without notice?*

Yes. There is no evidence in the record to indicate that defendant Kessler had any knowledge of the agreement or transactions between plaintiff and First Thrift or plaintiff and Great Western. Therefore he was a bona fide purchaser for value without notice and as such was not chargeable with the fraud of his predecessor and took a title purged of any anterior fraud affecting it and free of any equities existing between the original parties. (Marlenee v. Brown, 21 Cal.2d 668, 675 [1], 134 P.2d 770; Stout v. Gill, 110 Cal.App. 445, 449, 294 P. 446. Cf. Schultz v. McLean, 93 Cal. 329, 357, 28 P. 1053.)

[4] Likewise there is no merit in the contention that defendant Kessler did not pay an adequate price for the property since the rule is settled that mere inadequacy of price is not sufficient ground for setting aside a trustee's sale which is legally conducted, in the absence of proof of fraud. (Central Nat. Bank v. Bell, 5 Cal.2d 324, 328[4], 54 P.2d 1107.)

[5] The foregoing rules are applicable to equitable actions as well as legal actions.

[6] Fourth: *Did the municipal court have jurisdiction to entertain defendant Kessler's unlawful detainer action against plaintiff Karrell?*

Yes. Section 1161a of the Code of Civil Procedure provides that a person in possession of real property may be removed after a three day notice to quit, as follows:

"Where the property has been duly sold in accordance with Section 2924 of the Civil Code, under a power of sale contained in a deed of trust executed by him, or a person under whom he claims, and the title under the sale has been duly perfected."

Section 89 of the Code of Civil Procedure provided at the date of institution of the unlawful detainer action: "1. Municipal court shall have original jurisdiction of civil cases and proceedings as follows: * * * (d) In all proceedings in forcible entry or forcible or unlawful detainer, where the rental value is two hundred dollars ($200) or less per month, and where the whole amount of damages claimed is two thousand dollars ($2,000) or less."

Since in the unlawful detainer action defendant Kessler alleged the reasonable rental value of the premises to be $100 per month and sought damages for less than two months, his action fell clearly within the foregoing provisions. (Cf. Hewitt v. Justice's Court, 131 Cal.App. 439, 441, 21 P.2d 641.)

In view of our conclusions the trial court erred in quieting title in plaintiff against defendant Kessler.

B. *Appeal of First Thrift of Los Angeles.*

Since the judgment in favor of plaintiff must be reversed as against Kessler, no useful purpose would be subserved by discussing the questions raised in appellant First Thrift's Brief.

The judgment is reversed with directions to the trial court to enter a judgment quieting title in the property in question in defendant Howard M. Kessler.

MOORE, P. J., and WILSON, J., concur.

Hearing denied; CARTER, J., dissenting.

In re LEFRANC'S ESTATE.

MASSON v. URBANI et al.

Civ. 14716.

District Court of Appeal, First District, Division 1, California.

June 1, 1951.

Hearing Granted July 26, 1951.*

Proceedings in the matter of the estate of Marie Lefranc wherein Edith C. Urbani and another, executors of the last will and testament of Marie Lefranc, deceased, filed their first and final account and petitioned for final distribution, praying that the residue of a testamentary trust estate be distributed to Nelty Lefranc Horney because Adele Masson had forfeited her life estate by reason of her violation of the "no-contest" clause in the will. Adele Masson filed objections to the petition. The Superior Court in and for the County of Santa Clara, Leonard R. Avila, J., entered a decree distributing $1.00 to Adele Masson and the residue of the estate to Nelty Lefranc Horney, and Adele appealed. The District Court of Appeal, Peters, P. J., held that intestacy had resulted, as to the testamentary life estate given by the will to Adele Masson, upon her contesting the will, since there was no provision in will disposing of the life estate in such contingency, and held that therefore Adele, as an heir, could share in the life estate.

Reversed.

1. Wills ⇐665

Under California law, where will contained provision for forfeiture of interest of legatee if such legatee contested will contesting legatee forfeited her interest under will

2. Wills ⇐865(1)

Where life beneficiary of testamentary trust forfeited her interest under trust by contesting will but there was no provision in will disposing of testamentary trust life estate in such contingency, intestacy resulted as to life estate.

3. Remainders ⇐5

California does not follow doctrine of acceleration of remainders. Civ.Code, § 780.

4. Evidence ⇐58

In relation to distribution of property, termination of trusts and rule against perpetuities, it must be conclusively presumed that woman is capable of bearing children, even where hysterectomies have been performed, and regardless of her age or physical condition.

5. Wills ⇐853

Where testamentary trust made testatrix's niece beneficiary for life and provided that upon her death remainder should vest in her children, and additionally provided that if she left no children then the remainder should go to another niece and that if second niece predeceased life beneficiary then remainder should go to children of second niece, upon life beneficiary's forfeiture of her trust interest by violation of "no-contest" provision in will, it would be immaterial that life tenant had had hysterectomy and could not bear children, and probate court could not accelerate second niece's contingent remainder and increase bequest to her to include life estate. Civ.Code, § 780.

6. Descent and distribution ⇐48

Where "no-contest" clause of will provided that, if contest were instituted, contestant should receive sum of $1.00 and no more in lieu of provision which had been made or might have been made in will for such person, language could not reasonably be construed to mean that testatrix had intended to disinherit contestant who was also heir, so far as property not disposed of in will was concerned.

7. Descent and distribution ⇐48

To accomplish disinheritance, clear and unequivocal language should be required.

* Subsequent opinion 239 P.2d 617.

Joseph A. Brown, San Francisco, for appellant.

Burnett & Burnett, San Jose, for respondents.

PETERS, Presiding Justice.

Adele Masson appeals from the decree of final distribution in the estate of Marie Lefranc, which decree provides that, because Adele had instituted a contest of the will of the deceased, she had forfeited all her rights as a legatee under the will, and which further provides that the entire residue of the estate should be distributed to the respondent, Nelty Lefranc Horney.

Marie Lefranc died testate on April 7, 1942, leaving respondent Nelty Lefranc Horney and appellant Adele Masson, nieces, as her sole heirs at law, and leaving an estate now valued at about $100,000.

By her will the testatrix made certain minor specific bequests and then left the entire residue of the estate to trustees with instructions to pay the entire net income to Adele Masson, this trust to terminate upon the death of Adele, at which time the corpus was to vest in the children of Adele, and, if there were no children, then in Nelty, and if Nelty were not then alive, then in the children of Nelty. The will contained the following clause: "I purposely make no provision for any other person whether claiming to be an heir of mine or not, and if any person, whether a beneficiary under this Will or not mentioned herein, shall contest this Will or object to any of the provisions hereof, I give to such person so contesting or objecting the sum of $1.00 and no more in lieu of the provision which I have made, or which I might have made herein for such person so contesting or objecting."

In October of 1942, Adele petitioned to revoke the probate of the will on the ground that, when it was executed, the testatrix was unsound of mind. The will was upheld by the trial court, and this judgment was affirmed on appeal. Estate of Lefranc, 95 Cal.App.2d 885, 214 P.2d 420.

On May 1, 1950 the executors filed their first and final account, and petition for final distribution. The prayer was that the residue of the estate be distributed to Nelty Lefranc Horney because Adele had forfeited her life estate by reason of the contest. Adele filed her objections to this petition and Nelty also filed certain objections to the account, and joined in the request of the executors that the residue of the estate be distributed to her, and further alleging that Adele, who is childless, is unable to bear a child by reason of a surgical operation.

In July of 1950 the probate court entered its decree distributing $1 to Adele Masson and the residue of the estate to Nelty Lefranc Horney. Adele appeals.

The fifth clause of the will is the one creating the trust for Adele. It reads as follows:

"All the rest, residue and remainder of my Estate, whether the same be real, personal or mixed, I give and devise to Wells Fargo Bank & Union Trust Co. to be held in trust by them, nevertheless, subject to the following, uses, terms, conditions and limitations:

"(a) My said trustee shall pay to my niece Adele Masson, during her lifetime all of the net income of said Trust Estate.

"(b) This Trust shall cease and terminate upon the death of my said niece, Adele Masson, whereupon the corpus of said trust, as well as any undistributed income thereon shall become the property of and vest in the issue of my said niece, Adele Masson, born in lawful wedlock. If my said niece, Adele Masson, shall leave no issue born in lawful wedlock upon her death, then the corpus of said trust and the undistributed income thereon shall become the property of and vest in my niece Nelty Lefranc Horney, if she be alive at said time. If Nelty Lefranc Horney should predecease Adele Masson, then upon the death of said Adele Masson, without issue born in lawful wedlock, the corpus of said trust and the undistributed income thereon shall vest in the issue of said Nelty Lefranc Horney."

Then, after giving the trustees broad powers over the trust property, the clause continues: "(d) It is expressly understood

that the net income arising from this trust estate, and the principal thereof, are intended for the sole and individual use and enjoyment of the said beneficiary, Adele Masson, subject to the terms and conditions hereof, and said beneficiary shall not in any event sell, assign, transfer, convey, pledge, hypothecate or otherwise encumber her interest under this trust nor shall the principal or any of the income arising therefrom be liable for any debt of said beneficiary, nor subject to a judgment or judgments rendered against said beneficiary nor to the process of any Court in aid or execution of any judgment or judgments so rendered."

At the hearing of the petition for distribution there was read into the record the testimony of the attorney who drafted the will and one of its subscribing witnesses given on the trial of the will contest (he being too ill to appear at the hearing) to the effect that the purpose of the trust was to protect Adele Masson because she was not considered by the testatrix to be competent to handle her own business affairs. In addition, the attorney for Nelty Lefranc Horney offered to prove that Adele Masson had had a hysterectomy performed and, as a result, was incapable of bearing children. This offer of proof was never directly ruled upon, and no evidence on this issue was introduced.

The two key findings in the decree of distribution read as follows:

"That at the time of the commencement of said will contest proceeding by said Adele Masson, to wit, on the 7th day of October 1942, said Adele Masson was unmarried and has never been married, was approximately 48 years of age, and had not then or has she since given birth to any child or children, nor does she have nor has she ever had any child or children. * * *

"That the only reason for the creation of the trust in said will was for the individual use and enjoyment of said Adele Masson as to net income and principal, subject to the terms and conditions of the will of said decedent; that by virtue of the contest of said will commenced by Adele Masson as aforesaid, together with the results flowing therefrom as aforesaid, including paragraph Sixth of said will, the reasons for the creation of said trust ceased to exist, and said trust ceased and terminated and never came into effect or being, and that Wells Fargo Bank & Union Trust Company is entitled to have distributed to it nothing under said will, and the entire rest and residue of said estate should be distributed to Nelty Lefranc Horney, free from any trust or other restriction."

The theory upon which the court held that the remainder should be accelerated and the property distributed as if Adele Masson were dead, is not entirely clear. The court clearly held that, because of the forfeiture of Adele's rights under the will, the purpose of the trust had failed. But whether it also held that the remainder interest should be accelerated because Adele was incapable of bearing children is by no means clear.

[1] It is clear that Adele Masson has forfeited her rights under the will. In this state it is the law that provisions in a will for the forfeiture of an interest of a legatee if he contests the will are valid, and operate to forfeit the interests of the contestant under the will. Estate of Hite, 155 Cal. 436, 101 P. 443, 21 L.R.A., N.S., 953; Estate of Miller, 156 Cal. 119, 103 P. 842, 24 L.R.A.,N.S., 868; In re Kitchen's Estate, 192 Cal. 384, 220 P. 301, 30 A.L.R. 1008; Lobb v. Brown, 208 Cal. 476, 281 P. 1010; Estate of Howard, 68 Cal.App.2d 9, 155 P.2d 841. Adele concedes this to be the law, but she contends, among other things, that, because of the forfeiture of her life estate, all that the will disposed of was the remainder in the residue; that the will failed to dispose of this life estate in the event it was forfeited; that intestacy results as to this life estate; that she is entitled to one-half of the life estate as one of the two heirs at law. She also contends that the forfeiture of her life estate could not affect the rights of her unborn children in the remainder upon her death.

[2] We are of the opinion that there is no escape from the conclusion that upon the life estate being forfeited because of the contest, there being no provision in the will disposing of this life estate in such contingency, that intestacy resulted as to this life estate, and that Adele may share in that life estate as an heir at law.

[3] If a testator disposed of only the remainder of his estate which was to vest upon the death of X, but failed to dispose of the life estate, there would be no doubt at all in this state that, as to the life estate, intestacy results, and such life estate would go to the heirs at law. The same result follows where the intervening life estate provision is void, invalid, or is defeated by renunciation or by a forfeiture resulting from a will contest. California does not follow the doctrine existing in some states of acceleration of remainders. See Simes, "The Acceleration of Future Interests," 41 Yale Law Journal, 659; 30 Yale Law Journal, 849; see, also, Moxley v. Title Ins. & Trust Co., 27 Cal.2d 457, 165 P.2d 15, 163 A.L.R. 838, particularly authorities cited in Mr. Justice Traynor's dissent at page 469, et seq., of 27 Cal.2d, at page 21 of 165 P.2d. This doctrine is prohibited in this state by section 780 of the Civil Code which, since 1872, has provided: "When a remainder on an estate for life or for years is not limited on a contingency defeating or avoiding such precedent estate, it is to be deemed intended to take effect only on the death of the first taker, or the expiration, by lapse of time, of such term of years."

In re Estate of Arms, 186 Cal. 554, 199 P. 1053, is one of the leading cases on this subject. There, by will, a husband devised to his wife a life estate in the residue of his estate, all his separate property, with a devise of the remainder to take effect upon her death to residuary legatees. The wife renounced her life estate, and elected to take independently of the will. The probate court held that this accelerated the remainder, and that the residuary legatees took not only the remainder bequeathed to them, but also the life estate renounced by the wife. This was reversed by the Supreme Court. It held that the life estate, having been renounced, became a part of the estate of which no disposition had been made, that it therefore went by the rules of intestacy, and the wife was to receive a share thereof. Much of the language in the opinion is pertinent to the case under consideration. At page 564 of 186 Cal., at page 1057 of 199 P., the court stated:

"The appellant claims further that the court below erred in distributing the entire interest in the real property to the two residuary devisees. The theory advanced in support of this contention is that upon her election to renounce the will and take under the law the life estate given to her became ineffective; that that interest in the real property thereupon went back into the general estate, and, not having been effectually disposed of by the will, the testator died intestate as to that life estate. This being the case, and it being his separate property, as we have seen, they say that under the Code one half of it descended to her and the other half to his brothers and sisters and the descendants of such as are dead * * *, and that it should have been distributed accordingly.

"We see no escape from the conclusion that the widow is entitled to distribution of a one-half interest in this real estate for the period of her own life. The terms of the will are such that the estate given to the two residuary devisees did not begin in possession and enjoyment until after her death. It provides that 'Upon the death of my wife, * * * and out of the remainder and residue of my property and estate *unused and unexpended* for my said wife' the legacies amounting to $20,000 were to be paid, presumably by the executors, since no provision is made for the payment by any trustees or other person. The residue is then given by the following words:

"'Upon the death of my wife, * * * and after the payment of all of the gifts, devises and bequests hereinbefore mentioned and provided are paid and distrib-

uted, I give, devise and bequeath all of the rest, remainder and residue of my property,' to Gertrude Heath and George L. Arms.

"The phrase 'upon the death' usually refers to the time of enjoyment and not to the time of vesting, and doubtless it was so used here. But the decisive point here is the time of enjoyment, and it is clear that this did not begin until after the happening of both of the events mentioned, namely, the death of the widow and the payment of the legacies which did not become due until her death. Hence the estate in the property in the meantime was not included in the residue described and did not go to said residuary legatees, but was disposed of only by the provision for the wife, and when she renounced it that portion of the estate remained without effective testamentary disposition. As to that, the effect was the same as if he had died intestate.

"Where a legacy or devise is rejected by the beneficiary, and there is a residuary clause which would include it by its terms, the property so refused goes into the residue, and the residuary legatee or devisee takes it by virtue thereof. [Citing authorities.] But if the residuary clause is not general or is not couched in language that would include the property so refused, such property goes to the heirs at law as property of which the testator died intestate. [Citing authorities.] * * * When the widow elected to take under the law and renounced the provisions of the will for her benefit, the devise to her of the use, rents, and income of the real property in question during her natural life became inoperative, and that portion of the estate of the testator therefore fell into the undisposed of residue and descended to his heirs at law. The widow was one of the heirs of the husband, with respect to his separate estate, and under the circumstances of this case she was entitled to one-half of all the property not disposed of by the will. It follows that she was entitled to one half of this life estate, and the other half thereof descended in equal shares to the brothers and sisters of the testator and to the children or grandchildren of any deceased brother or sister by right of representation. [Citing an authority.] * * *

"There are cases which hold that upon a refusal of the widow to take a life estate given in lieu of her positive rights under the law, such as dower or other interest in land not subject to the husband's testamentary disposition, where there is a remainder over to residuary devisees, the vesting of the remainder is accelerated, so that the residuary devisees may take before the widow's death. But the weight of authority and the better reason is the other way. [Citing a case.] In effect, such a doctrine would operate as a judicial devise of the decedent's estate—a supplementary will not made by the testator. We think the court is without power to do that, even if it would be more convenient in the particular case. Moreover, it appears to be contrary to section 780 of the Civil Code."

This same doctrine applies where a legacy is forfeited because the legatee contests the will in violation of a "no contest" clause in the will. This was the precise situation presented in Estate of Mathie, 64 Cal.App.2d 767, 149 P.2d 485. There the testatrix bequeathed the residue of her estate one-half to her husband and one-half to her daughter by a previous marriage. The will contained a clause providing: "If any devisee or legatee hereunder contest this Will, or any part or provision hereof, any share given to such devisee or legatee is hereby revoked and shall become void." 64 Cal.App.2d at page 779, 149 P.2d at page 492. The will also contained a clause to the effect that: "I have, except as otherwise in this Will specified, intentionally and with full knowledge omitted to provide for my heirs living at the time of my decease." 64 Cal.App.2d at page 779, 149 P.2d at page 492. The trial court found that the husband fraudulently destroyed this will, so that it had to be proved as a lost will, and fraudulently presented for probate an earlier and superseded will. This, of course, constituted a "contest" of the later will. The probate court distributed the entire residue to the daughter. This was reversed, the court

holding that there was intestacy as to the husband's one-half, and that the husband was entitled to share therein as an heir at law. At page 779 of 64 Cal.App.2d, at page 492 of 149 P.2d, the court stated:

"The 'Fourth' paragraph of the will provides that any share given to a legatee or devisee who contests the will shall be revoked and become void, but it does not provide that such legatee or devisee shall not receive any part of the estate. Ineffectual legacies and devises pass into the residuum unless a contrary intention is shown by the will. * * * '* * * As there were no bequests or devises other than the trust provision which disposed of the entire estate, there was no "residue" involved.' See Estate of Moorehouse, 1944, 64 Cal.App.2d 210, 148 P.2d 385. There is no residuary legacy or devise in the present will.

"Since there is no residuary legacy or devise, the decedent died intestate as to the portion of the estate which appellant would have received under the will, unless that portion was otherwise disposed of by the will. * * * Even if a proper construction of said paragraph 'Third' is that the testatrix did not intend that appellant should receive any part of her estate if he contested the will; nevertheless, the testatrix did not direct what disposition should be made of the portion appellant would have taken if he had not made a contest. Paragraph 'Fourth' merely provides that 'any share' of a beneficiary shall be revoked and 'become void' in the event of a contest by such beneficiary. Said paragraph does not include the provision that is frequently in a contest clause that if a beneficiary contests the will he shall not receive any part of the estate. Even if said paragraph 'Fourth' had included such a provision that the beneficiary should not receive anything if he contested the will, there was no provision therein directing what disposition should be made of the portion appellant would have received if he had not contested. It was also argued by the daughter that the other heir mentioned as a beneficiary in the will, the daughter, would be entitled to receive the portion which appellant would have received, since the will provided that no heir other than the two mentioned should receive any part of the estate, and since the appellant could not receive his portion that the daughter is the only remaining heir not prohibited by the will from receiving a part of the estate. The will provided, however, that the daughter should receive only one-half of the estate, and did not provide that she should receive the portion which appellant would have received if he had not contested the will. The court cannot add to or change the provisions of the will, and therefore cannot order that the ineffectual legacy or devise, the portion provided for appellant, be distributed to the daughter."

The same rules apply in the case of lapsed legacies. See, In re Estate of Fritze, 85 Cal.App. 500, 259 P. 992.

In the instant case we have a trust set up for the sole purpose of paying the income of the residue of the estate to Adele for life. Upon her death the will provides that the remainder shall vest in the children of Adele, that if Adele leaves no children then to Nelty, and if she predeceases Adele, then to the children of Nelty. The probate court has given the entire estate to Nelty during the lifetime of Adele. In this fashion the court has cut off the rights of Adele's unborn children and the contingent rights of Nelty's living children. The probate court has, by thus accelerating the remainder, redrafted the testatrix' will by giving to Nelty the life estate not disposed of by the will. Even if Adele were not permitted to share in the life estate, or if it were held that Adele could not bear children, the probate court could not accelerate the remainder and increase the bequest of the remainder to include the life estate.

[4, 5] Respondent urges that she can show that Adele is incapable of bearing children because of an operation, and urges that, in such cases, the court is justified in finding that there is no possibility of Adele having children. That is an interesting problem. Generally, in America, in dealing with this question in relation to the distribution of property, the termina-

tion of trusts and the rule against perpetuities, it has been held that, regardless of age or physical condition, even where hysterectomies have been performed, it must be conclusively presumed that a woman is capable of bearing children. See annotation 146 A.L.R. 794; see for a discussion of the policy behind this rule Ricards v. Safe Deposit & Trust Co., 97 Md. 608, 55 A. 384, 63 L.R.A. 145. This seems to be the California rule. Fletcher v. Los Angeles Trust & Savings Bank, 182 Cal. 177, 187 P. 425; In re Estate of Sahlender, 89 Cal.App.2d 329, 201 P.2d 69. The Restatement has adopted a contrary view. See 2 Restatement of Trusts, § 340, Comment e; 3 Restatement of Property, § 274. In interpreting tax statutes the United States Supreme Court has adopted the view of the Restatement. U. S. v. Provident Trust Co., 291 U.S. 272, 54 S.Ct. 389, 78 L.Ed. 793. This is a most interesting legal question, but it is not here involved. That is so because not only are the rights of unborn children of Adele involved, but also the rights of the children of Nelty and the rights of Adele as an heir. Moreover, regardless of whether Adele may or may not have children the indisputable fact remains that all that Nelty was to receive under the will was a remainder interest. That interest cannot be increased by judicial fiat.

Respondent urges that such a holding defeats the intent of the testatrix because it was her intent that any person contesting the will should not share in her estate. The will does not so provide. If that had been the intent of the testatrix she would have provided what was to happen to the life estate if Adele instituted a contest. By not so providing, intestacy resulted when the contingency occurred, and Adele, as one of the heirs at law, is entitled to share in this life estate.

Far from defeating the intent of the testatrix, so far as we can ascertain it, such result is in accord with such intent. From the testimony of the attorney who drafted the will, which testimony was introduced in this hearing by respondent, it appears that her main concern was to take care of Adele. She believed Adele to be incompetent to handle her own affairs and needed protection. She, apparently, never contemplated that Adele would contest the will. Had she contemplated that contingency, and had she intended in that event that Adele was to receive nothing, she would have provided for that contingency by an alternative devise of the life estate. Because she devised Nelty, an heir of equal rank to Adele, nothing but a contingent remainder which might be defeated by birth of issue to Adele or by Nelty predeceasing Adele, she must have feared that Nelty might contest the will, and so put in the "no contest" clause. By forfeiting Adele's interest in the trust, and distributing to Adele a one-half interest in the undisposed of life estate, Adele will be afforded at least part of the protection desired by the testatrix.

[6, 7] Respondent makes much of the fact that the "no contest" clause provides that if a contest is instituted, then the testatrix gives "to such person so contesting or objecting the sum of $1.00 and no more in lieu of the provision which I have made, or which I might have made herein for such person," and urges that this indicates that it was the intent of the testatrix to disinherit a contestant completely. We do not so construe the language. What the language means is that a contestant shall receive but $1.00 so far as the will is concerned. The language cannot reasonably be construed to mean that the testatrix was intending to disinherit an heir so far as property not disposed of in the will was concerned. To accomplish that result clear and unequivocal language should be required. In the Estate of Mathie, 64 Cal.App.2d 767, 149 P.2d 485, 492, already discussed at length, the will expressly provided that the testatrix had "intentionally and with full knowledge omitted to provide for my heirs living at the time of my decease," and that in the event of a contest the share given to such contestant "is hereby revoked and shall become void." 64 Cal.App.2d at page 779, 149 P.2d at page 492. The court refused to interpret that language so as to prevent a contestant from sharing in the portion

of the estate as an heir that had been forfeited by reason of the contest.

For the foregoing reasons it is our opinion that Adele Masson is entitled to share in the life estate of the residue as an heir at law.

The decree appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.

104 Cal.App.2d 567

IDAHO MARYLAND MINES CORP. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 7990.

District Court of Appeal, Third District, California.

June 4, 1951.

Rehearing Denied July 3, 1951.

Hearing Denied Aug. 2, 1951.

Proceedings by the Idaho Maryland Mines Corporation against the Industrial Accident Commission of the State of California and Wilber L. Duncan to review and annul an award for permanent disability. The District Court of Appeal, Peek, J., held that the portion of the statute permitting apportionment of permanent disability rating between an industrial injury and pre-existing disease did not apply.

Award affirmed.

1. Administrative law and procedure ⇐786
Workmen's compensation ⇐1939

It is province of Industrial Accident Commission to resolve conflicts in evidence whether conflict arises from testimony of one witness or whether it arises from witnesses upon opposing side.

2. Administrative law and procedure ⇐791
Workmen's compensation ⇐1939

Where there is substantial evidence to to support findings and award of Industrial Accident Commission, District Court of Appeal cannot substitute its views for those of the Commission and annul award even though court might regard portions of testimony as more convincing and amply sufficient to support contrary decision.

3. Workmen's compensation ⇐845

Where Industrial Accident Commission determined upon conflicting and substantial evidence that claimant's disability was an industrial injury occasioned by exposure to gas which aggravated pre-existing heart disease, there was no basis for application of apportionment of permanent disability rating between injury and pre-existing disease. Labor Code, § 4663.

4. Workmen's compensation ⇐845

Provision of the workmen's compensation statute permitting apportionment of permanent disability rating between injury and pre-existing heart disease must be read in light of rule that employer takes employee as he finds him at time of employment, and when subsequent injury lights up or aggravates pre-existing condition rendering it disabling, liability for full disability without proration is imposed upon employer. Labor Code, § 4663.

5. Workmen's compensation ⇐845

Statute providing that employee suffering from previous permanent disability shall not receive compensation for later injury in excess of compensation allowed for such injury when considered by itself and not in conjunction with previous disability applies only to cases where employee presently is suffering from previous permanent disability or physical impairment, and did not apply to employee who had latent heart disease which caused no permanent disability or physical impairment prior to industrial accident. Labor Code, § 4750.

Leonard, Hanna & Brophy, San Francisco, for petitioner.

T. Groezinger, San Francisco, Frank Finnegan, Nevada City, for respondent.

PEEK, Justice.

Petitioner seeks a review and an annulment of an award made by respondent Commission of permanent disability to respondent Wilber L. Duncan.

The record shows that on November 1, 1948 Duncan, while employed as a miner by petitioner, was exposed to mine gas for approximately one-half hour and became exhausted as a result thereof. He continued working until December 3, 1948, when his physical condition became such as to prevent him from further work as a miner. For one year thereafter, his employer, who was and is self-insured, paid him compensation for temporary total disability. At the end of that time a question arose concerning his continued disability, and on December 3, 1949, Duncan filed with respondent Commission an application for adjustment of claim. At the hearing thereon he testified he had worked in coal mines in Oklahoma from 1924 to 1932, and in California mines since 1938; that he now had no energy and was unable to work or engage in anything other than minor exercise of short duration. He denied that he had any similar symptoms prior to the incident of November 1, 1948; that the only time he had ever noticed any shortness of breath was on previous occasions when he had been exposed to mine gas; that otherwise he had never had trouble with his chest. Approximately a month thereafter the respondent Commission appointed Dr. Benjamin H. Wolfman as an independent medical examiner, who examined Duncan and filed his report with the Commission. Counsel for petitioner then requested a further hearing for the purpose of cross-examining Dr. Wolfman. At that hearing the doctor testified generally concerning the condition of the employee's heart, stating that he was still disabled from the aggravation of that disease; that he was totally disabled for any occupation requiring physical exertion such as the usual duties of a miner, and that such condition was permanent, although slight improvement might occur. At one point in his examination the doctor testified that it was his opinion that fifty per cent of Duncan's disability was due to a pre-existing arteriosclerosis condition uninfluenced by the exposure to gas and that the remaining fifty per cent was attributable to the incident itself. However, later in his testimony he stated that if the injury had not occurred the employee's pre-existing heart disease would not have interfered with his working ability. Specifically, he was asked by the Referee: "Well, if he hadn't had this injury then, he would have been good for seven, eight, or nine years more, wouldn't he?" To which question the doctor replied: "I assume that—several years —we don't know when an acute episode would come along and block off one of the arteries." Additionally he testified that Duncan's pre-existing heart pathology made him more susceptible to disability following a gas incident than would have been the case of a man with a normal heart; also that in his opinion it was purely conjectural as to when Duncan's arteriosclerosis, uninfluenced by the injury, would have resulted in disability. The record further discloses testimony by the permanent disability rating specialist for the Commission to the effect that the rating of 73¼ per cent permanent disability was for Duncan's entire disability and that no attempt had been made to apportion the rating between the injury and the heart disease. The Commission found accordingly. Petitioner then sought a hearing upon substantially the same grounds as are urged herein, and following the denial thereof filed its petition for review in this court.

Petitioner makes no attack upon the Commission's evaluation of Duncan's permanent disability at 73¼ per cent. However, it is urged that by reason of Dr. Wolfman's testimony one-half of said disability should have been apportioned to the injury, occasioned by his exposure, and the other half of said disability should have been apportioned to the pre-existing heart condition. While it is true, as petitioner contends, that the doctor did testify that Duncan's present disability should be so apportioned, it is also true, as we have noted, that the doctor also testified directly contrary thereto.

[1, 2] Under such circumstances petitioner at the outset is confronted with the well settled rule that it is the province of the Commission to resolve conflicts in the evidence, Liberty Mutual Insurance Co. v. Ind. Acc. Comm., 33 Cal.2d 89, 199 P.2d 302, and this is true whether the conflict arises

from the testimony of one witness or whether it arises from witnesses upon opposing sides. People v. Holman, 72 Cal. App.2d 75, 90, 164 P.2d 297. Hence where, as here, there is substantial evidence to support the findings and award of the Commission this court cannot substitute its views for those of the Commission and annul the award, Riskin v. Ind. Acc. Comm., 23 Cal.2d 248, 144 P.2d 16, even though we might regard, as does petitioner, the portions of Dr. Wolfman's testimony which is favorable to it, as more convincing and amply sufficient to support a contrary decision. Gardner v. Ind. Acc. Comm., 73 Cal.App.2d 361, 166 P.2d 362.

[3, 4] It necessarily follows that since respondent determined upon conflicting and substantial evidence that the claimant's disability was an industrial injury occasioned by exposure to gas which aggravated a pre-existing disease, there is no basis for the application, as petitioner contends, of the apportionment rule as set forth in Labor Code § 4663. As the Supreme Court stated in Colonial Insurance Co. v. Ind. Acc. Comm., 29 Cal.2d 79, 83, 84, 172 P.2d 884, 887, "that section must be read in light of the rule that an employer takes the employee as he finds him at the time of employment and when subsequent injury lightens up or aggravates a previously existing condition rendering it disabling, liability for the full disability without proration is imposed upon the employer."

[5] Petitioner's further contention, that Labor Code, § 4750 also applies, is likewise without merit. That section applies only to cases where the employee presently "is suffering from a previous permanent disability or physical impairment". Here, although the evidence shows that Duncan had a latent heart disease prior to his injury, his as well as the medical testimony establishes without conflict that he had no "permanent disability or physical impairment" prior thereto.

The award is affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.

REACHI v. NATIONAL AUTO. & CAS. INS. CO. OF LOS ANGELES.

Civ. 18264.

District Court of Appeal, Second District, Division 2, California.

June 1, 1951.

Rehearing Denied June 18, 1951.

Hearing Granted July 26, 1951.*

Action was brought by Manuel Reachi against National Automobile and Casualty Insurance Company of Los Angeles to recover damages for wrongful attachment. The Superior Court, Los Angeles County, William B. McKesson, J., rendered judgment for defendant and plaintiff appealed. The District Court of Appeal, McComb, J., held that counsel fees, expert witness fee, and transportation and hotel expenses, incurred in principal suit in superior court, could not be recovered.

Judgment affirmed.

1. Attachment ⇐338

Where writ of attachment was issued in principal suit, and was levied on certain real property of defendant, and after trial judgment was rendered and became final in favor of defendant, but no action was taken to release, nor attempt made to dissolve the attachment, surety on attachment undertaking was not liable for counsel fees paid in defense of principal suit.

2. Attachment ⇐338

In action against surety on an attachment undertaking the measure of damages to be recovered is the actual expense and loss resulting from the levy, including counsel fees for professional services rendered in relation to the attachment, but not counsel fees paid in defense of the principal suit.

3. Courts ⇐95(1)

In view of decisions from the appellate courts of California, authorities from other states relied on by plaintiff were not controlling, in action to recover damages for wrongful attachment.

4. Costs ⇐187

Fees paid to an expert witness may be taxed as costs only where the services of such expert are necessary for the proper presentation of the case and where expert

* Subsequent opinion 236 P.2d 151.

has been appointed by and under direction of court.

5. Costs ⇐187

Where defendant in principal suit in superior court employed surveyor to testify as an expert witness in that suit, but record in action for damages for wrongful attachment failed to disclose that expert witness was appointed by trial court, fees paid to expert witness could not be recovered.

6. Costs ⇐193

A party, who voluntarily attends trial, and in whose favor judgment is rendered, is not entitled to recover transportation or hotel expenses.

7. Attachment ⇐375(1)
Costs ⇐193

Where defendant voluntarily attended principal suit in superior court, and judgment therein was rendered in his favor, he was not entitled to recover transportation and hotel expenses incurred in attending that trial, in action to recover damages for wrongful attachment.

Guy E. Ward and Kenneth D. Holland, Beverly Hills, for appellant.

Harry A. Franklin, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment predicated upon the sustaining of a general demurrer to plaintiff's second amended complaint without leave to amend in an action to recover damages for wrongful attachment, plaintiff appeals.

Facts: In the complaint it is alleged that on or about May 15, 1947, defendant surety company executed and filed an undertaking on attachment in the principal sum of $3,600 in an action pending in the superior court of Los Angeles County, entitled United Properties, Inc. v. Manuel Reachi (plaintiff herein). Thereafter a writ of attachment was issued in such action and levied on certain real property of defendant Reachi. After trial judgment was rendered in favor of said defendant which judgment is now final. No proceeding was taken to release the attachment nor was any attempt made by plaintiff herein to have the attachment dissolved.

The complaint discloses that plaintiff had incurred (1) attorney's fees in the sum of $2,500 in connection with the defense of the previous action, (2) expense for employment of a surveyor to testify as an expert at the trial whose services were of the value of $506, and (3) traveling expenses necessitated because of the trial in the sum of $1,500.

Questions: First: *Was plaintiff entitled to recover, in an action against the surety on an attachment undertaking, counsel's fees incurred in defense of the principal suit?*

[1, 2] *No.* In an action against a surety on an attachment undertaking the measure of damages to be recovered is the actual expense and loss resulting from the levy, including counsel fees for professional services rendered in relation to the attachment, but not counsel fees paid in defense of the principal suit. (Soule v. United States Fidelity & Guaranty Co., 82 Cal. App. 572, 574 et seq. [1], 255 P. 886; Java Cocoanut Oil Co. v. Fidelity & Deposit Co., (9 Cir., Northern Dist. of Cal.) 300 F. 302, 303 et seq., 39 A.L.R. 523. Cf. Hornaday v. Hornaday, 95 Cal.App.2d 384, 393 [6], 213 P.2d 91; Albertsworth v. Glens Falls Indem. Co., 84 Cal.App.2d 816, 824 [3], 192 P.2d 66.)

[3] In view of the decisions from the appellate courts of California, authorities from other states relied on by plaintiff are not controlling. (Schneider v. Schneider, 82 Cal.App.2d 860, 862 [2], 187 P.2d 459.)

Second: *Was plaintiff entitled to recover for the expenses incurred in employing an expert witness?*

[4, 5] *No.* Fees paid to an expert witness may be taxed as costs only where the services of such expert are necessary for the proper presentation of the case and where the expert has been appointed by and under the direction of the court. (Bathgate v. Irvine, 126 Cal. 135, 149, 58 P. 442. See 7 Cal.Jur. (1922) sec. 23, page

283.) In the instant case the record fails to disclose that the expert was appointed by the trial court.

Third: *Was plaintiff entitled to his expenses incurred in attending the trial?*

[6, 7] *No.* A party in whose favor judgment is rendered who voluntarily attends the trial is not entitled to recover transportation or hotel expenses. In this case plaintiff voluntarily attended the trial and the foregoing rule is therefore applicable.

In view of our conclusions it is apparent that plaintiff's second amended complaint failed to allege a cause of action against defendant. The trial court properly sustained a demurrer thereto without leave to amend.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

104 Cal.App.2d 560

H. MOFFAT CO. v. KOFTINOW et al.

Civ. 7820.

Sac. 6091.

District Court of Appeal, Third District, California.

June 4, 1951.

Rehearing Denied July 3, 1951.

Hearing Denied Aug. 2, 1951.

H. Moffatt Co., a corporation, brought action against John Koftinow, and others, to restrain defendants' use of word "Manteca" in connection with sale of defendants' beef on ground that it constituted infringement of plaintiff's trade-name "Manteca". The Superior Court, Stanislaus County, H. S. Shaffer, J., entered judgment for plaintiff, and John Koftinow and N. J. Antifae, individually and as co-partners doing business as Manteca Veal Company, appealed. The District Court of Appeal, Van Dyke, J., held that evidence established that word "Manteca" had acquired such special meaning that it made up part of good will and reputation of plaintiff's business, and held that defendants misused trade-name.

Affirmed.

1. Trade-marks and trade-names and unfair competition ⇐70(3)

Where plaintiff meat wholesaler, since 1934, had used word "Manteca" to describe and designate special quality beef, and defendants, in 1948, began using word "Manteca" in labeling beef, defendants misused a trade-name owned by plaintiff. Business and Professions Code, §§ 14400, 14402.

2. Trade-marks and trade-names and unfair competition ⇐21, 67

Any person who has first adopted and used a trade-name is its original owner, and violation of such person's rights therein may be enjoined. Business and Professions Code, §§ 14400, 14402.

3. Trade-marks and trade-names and unfair competition ⇐1

Where a trade-mark and a trade-name both consist of use of words, there is little distinction between them, except that trademark is generally considered as being an emblem of some sort affixed to product, as distinguished from trade-name adopted and used to denominate goods of user.

4. Trade-marks and trade-names and unfair competition ⇐93(3)

In action by meat wholesaler against defendant meat wholesalers to enjoin use of word "Manteca" in connection with sale of beef, evidence established that plaintiff used word to describe special quality beef, that word came to mean plaintiff's particular product, and that word had acquired such special meaning as to make up in part the good will and reputation of plaintiff's business. Business and Professions Code, §§ 14400, 14402.

5. Trade-marks and trade-names and unfair competition ⇐70(3)

Where plaintiff meat wholesaler used word "Manteca" to describe and designate special quality beef, and word acquired such special meaning as to make up part of good will and reputation of plaintiff's business, subsequent use of word "Manteca" in defendants' trade-name of "Manteca Veal Company", would be mis-

use of plaintiff's trade-name, notwithstanding that plaintiff's trade-name, "H. Moffat Company," did not include word "Manteca". Business and Professions Code, §§ 14400, 14402.

6. Trade-marks and trade-names and unfair competition ⇐9

Where plaintiff meat wholesaler used word "Manteca" to describe and designate special quality beef to such extent that word had become trade-name, though word "Manteca" would be geographical in local sense that it is name of a town, statute providing that a trade-mark cannot consist of a mere geographical name, would not deprive word "Manteca" of its character as a trade-name. Business and Professions Code, § 14242.

7. Trade-marks and trade-names and unfair competition ⇐75

Test of whether a similar trade-mark is misleading is not whether upon close examination the ordinary consumer would be deceived, but whether, upon the sort of examination that such person gives, deception would result, whether or not the ordinarily prudent buyer would be deceived.

8. Trade-marks and trade-names and unfair competition ⇐70(3)

Where plaintiff meat wholesaler used label "Moffat's Manteca" on its beef, and defendant meat wholesalers used words "Manteca Veal Co.'s Select" or "Manteca Veal Co.'s Premium" to label its beef, and public had been conditioned by advertising to identify word "Manteca" with plaintiff's beef, the ordinarily careful purchaser would be confused and mislead into buying defendants' beef when he desired to buy plaintiff's beef. Business and Professions Code, §§ 14400, 14402.

9. Trade-marks and trade-names and unfair competition ⇐86

Defense of laches was inapplicable to plaintiff meat wholesaler's action to enjoin defendants' use of word "Manteca" in labeling beef on ground that defendants' conduct constituted infringement of plaintiff's trade-name, where plaintiffs never abandoned nor placed acts which could be construed as intent to abandon, the use of the trade-name "Manteca". Business and Professions Code, §§ 14400, 14402.

10. Trade-marks and trade-names and unfair competition ⇐86

Laches is not ordinarily a defense to application for injunction to restrain infringement on use of duly registered and privately owned trade-mark or trade-name, where public has not been mislead or deceived to its damage by delay in instituting the action.

11. Trade-marks and trade-names and unfair competition ⇐93(3)

In action by plaintiff meat wholesaler, who used word "Manteca" to describe and designate special quality beef, against defendant meat wholesalers to enjoin use of word "Manteca" in labeling its beef, evidence was insufficient to show that plaintiff practiced fraud and deceit upon public in connection with its trade-name. Business and Professions Code, §§ 14400, 14402.

12. Trade-marks and trade-names and unfair competition ⇐85(1)

Where plaintiff meat wholesaler used word "Manteca" to describe and designate special quality beef, obtained from specially fed cattle, fact that most of plaintiff's beef marked "Manteca" did not come from feed yard at city of Manteca was not fraud upon public and would not bar plaintiff's equitable relief of injunction for infringement of trade-name, where word was used to describe quality of the beef and not the town near original feed yard. Business and Professions Code, §§ 14400, 14402.

13. Trade-marks and trade-names and unfair competition ⇐85(1)

Where plaintiff meat wholesale dealer, since 1934, had used word "Manteca" in describing and designating special quality beef, and defendants, in 1948, began using word "Manteca" in firm name and to label beef, and such use of word would result in fraud both upon plaintiff and general public, injunctive decree restraining defendants from using word "Manteca" in designation, description, displaying, advertising, labeling, selling and distributing meat products, was proper. Business and Professions Code, §§ 14400, 14402.

Forrest E. Macomber, Stockton, Hawkins & Hawkins, and Fowler & Fowler, all of Modesto, for appellants.

Cleary & Zeff, Modesto, C. Ray Robinson, Margaret A. Flynn, Merced, for respondent.

VAN DYKE, Justice.

Plaintiff and respondent is a corporation. Defendants and appellants are the members of a partnership doing business under the firm name of "Manteca Veal Company". Neither the corporation nor the partnership maintains or has maintained a place of business in the town of Manteca. Respondent has been engaged in the wholesaling of meats for a great many years. Its principal place of business is and has been the City and County of San Francisco. Appellants are likewise engaged in the wholesaling of meats and their principal place of business is and since 1943 has been the City of Turlock. Formerly their predecessor in the use of the name had a place of business in French Camp, not far distant from the town of Manteca. Until approximately 1943 the defendants and their predecessors dealt exclusively in veal. Thereafter they also dealt in beef and began the prominent use of the word "Manteca" in connection with this product. Claiming that it owned by prior and constant use the property of a trade name in the word "Manteca" when used to designate and describe a certain special quality of meat products and that appellants were guilty of infringement thereof, the respondent brought action to restrain such infringement. Responsive to findings by the court favorable to respondent the court permanently enjoined appellants from in any manner using or employing the word "Manteca" in the designation, description, displaying, advertising, labeling, selling and distributing of their meat products and from in any manner deceiving or misleading the public into believing that the appellants' meat products were those of respondent.

There was substantial evidence to the following effect: That before 1934 and at all times since respondent had developed, promoted and advertised a special quality product known as "Manteca beef" and had spent in excess of $100,000 in such development, promotion and advertising; that cattle from which "Manteca beef" results are specially fed at feed lots and the beef so produced sells at a premium and through the course of the years has become widely known and accepted in the trade and by the public by its trade name "Manteca"; that the beef marketed under the name "Manteca" is specially graded and safeguarded as to quality and character; that with the exception of the defendants no person or corporation has used the word "Manteca" or the words "Moffat's Manteca Fed Beef" or "Moffat's Manteca Baby Beef" at any time in the meat industry, except for one corporation which long ago ceased to do business; that before 1943 the appellants had never marketed beef, but that subsequent to 1943 they had done so, but in doing so did not label their beef carcasses with the word "Manteca" or with the words "Manteca Veal Co."; that in July, 1948, they began using a roller label similar to that which had been long used by respondent which prominently utilized the word "Manteca"; that the word "Manteca" was used in early Spanish California as meaning a layer of fat nearest the hide of cattle, delicate in flavor and texture and widely used for cooking; that the word is also the name of a town near which respondent conducted its early experiments in the special feeding of beef cattle which it has, since 1933, marketed under labels describing it as "Moffat's Manteca Fed Beef" or "Manteca Beef" or "Moffat's Manteca Beef"; that respondent adopted the word "Manteca" as descriptive of these special products because of the meaning of the word in early California speech, and because of the location of the original feed yard near the town of Manteca; that roller branding is so done that a portion of the roller brand will appear on each cut of meat from a carcass of beef sold. The court found in accordance with the foregoing evidence and further found that the roller label used by appellants would and did deceive the public, the trade and the industry into believing that they were purchasing "Manteca Beef" as pro-

duced and sold by respondent and that the right to use the word "Manteca" in respect to meat products, as well as the words "Manteca Fed Beef" and "Moffat's Manteca Baby Beef" has been and is the property of the respondent. It is undisputed that appellants and respondent do business in the same trade area though respondent's products are more widely distributed.

[1-3] Appellants first contend that in so far as respondent's action was based on infringement of a valid trademark no cause of action is stated. It is unnecessary to follow respondent's argument on that assignment of error, for we think that the judgment must be sustained upon the theory that the action involved misuse of a trade name owned by the respondent and imitated to the point of deception by appellants. Any person who has first adopted and used a trade name is its original owner and the violation of such person's rights therein may be enjoined. Secs. 14400 and 14402, Business & Professions Code. Where both consist of the use of words there is little distinction between a trademark and a trade name, except that in respect to the trademark it is generally considered as being an emblem of some sort affixed to the product as distinguished from a trade name adopted and used to denominate the goods of the user.

[4, 5] Appellants assert that respondent's trade name is "H. Moffat Company", while their trade name is "Manteca Veal Co." and that there is no similarity between the two. This assertion clearly misses the point of the inquiry. The evidence is substantial and abundant that with respect to a certain specialized product, that is, a specially fed beef, the respondent has for long sought to describe, and has succeeded in describing, that special product by a trade name involving particularly the use of the word "Manteca". This denominative descriptive process has gone on until, according to the testimony, the trade name has in a public sense come to mean that particular product marketed by respondent. The evidence was sufficient to establish that the word "Manteca" in connection with beef products and in the general market where both respondent and appellants do business, has acquired a fanciful meaning and one that has no connection with the ordinary meaning of the word or with the name of the town, Manteca. We think the evidence further establishes that these meanings have dropped into the background and that now the right to use the word as descriptive of meat products is in the respondent. Indeed, the evidence establishes that this word has acquired such a special meaning that it now makes up in part the good will and reputation of respondent's business. Eastern Columbia, Inc. v. Waldman, 30 Cal.2d 268, 271, 181 P.2d 865.

[6] Appellants contend that the word "Manteca" constitutes a geographical name, that is, the name of a town, and that it cannot, therefore, be the subject of a trademark. It is true that the Business and Professions Code provides that a trademark cannot consist of a mere geographical name, Section 14242, but assuming that the word "Manteca" is geographical in a local sense in that it is the name of a town, still the rule invoked has no application here where the court has found on substantial evidence that the word has become a trade name. Even geographical names may become such. Restatement of Torts, Sec. 720, Comment b.

[7, 8] Appellants contend that the court erred in finding that the roller label used by appellants would confuse their goods with those of respondent and rely upon the rule with respect to such markings that the final test is to place the two markings side by side and from the whole appearance determine whether or not consumers of these products would be deceived. The court found against this contention and we think that its finding is justified. The test is not whether upon a close examination the ordinary consumer would be deceived, but whether, upon the sort of examination that such a person gives, deception would result; that is, whether or not the ordinarily prudent buyer would be deceived. Respondent's roller repeats the words "Moffat's Manteca", whereas appellants' roller repeats the words "Manteca Veal Co.'s Select" or "Manteca Veal Co.'s Premium." In appellants' roller the words

"Manteca" and "Select" are emphasized over the remaining two words, and we think the trial court could find from a comparison of the two labels that the ordinarily careful purchaser, seeing meat marked with defendants' label, might well confuse it with respondent's product, which he desired to buy. In part, the court could have based this finding upon the extent and kind of advertising by means of which respondent has sought to identify the word "Manteca" on its products with itself as the source thereof. The testimony was without conflict that this advertising had been quite extensive and had gone on for a very long time. It consisted of extensive newspaper advertising, of neon signs emphasizing the word "Manteca" in connection with respondent's product, of menus furnished the restaurants, of labels attached to cooked meat by means of toothpicks inserted therein as they were presented for consumption by restaurant patrons, and the like. A public so conditioned to identify the word "Manteca" appearing on the meat, with respondent as producer of the product, could easily be confused by the appellants' roller label as applied to beef carcasses.

[9, 10] Appellants pleaded laches and here contend that this defense was made out as a matter of law. However, in view of the court's findings hereinbefore noted that appellants' conduct constituted infringement, the doctrine of laches is not applicable. "Laches is not ordinarily a defense to an application for injunction to restrain an infringement on the use of a duly registered and privately owned trademark or name. Where the public has not been misled or deceived to its damage by the delay in instituting an action for infringement against the use of a trade-mark or design, mere laches will not furnish a defense." Hall v. Holstrom, 106 Cal.App. 563, 570, 289 P. 668, 672.

"In suits for unfair competition or infringement mere laches in the sense of delay to bring suit does not constitute a defense. Such laches may, under some circumstances, bar an accounting for past profits, even though not sufficient to bar an injunction against a further continuance of the wrong. Laches or delay must be accompanied by circumstances amounting to an abandonment or an estoppel before it constitutes any defense." 63 C.J. p. 526, § 227.

It is plain here that respondent has never abandoned, nor indulged in acts which could be construed as an intent to abandon, the use of the trade name here involved; on the contrary it has vigorously continued building up in the minds of the public served by both the parties here the acceptance of the name as indicating respondent's product.

[11, 12] Appellants contend that the evidence conclusively shows that respondent itself practiced fraud and deceit upon the public in connection with its trade name and is therefore entitled to no equitable relief, but here the contention is clearly against the proven facts. It is true, as appellants contend, that not more than roughly a third of the cattle which respondent has specially fed and which could be marketed as "Manteca Beef", has been fed at the Manteca feed yard maintained by respondent and that the rest have come from other feed yards, where, however, the same method of finishing the beef for market has been followed. But the testimony clearly shows that throughout the emphasis placed by respondent in its use of the word "Manteca" in connection with its products has been upon the quality of the beef as being the product of special feeding and not at all upon the town near which one of its feed yards, and the original one, is located. The court found against the pleaded defense and the evidence fully justifies its finding.

[13] As hereinbefore noted, the appellants were restrained from using the word "Manteca" in the designation, description, displaying, advertising, labeling, selling and distributing of their meat products. This form of injunction was appropiate under the facts of this case. It is apparent that appellants' marketing of their goods in the way in which they have been doing will result in a fraud upon both the respondent and the general public in that it will result in their being marketed as the pro-

ducts of respondent. There appears to have been no good reason from the beginning for appellants' use of the name "Manteca" in its firm name, for they have never conducted their business in the town of Manteca and the court could well infer that from the beginning they were aware of the possibility, if not the probability, that as their market expanded there would be likelihood of confusion. There seems to be no practical way in which an injunction less broad would remedy the injury shown to have been inflicted and extremely likely to continue. The trial court was justified in adopting the form of injunctive decree which it has here used.

The judgment is affirmed.

ADAMS, P. J., and DEIRUP, Justice pro tem., concur.

LENAHAN v. POOLE.

Civ. 7868.

District Court of Appeal, Third District, California.

May 31, 1951.

Rehearing Denied June 26, 1951.

Hearing Granted July 26, 1951.*

Action by Lavona Lenahan against Eula Poole for injuries sustained when plaintiff was struck on the head by a falling board which constituted a part of an awning over the sidewalk in front of defendant's store. The Superior Court, Yuba County, Arthur Coats, J., rendered judgment for plaintiff and defendant appealed. The District Court of Appeal, Adams, P. J., held that where store operator had exclusive right of control of awning over sidewalk in front of store, even though awning was being operated at time of accident by employee of next-door barber shop, pedestrian could rely on doctrine of res ipsa loquitur.

Judgment affirmed.

1. Negligence ⇐121(2)

To authorize application of doctrine of "res ipsa loquitur" accident must be of kind which ordinarily does not occur in absence of someone's negligence, it must be caused by an agency or instrumentality within exclusive control of defendant, and it must not have been due to any voluntary action or contribution on part of plaintiff.

See publication Words and Phrases, for other judicial constructions and definitions of "Res Ipsa Loquitur".

2. Negligence ⇐121(2)

To authorize application of doctrine of "res ipsa loquitur" test of actual exclusive control of instrumentality does not mean actual physical control, but test applies to mere right of control.

3. Municipal corporations ⇐817(2)

Where store operator had exclusive right of control of awning over sidewalk in front of store, and pedestrian was injured when struck by board which fell from awning, even though awning was being operated at time of accident by employee of next-door barber shop, pedestrian could rely on doctrine of res ipsa loquitur in action for injuries.

4. Appeal and error ⇐1008(1)

In action by pedestrian against store operator for head injury sustained when part of awning over sidewalk in front of store fell on pedestrian, whether store operator's evidence dispelled inference of negligence arising from application of res ipsa loquitur doctrine was question for trial court.

5. Negligence ⇐121(2)

Inference of negligence created by application of doctrine of res ipsa loquitur constitutes evidence which may not be disregarded by jury, but is to be weighed and considered as against evidence adduced by defendant in rebuttal thereof.

Hewitt & McBride, Yuba City, for appellant.

Ralph W. Rutledge and Richard E. Patton, Colusa, Robert E. Hatch, San Francisco, for respondent.

ADAMS, Presiding Justice.

This is an appeal from a judgment rendered by the court sitting without a jury,

* Subsequent opinion 240 P.2d 276.

awarding damages to plaintiff who was injured as she was about to enter defendant's store when she was struck on the head by a board which constituted a part of an awning over the sidewalk in front of the store. The awning had been installed by defendant and extended across the front of the store and an adjoining barber shop. It consisted of canvas attached to a roller next to the building and to a board which constituted its outer edge. It was raised and lowered by means of a crank inserted in a gear box. The crank was kept in defendant's store, but a similar one was also kept in the barber shop. Employees of the barber shop operated the awning occasionally when they desired to shut out sunlight from one of their chairs, and it was being lowered by one of the barber shop operators when the board was torn loose from the canvas and fell to the street.

Plaintiff relied upon the doctrine of res ipsa loquitur, to wit, that the awning belonged to defendant, and that such accidents normally do not happen in the absence of negligence on the part of the one owning the object which causes the damage. Plaintiff introduced evidence showing that she was injured when struck by the board which fell from the awning, that the awning was owned by defendant, and that defendant was responsible for the management and maintenance of same. Defendant sought to avoid liability by showing, as a defense, that the awning was being operated at the time of the accident by an employee of the barber shop who was without authority to operate it, and that she was not responsible for his actions; and she argues that the doctrine of res ipsa loquitur does not apply because it was not shown by plaintiff that defendant had *exclusive* control of the awning. The trial court found that defendant Poole "owned, maintained, operated and controlled" the awning.

[1–3] That others than defendant did operate the awning, though without defendant's consent, does not necessarily prevent the application of the rule of res ipsa loquitur. In Ybarra v. Spangard, 25 Cal. 2d 486, at page 493, 154 P.2d 687, at page 691, 162 A.L.R. 1258, the court said that the doctrine of res ipsa loquitur has three conditions: that the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; that it must be caused by an agency or instrumentality within the exclusive control of the defendant; and it must not have been due to any voluntary action or contribution on the part of plaintiff; but it also said: "An examination of the recent cases, particularly in this state, discloses that the test of actual exclusive control of an instrumentality has not been strictly followed, but exceptions have been recognized where the purpose of the doctrine of res ipsa loquitur would otherwise be defeated. Thus, the test has become one of *right of control* rather than actual control. See Metz v. Southern Pac. Co., 51 Cal.App.2d 260, 268, 124 P.2d 670." (Italics added.) Exceptions to the rule that exclusive control of the agency causing injury renders the doctrine inapplicable are then cited. Here defendant Poole claimed to have the exclusive right of control of the awning.

In Rafter v. Dubrock's Riding Academy, 75 Cal.App.2d 621, 626, 171 P.2d 459, and Doke v. Pacific Crane and Rigging, Inc., 80 Cal.App.2d 601, 606, 182 P.2d 284, the Ybarra case is cited and followed. Hearing in the Supreme Court was denied in each case.

The following are some falling awning cases from other jurisdictions. In McHarge v. M. M. Newcomer & Co., 117 Tenn. 595, 100 S.W. 700, 703, 9 L.R.A., N.S., 298, 301, the court said: "It was their duty to exercise a high degree of care and diligence in the construction, maintenance, inspection, and repair of the awning, so as to prevent it from obstructing the street, or endangering those using it; and their failure to do so, or to take proper precautions to protect the public at all times from injury in any way growing out of its maintenance or repair, renders them liable for the damages suffered." In Waller v. Ross, 100 Minn. 7, 110 N.W. 252, 253, 12 L.R.A., N.S., 721, 726, 117 Am.St.Rep. 661, 10 Ann. Cas. 715, the court held that the doctrine of res ipsa loquitur applied where an awning fell and struck a person walking on the sidewalk. It quoted from an English case

to the effect that "'where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen, if those who have the management used proper care, it affords reasonable evidence, in the absence of explanation of the defendant, that the accident arose from the want of care.'" To the same effect is Potter v. Rorabaugh-Wiley Dry Goods Co., 83 Kan. 712, 112 P. 613, 614, 32 L.R.A., N.S., 45, in which the court said: "Those who place or project objects over the street upon which persons are passing and repassing take upon themselves the duty of making them secure, and, if the object falls and injures a pedestrian, the maxim of res ipsa loquitur applies, and the burden rests upon them to show that the fall and injury did not occur through their negligence." Also see Schnur v. State, Ct.Cl., 35 N.Y.S.2d 499; Leighton v. Dean, 117 Me. 40, 102 A. 565, 566, L.R.A. 1918B, 922; McCrorey v. Thomas, 109 Va. 373, 63 S.E. 1011, 1013–1014.

[4, 5] Appellant next argues that the judgment must be reversed because evidence produced by her dispelled the inference arising from application of the doctrine of res ipsa loquitur. However, whether defendant's evidence had that effect was a question of fact for the trial court. In Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 461, 150 P.2d 436, 440, the court said: "It is well settled, however, that when a defendant produces evidence to rebut the inference of negligence which arises upon application of the doctrine of res ipsa loquitur, it is ordinarily a question of fact for the jury to determine whether the inference has been dispelled. Druzanich v. Criley, 19 Cal.2d 439, 444, 122 P.2d 53; Michener v. Hutton, 203 Cal. 604, 610, 265 P. 238, 59 A.L.R. 480." In the Michener case cited in the Escola case we find, at page 610 of 203 Cal., at page 240 of 265 P.: "It is apparent from these latter authorities that it is for the jury, or the court when sitting without a jury, to determine from all the evidence in the case whether the defendant has successfully met and rebutted the *prima facie* case made out by the plaintiff in an action wherein the mere proof of the happening of the accident and the circumstances surrounding it give rise to an inference of negligence. That the inference of negligence created by the application of the doctrine of res ipsa loquitur constitutes evidence which may not be disregarded by the jury, but is to be weighed and considered as against the evidence adduced by the defendant in rebuttal thereof, has been announced in numerous cases. [Citing many cases so holding.]"

Appellant urges, also, that the judgment is excessive and unsupported by the evidence. The evidence as to the extent of plaintiff's injuries and the probable duration of their injurious effects is conflicting. But there is sufficient to support the award made by the court and to justify its denial of a new trial. It is not so large as to indicate passion or prejudice, and in view of the reduced purchasing power of the dollar it is not unreasonable.

The judgment is affirmed.

DEIRUP, Justice pro tem, and VAN DYKE, J., concur.

104 Cal.App.2d 554

SHIMMON v. MOORE et al.

No. 14549.

District Court of Appeal, First District, Division 1, California.

June 4, 1951.

Action by John Shimmon against E. H. Moore and another, individually and as copartners doing business under the firm name of Moore & Roberts, for breach of a plastering contract, wherein defendants filed a cross-complaint, which was stricken on motion. Defendants were subsequently allowed to file a counterclaim, whereupon respondent cross-complained. Judgment for plaintiff in the Superior Court in and for the City of San Francisco, Harry J. Neubarth, J., and the defendants apealed. The District Court of Appeal, Agee, J. pro tem, held that

parol evidence was properly admitted and that any alleged error was cured by instructions of the trial court.

Judgment affirmed.

1. Pleading ⇐26

It is not the appellation given to a pleading but its allegations which determine its legal effect.

2. Pleading ⇐26

The subject matter of an action and issues involved are determinable from the facts alleged rather than the title of the pleading.

3. Pleading ⇐142

Where cross-complaint of defendants was stricken and defendants were allowed to file a counterclaim in substantially the same terms and respondent answered the counterclaim by a cross-complaint for damages, contention that there is no such pleading allowed by law as a "cross-complaint to a counterclaim" was without merit since it matters not what name is given to a pleading. Code Civ.Proc. § 442.

4. Contracts ⇐350(1)

In action by subcontractor against general contractors for breach of a plastering contract, evidence sustained verdict for plaintiff.

5. Contracts ⇐212(2)

A reasonable time is to be read into a contract by law where no time is specified as to when a party thereto is to be called upon to perform. Civ.Code, § 1657.

6. Contracts ⇐176(10)

What is a reasonable time for performance of a contract specifying no time is a question of fact to be determined from the nature of the contract and circumstances.

7. Contracts ⇐349(1)

In action by subcontractor against general contractors for breach of a plastering contract, evidence that cost of labor and materials were rising, though not excusing performance by the plaintiff, was admissible to show how and why plaintiff was damaged by the delay of the defendants in getting the job ready for plastering.

8. Contracts ⇐213(2)

Under a contract by subcontractor to do plastering for general contractors, the latter could not demand that the former perform his work piecemeal.

9. Contracts ⇐322(4)

Evidence justified the jury's implied finding that a reasonable time for performance by plastering subcontractor of contract with general contractors had expired by specified date and that the subcontractor was therefore justified in refusing to perform.

10. Evidence ⇐417(19)

Where plastering subcontract did not fix time for performance by the subcontractor parol testimony with respect to time of performance by the subcontractor was not inadmissible as violating the parol evidence rule. Civ.Code, §§ 1647, 1657.

11. Contracts ⇐212(2)

Where contract does not fix time of performance, a reasonable time is allowed. Civ.Code, § 1657.

12. Contracts ⇐169

A contract may be explained by reference to circumstances under which it was made and matter to which it relates. Civ. Code, § 1647.

13. Evidence ⇐397(1)

Where parol evidence explains and does not vary the written contract, it may be admitted.

14. Evidence ⇐397(1)

Where parol evidence is consistent with and not contrary to the written instrument, it may be admitted.

15. Appeal and error ⇐1053(3)

Any possible error with reference to admission of parol evidence fixing time for performance of a subcontractor under a plastering contract was cured by instruction of the trial court.

16. Trial ⇐260(1)

Failure to give certain requested instructions was not error, where all of them were covered by other instructions given.

William E. Ferriter, James C. Purcell, San Francisco, for appellants.

Louis J. Glicksberg, Melvyn C. Friendly, San Francisco, for respondent, Guernsey Carson, San Francisco, of counsel.

AGEE, Justice pro tem.

This is an appeal by defendants, doing business as Moore & Roberts, from a judgment of $1,964 entered against them following a jury verdict in favor of plaintiff in that amount.

Appellants, as general contractors, entered into a subcontract with respondent whereunder respondent was to do the plastering work on a theater building being constructed at Menlo Park.

Appellants had also become the general contractors for the construction of the mess hall at the Veterans' Home at Yountville. Respondent was the low bidder on the plastering work on this job, and on January 3, 1946, entered into a written subcontract to do this work.

This litigation was commenced on June 6, 1947, by the filing of suit by respondent against appellants for the balance which he claimed was due him on the Menlo Park job. Appellants answered and cross-complained for damages in the sum of $24,187 for breach of the Yountville subcontract. This was upon the theory that when the job was ready for plastering, respondent wrongfully refused to do it and appellants were required to have this done at an expense of $24,187 more than the $19,640 for which respondent had agreed to do the work. This cross-complaint was stricken on motion, Code Civ.Proc. § 442, and appellants were allowed to file a counterclaim in substantially the same terms. Thereupon, respondent answered appellants' counterclaim and "cross-complained" for damages in the sum of $4,000 for breach by appellants of the Yountville subcontract. This is the pleading upon which respondent recovered the aforesaid verdict of $1,964. Appellants contend that there is no such pleading allowed by law as a "Cross-complaint to Counterclaim." At the start of the trial it was stipulated that respondent have judgment on his complaint, which concerned only the Menlo Park job. This eliminated the complaint and answer thereto except as they are involved in the pleading point discussed herein, and in effect placed appellants in the position of plaintiffs proceeding upon the counterclaim as though it was a complaint. Counsel for appellants concurred in this and proceeded thereafter as though plaintiffs.

"Mr. Ferriter [counsel for appellants]: * * * In other words, * * * in so far as positions, then, of the respective parties, * * * Moore & Roberts [appellants], on the counterclaim, become the moving party, and the plaintiff is relegated to defendant's position.

"The Court: Very good.

"Mr. Glicksberg [counsel for respondent]: And in that light, we have agreed that Mr. Ferriter will make the opening statement.

"Mr. Ferriter: Yes."

This order of procedure remained unchanged throughout. At the end of the case, appellants' counsel opened and closed the oral arguments to the jury.

[1–3] The answer to appellants' pleading point is that it is not the appellation given to a pleading but its allegations which determine its legal effect. It matters not what name be given to a pleading. Terry Trading Corp. v. Barsky, 210 Cal. 428, 438, 292 P. 474. "The subject matter of an action and the issues involved are determinable from the facts alleged rather than from the title of the pleading * * *. Moreover, the matter of pleading becomes unimportant when a case is fairly tried upon the merits and under circumstances which indicate that nothing in the pleadings misled the unsuccessful litigant to his injury." Buxbom v. Smith, 23 Cal.2d 535, 542–543, 145 P.2d 305, 308. Here, the appellants at their own suggestion assumed the position of plaintiffs with their counterclaim in effect a complaint. The respondent's "Answer and Cross-Complaint to Defendants' Counter Claim" became in effect "Answer and Cross-Complaint to Complaint" and the "Defendants' Answer to Plaintiff's Cross Complaint to Defendants' Counter-Claim" became in effect "Answer to Cross-Complaint."

By its verdict for respondent, the jury impliedly found that respondent had not breached his contract but that appellants had. The express finding is that respondent had been damaged thereby in the sum of $1,964 as and for loss of profits which otherwise would have been made by respondent.

[4–7] Appellants argue that the evidence is insufficient to justify the verdict. The facts are amply sufficient. Appellants' general contract with the State of California called for the work to begin within 15 days of December 17, 1945, and called for completion with in 275 working days. The testimony shows that this would comprise 55 calendar weeks. Respondent's subcontract was executed on January 3, 1946, and expressly incorporated the general contract therein. Respondent was to begin work when notified to do so by appellants. No time was specified as to when respondent was to be called upon to perform. A reasonable time is therefore read into the contract by the law. Civ.Code, § 1657. What is a reasonable time is a question of fact to be determined from the nature of the contract and the circumstances. Singh v. Cross, 60 Cal.App. 309, 315, 212 P. 946; Ottney v. Finnie, 5 Cal.App.2d 356, 362–363, 42 P.2d 714. Plastering on a building of the type involved commences when the building is 50 per cent to 60 per cent completed. This would mean that respondent could expect to commence his work about 27 to 33 calendar weeks after January 1, 1946, which would be some time in July or August, 1946. Costs of labor and materials were rising. Although this factor would in no way excuse performance by respondent it was certainly pertinent for him to show how and why he was being damaged by the delay of appellants in getting the job ready for plastering. Respondent cannot and does not contend that the rise in costs gave him any ground for nonperformance. Impossibility of performance is not involved and the jury were in effect so instructed.

[8] On November 15, 1946, appellants advised respondent by letter as follows: "* * * we request your presence on subject job 15 December, 1946. Your work is *scheduled* to start on this date * * *." (Emphasis ours.) On December 9, 1946, appellants requested respondent to put a lather on the job. Respondent immediately visited the job and found that it was not ready for plastering. In fact, they were just then pouring the concrete walls and the roof was not up. It cannot be contended that appellants could demand that respondent perform his work piecemeal. Las Vegas Development Co. v. Neighbors, 75 Cal.App.2d 842, 171 P.2d 962. In his pleadings and testimony respondent stated that he was "at all times ready, able and willing to perform said plastering work up to and including the month of February, 1947." Finally, on March 18, 1947, respondent caused one more inspection to be made of the premises and had numerous photographs taken of the conditions then existing. Detailed testimony was given as to why the job was not then ready for plastering.

On March 24, 1947, appellants telegraphed respondent to proceed. Respondent's counsel replied to this by letter, stating that the delay in preparing the job for plastering had been unreasonable and that respondent would not proceed but would demand the profits lost by him by reason of not having been able to proceed within a reasonable time.

[9] The transcript is voluminous but the foregoing should indicate that there was ample evidence to justify the jury's implied finding that a reasonable time for performance by respondent had expired by at least March 24, 1947, and that respondent was therefore justified in refusing to perform.

No direct attack is made upon the amount of the award of $1,964 in favor of respondent. Respondent's testimony as to lost profits would justify an award of double this amount. Appellants simply argue that they were entitled to damages against respondent and that, ipso facto, respondent was not entitled to any damages at all against them.

[10–15] Appellants call attention to certain evidence as being violative of the parol evidence rule. First, respondent

testified as to when appellants' head estimator said the job would be ready for plastering. This was before respondent had put in his bid. Secondly, respondent testified that, in December, 1946, appellants' superintendent told him that the job was not yet ready. Thirdly, respondent testified that one of the appellants told him to go to the State of California and ask for more money "because everybody knew that things had gone up." This latter part was stricken out on motion. Lastly, respondent was permitted to testify concerning what it would cost him to do the job at a time when one of the appellants said he would get the job ready for respondent. All that appellants do in their brief with regard to the foregoing is to quote the testimony and say that parol evidence is not admissible to alter or vary the terms of a written instrument. If we interpret their contention correctly, it is that the testimony complained of attempts to fix the time for respondent's performance contrary to the terms of the agreement. However, the agreement did not fix the time and appellants themselves admit that, "Where the contract does not fix the time of performance, a reasonable time is allowed and that provision of law is deemed written into the contract." If no time is specified for the performance of an act, a reasonable time is allowed. Civ.Code, § 1657. A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates. Civ. Code, § 1647. Where parol evidence explains and does not vary the written contract, it may be admitted. White v. Ardzrooni, 71 Cal.App. 393, 235 P. 461. Where parol evidence is consistent with and not contrary to the written instrument, it may be admitted. Lindsay v. Mack, 5 Cal.App.2d 491, 496, 43 P.2d 350. Any possible error was cured by the foregoing instruction (XXXVI): "You are instructed that no stipulation, promise, agreement or warranty alleged to have been made by the plaintiffs, Moore & Roberts, to the defendant, Shimmon, can be considered by you in determining the issues in this case unless such warranty, stipulation or agreement was itself in writing because it is the law of this state that a written agreement may not be changed, altered, modified, detracted from or added to in any particular whatsoever except by another instrument in writing."

[16] Lastly, appellants complain of the failure to give certain proposed instructions, fourteen in number. All of these were covered by other instructions given. They were so marked by the trial judge. An examination of the record demonstrates that this determination of the trial court was correct.

The case was fairly tried and the jury fully and correctly instructed. The evidence amply sustains the verdict and no errors of law occurred. Judgment affirmed.

PETERS, P. J., and BRAY, J., concur.

104 Cal.App.2d 545

OPPENHEIMER v. CITY OF LOS ANGELES et al.

Civ. 18034.

District Court of Appeal, Second District, Division 3, California.

June 1, 1951.

Hearing Denied July 26, 1951.

Action by John G. Oppenheimer against City of Los Angeles, and others, for damages for false imprisonment. The Superior Court of Los Angeles County, William B. McKesson, J., dismissed plaintiff's complaint and entered order striking plaintiff's amendment to second amended complaint and entered order quashing subpoena duces tecum, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that complaint which stated that defendant police officers had made arrest without warrant for misdemeanor not committed within their presence under which plaintiff was imprisoned to his damage stated cause of action against such officers.

Judgment affirmed in part, and reversed in part.

See also 232 P.2d 30.

1. Municipal corporations ⇐747(3)

A municipality is not liable in damages for torts of its police officers committed while officers are acting in governmental capacity.

2. Municipal corporations ⇐734

A municipal corporation exercises a purely governmental function in maintaining and operating a jail.

3. Municipal corporations ⇐742(4)

Complaint which sought damages from defendant city on ground that plaintiff was wrongfully confined in jail which was overcrowded, unsanitary and not a suitable place for detention and that in confining plaintiff with disreputable characters defendant was guilty of wanton disregard of rights and feelings of plaintiff, did not state a cause of action, since municipal corporation was exercising purely governmental function in maintaining and operating jail.

4. False imprisonment ⇐15(1)

A chief of police is not liable in damages for alleged false imprisonment occasioned by unlawful acts and omissions of subordinates of department unless he has directed such acts or has personally co-operated therein.

5. False imprisonment ⇐20(1)

Allegation in complaint for damages for false imprisonment that chief of police had in effect ratified, condoned and abetted actions of other individual police officers amounting to false imprisonment of plaintiff was insufficient as statement that chief had directed such acts or had personally co-operated in the false imprisonment in such manner as to make him liable for damages therefor.

6. Arrest ⇐63(1)

Arrest of individual by police officer without warrant for misdemeanor not committed in his presence is unlawful.

7. False imprisonment ⇐20(1)

Complaint against police officer for damages for arrest of plaintiff made without warrant for misdemeanor not committed within presence of officer is sufficient if it alleges arrest without process, the subsequent imprisonment, and damage to plaintiff.

8. Pleading ⇐35

Where complaint stated all necessary elements of cause of action for false imprisonment, allegations which were surplusage would be disregarded on general demurrer to complaint.

9. Appeal and error ⇐113(1)

Appeal from order denying plaintiff's motion to vacate judgment which did not present facts for consideration of court other than facts presented upon appeal from judgment itself would be dismissed.

10. Appeal and error ⇐82(1)

An order made after judgment is not appealable when motion or application to set aside order merely asks court to repeat or overrule former holding on same facts.

John G. Oppenheimer, in pro per.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty. and Roland Wilson, Deputy City Atty., all of Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiff from 1) a judgment of dismissal entered pursuant to an order sustaining, without leave to amend, the demurrers of the City of Los Angeles, Clemence B. Horrall, v. Fallon, and W. Erskine to the second amended complaint, 2) an order denying plaintiff's motion to vacate the judgment, 3) an order striking plaintiff's amendment to the second amended complaint, 4) an order quashing a subpoena duces tecum, and 5) an order denying plaintiff's motion to annul the order quashing the subpoena duces tecum. The foregoing defendants, in the order named, are the City of Los Angeles, a municipal corporation, the chief of police, and two police officers of the city.

The first count of the second amended complaint alleges that on November 12, 1948, while on the premises of a restaurant located at 648 South Broadway, "the defendant city by and through its agents and

employees, defendants, Doe One and Doe Two [police officers], and each did, accost, seize and wilfully assault plaintiff, bruise and twist his right arm, and unlawfully arrest him at nighttime, without a warrant and against his will, on a pretended charge of a misdemeanor not witnessed by either of them, and then did turn the plaintiff over to the defendants V. Fallon and W. Erskine, for them to take the said plaintiff to jail"; that "defendants V. Fallon and W. Erskine and each did, in fact then take plaintiff to city jail, on such purported charge of a misdemeanor not witnessed by them, and without a warrant of arrest, and there imprison the said plaintiff and restrain him of his liberty without any right or authority so to do, until the afternoon of the 17th day of November, 1948"; that defendant Clemence B. Horrall, "then Chief of Police of the defendant city, on or about April 6, 1949, in effect ratified, condoned and abetted the cruel and lawless actions of the other non-corporate defendants, and has never repudiated them." The complaint recites the filing of a verified damage claim with defendant city, which claim was subsequently denied. Damage in the sum of $19,000 is alleged.

The second count, directed against defendant city, alleges that on November 12, 1948, and while plaintiff was wrongfully confined, the city maintained and operated a jail which was unfit, overcrowded, unsanitary and not a suitable place of detention; the food was not fit for human consumption and caused plaintiff to become ill; plaintiff was confined in a "stall" with the "dregs and degenerates of human society, as well as thieves and other parasites and disreputable characters"; that in so confining plaintiff the defendant city was "guilty of a wanton disregard of the rights and feelings of this plaintiff," to his damage in the sum of $19,000.

The demurrers of the above named defendants were based on the grounds that the second amended complaint did not state facts sufficient to constitute a cause of action, that a cause of action for false imprisonment was improperly united with a cause of action for assault and battery and not separately stated, and that the complaint was uncertain.

[1–3] The demurrer of the city was properly sustained. A municipality cannot be held in damages for the torts of its police officers acting in a governmental capacity. Stedman v. City and County of San Francisco, 63 Cal. 193; Brindamour v. Murray, 7 Cal.2d 73, 78, 59 P.2d 1009; Wood v. Cox, 10 Cal.App.2d 652, 653, 52 P.2d 565; Abrahamson v. City of Ceres, 90 Cal.App.2d 523, 526, 203 P.2d 98. A municipal corporation exercises a purely governmental function in maintaining and operating a jail. See cases cited Annotation 46 A.L.R. 97; 50 A.L.R. 268; 61 A.L.R. 569. The second count therefore does not state a cause of action.

[4, 5] The demurrer was likewise properly sustained as to the chief of police. A chief of police is not liable in damages for the unlawful acts and omissions of the subordinates of the department unless he has directed such acts or personally cooperated in the alleged false imprisonment. Abrahamson v. City of Ceres, 90 Cal.App.2d 523, 526, 203 P.2d 98; Downey v. Allen, 36 Cal.App.2d 269, 273, 97 P.2d 515. The only allegation with respect to the chief of police was that he "in effect ratified, condoned and abetted" the actions of the other individual defendants. This allegation falls far short of an allegation that he directed such acts or personally cooperated in the false imprisonment.

[6–8] As to respondents Fallon and Erskine, the complaint states a cause of action. A police officer is without right to arrest an individual, without a warrant, for a misdemeanor not committed in his presence. Pen.Code, § 836; Collins v. Owens, 77 Cal.App.2d 713, 718, 176 P.2d 372. Where a complaint is based upon an arrest made without a warrant, for a misdemeanor not committed within the presence of an officer, as it is here, all that need be alleged to charge the unlawful arrest is 1) the arrest without process, 2) the imprisonment, and 3) the damage. Collins v. Owens, supra, 77 Cal.App.2d at page 718, 176 P.2d 372; Kaufman v. Brown, 93 Cal.

App.2d 508, 511–512, 209 P.2d 156. While other matters not necessary to a cause of action for false imprisonment are here alleged, the complaint contains the vital allegations. As against a general demurrer the surplus allegations must be disregarded.

Respondents Fallon and Erskine say that the complaint does not state a cause of action against them for false imprisonment since it charges them only with transporting appellant from the place of his arrest to the place of detention, and not with the actual arrest. This is a misstatement of the pleading. The complaint, in addition to charging them with transporting plaintiff, alleges that without a warrant of arrest, these officers imprisoned him and deprived him of his liberty without any right or authority from November 12, 1948, until November 17, 1948.

Van Fleet v. West American Ins. Co., 5 Cal.App.2d 125, 42 P.2d 378, 43 P.2d 557, cited by respondent in this behalf, is not in point. In that case an officer was held not liable for false imprisonment for an arrest without a warrant of a person when a felony had in fact been committed and the officer had reasonable cause for believing the person arrested had committed it. Consequently, it was held that other persons, not officers, who transported the arresting officer and the plaintiff to the police station were not liable. In the present case, assuming the allegations of the complaint to be true, as we must, the arrest, consequent transportation, and detention were unlawful.

Neither an assault nor a battery is alleged as against the defendants Fallon and Erskine. The allegation that the arresting officers and the jailer assaulted plaintiff is surplusage as to them. We need not, therefore, consider defendants' contention that a cause of action for false imprisonment is united with a cause of action for assault and battery and not separately stated.

A demurrer to plaintiff's amended complaint had been sustained with leave to amend. He then filed his second amended complaint. Defendants then filed their demurrers thereto. Before the demurrers were heard plaintiff filed an amendment to the second amended complaint. On the hearing of the demurrers, an oral motion of defendants, the amendment was ordered stricken from the files. As the amendment did not pertain to the cause of action against Fallon and Erskine, we need not consider whether the court erred in striking it from the files.

Defendants do not urge here that the cause of action stated against Fallon and Erskine is uncertain. We have examined the points made below in that respect and find them to be without merit.

[9, 10] The orders striking the amendment to the second amended complaint, quashing the subpoena duces tecum, and denying plaintiff's motion to annul the order quashing the subpoena duces tecum, being nonappealable, Code Civ.Proc. § 963, are dismissed. The appeal from the order denying plaintiff's motion to vacate the judgment does not present any facts for the consideration of the court other than those which are presented upon the appeal from the judgment itself. It is well settled that an order made after judgment is not appealable where the motion or application merely asks the court to repeat or overrule the former ruling on the same facts. Kent v. Williams, 146 Cal. 3, 11, 79 P.2d 527; People v. Palmer, 49 Cal.App.2d 579, 580, 122 P.2d 114; Payne v. Pullan, 44 Cal.App. 728, 730, 187 P. 127. The appeal from this order is, therefore, dismissed.

The judgment is affirmed as to defendants City of Los Angeles and Clemence B. Horrall. That part of the judgment dismissing the action on the second count of the second amended complaint as to defendants Fallon and Erskine is affirmed. That part of the jugment dismissing the action on the first count of the second amended complaint as to defendants Fallon and Erskine is reversed.

SHINN, P. J., and WOOD, J., concur.

104 Cal.App.2d 551

OPPENHEIMER v. CITY OF LOS ANGELES et al.

Civ. 18227.

District Court of Appeal, Second District, Division 3, California.

June 1, 1951.

Hearing Denied July 26, 1951.

Action by John G. Oppenheimer against City of Los Angeles, and others, for damages for false arrest and imprisonment. The Superior Court of Los Angeles County, Clarence M. Hanson, J., sustained defendant William J. Greenbaum's motion to strike third amended complaint from files and to dismiss action as to him, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that despite additional allegations in amended complaint as to physical mistreatment of plaintiff by defendant Greenbaum while plaintiff was incarcerated in jail, in view of fact that only general damages were sought, amended complaint did not state new or different cause of action from original complaint.

Dismissal reversed.

1. False imprisonment ⇐20(1)

Complaint which set forth unlawful arrest without process, imprisonment of plaintiff and damages, sufficiently stated cause of action for false imprisonment.

2. False imprisonment ⇐19

All who take part in or assist in commission of false imprisonment are joint tort-feasors and may be joined as defendants without allegation or proof of conspiracy.

3. Limitation of actions ⇐127(5)

Where original complaint for false imprisonment was filed within one year after cause of action accrued as required by statute and amendment to complaint included police officer who had acted as jailer as defendant and alleged aggravating circumstances consisting of physical mistreatment, while confined, but merely asked general damages, amendment did not state new or different cause of action and was not barred by statute of limitations. Code Civ.Proc. § 340, subd. 3.

John G. Oppenheimer, in pro. per.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., and Roland Wilson, Deputy City Atty., all of Los Angeles, for respondent.

VALLÉE, Justice.

This is a companion case to Oppenheimer v. City of Los Angeles, Cal.App., 232 P.2d 26.

This is an appeal by plaintiff from a judgment of dismissal entered pursuant to an order granting defendant William J. Greenbaum's motion to strike the third amended complaint from the files and to dismiss the action as to him. The second amended complaint was the first complaint served on Greenbaum, a police officer of the city of Los Angeles, sued as Doe Three.

Plaintiff's second amended complaint is the same as the second amended complaint referred to in our opinion in the companion case. In addition to the matters mentioned in our other opinion, it is alleged that on November 14, 1948, while "incarcerated" in the jail and "deprived of his freedom, the defendant, Doe Three, acting as jailer, wantonly seized the person of the plaintiff by the throat and violently choked the plaintiff and wielded him back and forth, in a fiendish and licentious manner." This complaint sought only general damages for the false imprisonment by the "defendants." Greenbaum's demurrer to this complaint was sustained with leave to amend.

The third amended complaint alleged the unlawful arrest of plaintiff by police officers Doe One and Doe Two without a warrant for a misdemeanor not committed in their presence, the turning over of plaintiff to police officers Fallon and Erskine, who wrongfully "imprisoned" plaintiff in the city jail on a purported charge of a misdemeanor not committed in their presence; and that at all times, while plaintiff was so falsely imprisoned, defendant Greenbaum "wilfully refused to let plaintiff secure his release on bail, upon demand therefor, but that said defendant continued to hold plaintiff in confinement and starved him daily from morning to night." This

complaint seeks general damages against all defendants in the sum of $19,000, and exemplary damages against defendants Doe One, Doe Two, and Greenbaum in the sum of $10,000.

The motion to strike the third amended complaint from the file and to dismiss the action as to Greenbaum was based upon the ground that 1) the third amended complaint sets forth a new and different cause of action as to this defendant, 2) the new and different cause of action is barred by the statute of limitations, and 3) it is sham and frivolous.

The grounds upon which the motion was based are without merit.

[1, 2] The third amended complaint clearly sets forth the essential allegations necessary to sustain a cause of action for false imprisonment against defendants Doe One, Doe Two, Fallon, Erskine, and Greenbaum, namely, 1) the unlawful arrest without process, 2) the imprisonment, and 3) damages. Oppenheimer v. City of Los Angeles, Cal.App., 232 P.2d 26 and cases there cited. All who take part in or assist in the commission of a false imprisonment are joint tort-feasors, and may be joined as defendants without an allegation or proof of a conspiracy. McAlmond v. Trippel, 93 Cal.App. 584, 587, 269 P. 937; Peters v. Bigelow, 137 Cal.App. 135, 139, 30 P.2d 450. See, also, cases cited in Oppenheimer v. City of Los Angeles, Cal.App., 232 P.2d 26. The matters which were alleged in the second amended complaint with respect to the alleged assault on plaintiff by Greenbaum were but statements of aggravating circumstances attendant on the commission of the alleged false imprisonment committed by defendants. That this was the intent of the pleader is clear since no exemplary damages for the alleged assault were sought in that complaint, but only general damages for the false imprisonment. The principle is correctly stated in Great Atlantic & Pacific Tea Co. v. Smith, 281 Ky. 583, at page 595, 136 S.W.2d 759, at page 765, where it was said: "No claim was made in the petition to damages for any physical injury or that such injury resulted from the alleged act of assault. Such allegation of assault and battery, committed in connection with the alleged false imprisonment of plaintiff, may be considered as only an 'aggravating fact' or circumstance attending the defendants' commission of the one cause of action alleged of false imprisonment. The offense of assault and battery may be, it is well settled, treated as being in its nature a form of and akin to the offense of false imprisonment and is embraced therein, or, as asserted by the lower court, is but an aggravating circumstance of or one attendant on the commission of false imprisonment and not to be treated as a separate cause of action, distinct and variant from that alleged of false imprisonment."

[3] We conclude that the third amended complaint does not state a new or different cause of action. The original complaint was filed within one year after the cause of action accrued. Code Civ.Proc. § 340(3). The third amended complaint was not barred therefore by the statute of limitations.

Reversed.

SHINN, P. J., and WOOD, J., concur.

104 Cal.App.2d 710

PEOPLE v. RAMIREZ.

Cr. 4637.

District Court of Appeal, Second District, Division 2, California.

June 12, 1951.

Magriseo A. Ramirez was convicted in the Superior Court, Los Angeles County, Clement D. Nye, J., for possessing heroin and having suffered a prior conviction of robbery, and he appealed. The District Court of Appeal, Moore, P. J., held that the evidence justified the trial court's finding that defendant had possession of a package of heroin with knowledge of its narcotic content.

Judgment affirmed.

1. Poisons ⇨9

Evidence justified trial court's finding that defendant had possession of heroin as charged. Health and Safety Code, § 11500.

2. Poisons ⇨4

To justify conviction of possessing heroin, state was not required to prove that defendant knew his possession thereof to be unlawful, but evidence of defendant's knowledge of nature of contents of package of heroin in his possession was sufficient. Health and Safety Code, § 11500.

3. Poisons ⇨9

In prosecution for possessing heroin, evidence justified trial court's finding of defendant's knowledge of narcotic content of package of heroin in his possession, so as to warrant conviction. Health and Safety Code, § 11500.

Ernest Best, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Gilbert Harelson, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Adjudged guilty of having heroin in his possession, a felony, Health and Safety Code, § 11500, and of having suffered a prior conviction of robbery, a felony, defendant demands a reversal on the ground that the proof is insufficient to justify the judgment. He contends that the evidence does not prove (1) the fact of possession; (2) that the substance was a narcotic; (3) that defendant knew its possession to be unlawful.

[1] Officer Campillo testified that he was within five feet of appellant on the corner of a street intersection of Los Angeles about 3:30 p. m. when he saw four capsules in the right hand of appellant who threw them to the sidewalk; the witness recovered them; they contained whitish powder; he marked them and enclosed them in a larger envelope which he delivered to the property clerk at police headquarters. Appellant's story of how a girl at the street corner handed him the package and he dropped it because he had no knowledge of its contents was rejected by the court. That appellant had the narcotic in his possession with intent to exercise physical control over it, had not abandoned its possession and that no other person had gained possession thereof at the time of his apprehension are facts found by the court. Such evidence constitutes proof of possession when believed by the trier of facts. People v. Gory, 28 Cal.2d 450, 455, 170 P.2d 433; People v. Noland, 61 Cal.App.2d 364, 366, 143 P.2d 86. The police chemist testified that the capsules contained heroin, a narcotic.

[2, 3] Appellant contends that there was no evidence that he had "knowledge or scienter as to the unlawfulness of his possession" of the heroin; that the court can surmise that someone in the group that approached appellant at the street corner "knew the officers were approaching, put the article in appellant's hands, and appellant dropped the same immediately." The officer's testimony which the trial court adopted was that he saw the capsules in appellant's hand and saw the latter cast them upon the sidewalk. The state was not required to prove that appellant knew the possession to be unlawful. All the proof necessary on that point was evidence of appellant's knowledge of the nature of the contents of the package and this was justifiably inferred from the fact of his having the substance in his actual custody. People v. Carlton, 83 Cal.App.2d 475, 477, 189 P.2d 299. If he knew the capsules he held contained a narcotic he necessarily knew of its nature. People v. Physioc, 86 Cal. App.2d 650, 652, 195 P.2d 23. Further proof of his knowledge of the narcotic content of his package was his act of throwing it upon the sidewalk.

In support of his contention as to the insufficiency of the evidence, appellant cites People v. Martin, 76 Cal.App.2d 317, 172 P.2d 910, and People v. Bledsoe, 75 Cal.App. 2d 862, 171 P.2d 950. They are not *apropos*. In the Martin case he had left his automobile parked on the street before he registered in a hotel where he remained four days. During his absence the officers found the car, some movables

of Martin, and a package of marihuana. The conviction was reversed because the trial court refused to instruct the jury that in order to convict they must find the accused knew of the presence of the marihuana in his car. The Bledsoe case is as readily distinguishable.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

104 Cal.App.2d 597

CLARKE v. BATES.

Civ. 14709.

District Court of Appeal, First District, Division 2, California.

June 5, 1951.

Action in ejectment by Juanita G. Clarke, against Mamie Alice Bates. From a judgment of the Superior Court, County of Alameda, A. J. Woolsey, J., in favor of the plaintiff, the defendant appealed. The Court of Appeal, Dooling, J., held that upon death of a life tenant the remainderman's remainder interest became a vested fee and the life tenant's devisee had no interest in property.

Judgment affirmed.

1. Executors and administrators ⇐130(1)

Decedent's personal representative was not entitled to possession, as part of corpus of decedent's estate, of property in which decedent had only a life estate.

2. Remainders ⇐1

On life tenant's death, remainderman's remainder interest became a vested fee and devisee under life tenant's will had no interest in property.

3. Abatement and revival ⇐80

Claim of another action pending was not available to defendant where it was not raised by her answer.

4. Remainders ⇐17(4)

In remainderman's ejectment action against devisee of deceased life tenant, where remainderman's title was proved without contradiction and no evidence to support defense of fraud was produced, trial court properly directed verdict for remainderman

Edward D. Mabson, San Francisco, for appellant.

Richard M. Lyman, Jr., Andrew P. Costelli, Oakland, for respondent.

DOOLING, Justice.

Mattie G. Stanley died in 1943, leaving as heirs Milledge Stanley, her husband, and Juanita Clarke, her daughter. Pursuant to a consent agreement entered into between the two heirs, Milledge and Juanita, the decree of distribution in the estate of Mattie gave to Juanita a parcel of real property in Oakland, together with the furnishings in the house thereon, subject to a life estate in Milledge. On an appeal from this decree, the agreement and the decree were held to be valid. Estate of Stanley, 34 Cal.2d 311, 209 P.2d 941.

In 1944 appellant, a niece of Milledge Stanley, moved in with him on the property in dispute. Milledge Stanley died on November 26, 1949, leaving his entire estate by will to his niece Mamie, appellant herein.

Appellant refused to vacate the premises after Stanley's death and Juanita brought the instant action for ejectment and damages. Defendant's answer denied that plaintiff owned or was entitled to possession of the property; alleged that defendant was entitled to the property under the will of Stanley and, by way of cross-complaint, alleged that Juanita Clarke was not the daughter of Mattie Stanley, but falsely and fraudulently represented herself as such, which resulted in the "consent to distribution".

Upon trial before a jury a directed verdict was ordered returned for the plaintiff.

[1] Most of appellant's points on appeal rest on the premise that as personal representative of Stanley's estate appellant is entitled to the possession of this property

as part of the corpus of that estate. Since Stanley had only a life estate in this property the premise is untenable and the several arguments based upon it need not be separately discussed.

[2] The fact of Stanley's death is undisputed and on his death the remainder interest of respondent became a vested fee. It is therefore immaterial whether the decree previously secured by respondent terminating the life estate is binding on appellant. The judgment is amply supported by all of the other evidence.

[3] The claim of another action pending is not available to appellant since it was not raised by her answer. Martin v. Pacific Southwest Royalties, 41 Cal.App.2d 161, 171, 106 P.2d 443.

[4] The title of respondent was proved without contradiction and no evidence to support the defense of fraud was produced. The court's action in directing a verdict was therefore proper.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

104 Cal.App.2d 629

RUTHERFORD v. REILLY et al.

Civ. 17922.

District Court of Appeal, Second District, Division 1, California.

June 8, 1951.

Action by Bert A. Rutherford against Leo Reilly, and Sleepy Hollow Riding Academy, Inc., a corporation, for injuries sustained in a collision between an automobile and a horse. The Superior Court, Los Angeles County, Joseph L. Call, J., rendered a judgment against both defendants, and Riding Academy appealed. The District Court of Appeal, Hanson, J., Pro Tem, held that the riding academy was not liable for the injuries.

Judgment reversed with instructions.

1. Livery stable keepers ⇨7

Where stable boarded horse for owner in box stall adjacent to riding ring under arrangement by which owner was privileged at any time to go directly to stable and procure horse for any purpose he chose and to exercise it in riding ring, owner was entitled to and was in exclusive possession of horse from moment he opened stable door and possession of stable keeper as bailee thereupon ceased.

2. Livery stable keepers ⇨7

Where stable boarded horse under arrangement by which owner was privileged at any time to go directly to stable and secure horse for any purpose, and horse escaped when owner opened box stall and either jumped fence of adjacent riding ring or bolted through open gate onto highway and then collided with automobile, operator of stable was not under any legal liability for injuries to motorist. Agricultural Code, § 423.

I. Henry Harris, Jr., Robert J. Magdlen and Marvin Wellins, Los Angeles, for appellant.

Tudor Gairdner, Los Angeles, for respondent.

HANSON, Justice pro tem.

The question here presented is whether the operator of a boarding stable for horses is liable for injuries caused by a horse which escaped from its box stall while its owner was in the act of placing a halter on it preparatory to exercising the horse. Unlike the trial judge we fail to see any legal liability.

The controlling facts are undisputed. The defendant Riding Academy is engaged, among other things, in boarding horses for their owners in its stables—adjacent to which is a riding ring. At the time here involved and for some two months prior thereto the defendant was engaged in boarding a horse owned by defendant Reilly under an arrangement by which Reilly was privileged at any time to go directly to the stables and procure his horse for any purpose he chose, among

others, to exercise it in the riding ring on the premises. The Academy kept the horse loose in a box stall access to which was had through a sliding door. On the occasion in question Reilly went directly to the stall carrying a halter and a 50-foot "lunge rope" his purpose being to exercise the horse on the premises. Reilly opened the door but before he had an opportunity to place the halter on the animal it bolted out the open door, through a gate into the riding ring. The Academy's foreman having observed what had happened and seeing Reilly in pursuit of his horse directed Reilly to run in one direction while he ran in another for the purpose of heading the horse off. These efforts apparently excited the horse and he escaped upon the highway either through a gate that was open or by jumping a board fence four feet in height which enclosed the riding ring. On the highway the horse collided with an automobile driven by plaintiff-respondent injuring him. The trial judge sitting without a jury found that the "possession of the aforesaid thoroughbred horse was controlled" by the two defendants; that "immediately prior to the happening of the accident" the defendants "negligently permitted the aforesaid horse to escape from its stable"; that the defendants "negligently permitted said horse to escape from said ring and to stray upon" the highway "unaccompanied by a person in charge or control thereof, or by any person or persons whomsoever, as a direct and proximate result of which said horse collided against" the automobile driven by plaintiff. The court awarded damages against Reilly and the Academy. The Academy alone appeals.

[1, 2] On the facts narrated it is plain that Reilly was entitled to and was in exclusive possession of the horse from the moment he opened the stable door and that the possession of the Academy as bailee thereupon ceased. The court's finding to the contrary is not supported by the evidence. The horse escaped from the stall through the act of Reilly and through no act of the Academy, negligent or otherwise.

Respondent, however, contended below, as he does here, that the Academy was negligent in that it knew that the horse was a "jumper" and so it was under a duty to maintain a fence of sufficient height so the horse could not jump over it and that it was negligent in not so doing. The trial court did not find that the horse jumped the fence or that it went through the open gate leading to the highway. It merely found that the defendants negligently permitted the horse to stray onto the highway. It is a little difficult to understand how it can be said that the horse was straying on the highway when it was running away from its owner and he in "hot pursuit" of it.

The language of the findings indicates that the trial judge was of the view that Agricultural Code, § 423, was violated as respondent contended. The statute has no application to the facts. It merely provides that "No person owning, or controlling the possession of, any live stock, shall wilfully or negligently permit any such live stock to stray upon or remain unaccompanied by a person in charge or control thereof upon a public highway, * * *. In any civil action brought by the owner, driver or occupant of a motor vehicle, or by their personal representatives or assignees, or by the owner of live stock, for damages caused by collision between any motor vehicle and any domestic animal or animals on a highway, there is no presumption or inference that such collision was due to negligence on behalf of the owner or the person in possession of such live stock."

From what has been said it is apparent that no legal liability of the Academy was shown for the injuries sustained by plaintiff, and hence we do not discuss other errors assigned.

The judgment is reversed with instructions to enter judgment for defendant Academy with costs.

WHITE, P. J., and DRAPEAU, J., concur.

104 Cal.App.2d 517

FULLER et al. v. I. MAGNIN & CO.

Civ. 14625.

District Court of Appeal, First District, Division 1, California.

June 1, 1951.

Action by George W. and Jane H. Fuller, husband and wife, and Mrs. John Elstun against I. Magnin & Company, a corporation, to recover for loss of a diamond and platinum brooch in defendant's store. The Superior Court in and for the City and County of San Francisco, I. L. Harris, J., rendered judgment for plaintiffs, and the defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence supported finding that defendant was charged with notice and knowledge of the existence of the brooch on the dress, and that it had failed in performance of duty of exercising reasonable care to protect such brooch.

Judgment affirmed.

1. Bailment ⇐31(3)

In customer's action against women's retail specialty store to recover for loss of a diamond brooch, evidence was sufficient to support finding that store so carelessly and negligently took possession and custody of a dress which had customer's brooch attached to it, and so carelessly and negligently conducted themselves with respect thereto that customer's brooch was lost, for which loss, store was liable.

2. Bailment ⇐31(3)

In customer's action against women's retail specialty store to recover for loss of a diamond brooch, evidence that dress with brooch attached to it lay on a chair in fitting room plainly visible to a person in that room for two hours, that saleslady frequented room during such period, and knew that customer had removed her dress, and that saleslady was familiar with brooch and knew customer was accustomed to wearing it, supported implied finding that saleslady, and hence store, should have known and been aware of presence and location of brooch.

3. Bailment ⇐31(3)

In customer's action against women's retail specialty store to recover for loss of a diamond brooch, evidence that saleslady took dress with brooch attached to it, from fitting room into and across public show room, which was frequented by customers and other members of public, into stock room, frequented by or accessible to more than 40 of store's employees and placed dress on table with dresses belonging to the store, supported an implied finding that loss of brooch was likely to occur if removed from privacy and relative safety of fitting room, and that such loss was foreseeable.

4. Bailment ⇐14(4)

A retailer impliedly invites public to enter his store and do business, and thereby undertakes to exercise reasonable care for protection of property which customer properly brings there and necessarily lays aside while doing business pursuant to the invitation.

5. Bailment ⇐14(4)

Where customer entered women's retail specialty store fitting room, remained therein for approximately two hours trying on various dresses, and saleslady picked up discarded dresses, one of which had been worn into store by customer and had attached to it a diamond brooch, and delivered dresses to stock room, and brooch disappeared, store was liable for reasonable value thereof notwithstanding that saleslady had not noted presence of such brooch on dress when customer entered store.

6. Bailment ⇐14(4)

A storekeeper is charged with exercise of some degree of care for protection of those garments which a customer necessarily removes when he tries on new garments at the store and may be charged with duty of protecting other articles such as money, watch, jewelry which customer carries with him and must lay aside while being fitted, depending largely upon fact that notice of these other articles is brought home to storekeeper.

7. Bailment ⇐33

In customer's action against women's retail specialty store to recover for loss of a diamond brooch which disappeared after customer's dress was taken from fitting

room by saleslady, whether store was chargeable with notice of brooch worn on customer's dress was for jury.

8. Bailment ⇐14(1)

There is nothing about mere acceptance of possession of a suit of clothes for cleaning purposes to put one on notice that pockets contain valuable jewelry or to charge one with duty of safely keeping such jewelry unless and until he learns that he has it in his possession.

9. Appeal and error ⇐173(2)

In customer's action against women's retail specialty store to recover for loss of a diamond brooch attached to customer's dress which had been removed from fitting room by saleslady, store's argument that customer was negligent and that such negligence contributed to loss of brooch which was not pleaded as defense to action nor otherwise presented to trial court for consideration could not be urged for first time upon appeal.

Samuel S. Stevens, Edward W. Rosston and Heller, Ehrman, White & McAuliffe, all of San Francisco, for appellant.

George F. Jansen and Thornton & Taylor, all of San Francisco, for respondents.

FRED B. WOOD, Justice.

Defendant I. Magnin & Company appeals from a judgment rendered against it and in favor of plaintiffs in the sum of $4,612.50, the value of a diamond and platinum brooch, which belonged to plaintiffs George W. and Jane H. Fuller and was in the lawful possession of plaintiff Mrs. John Elstun at the time of its loss in defendant's store.

Appellant claims (1) that the evidence is insufficient to support certain of the court's findings of fact and (2) that the conclusion that appellant became and is indebted to respondents in the sum of $4,612.50 (the value of the brooch) is contrary to law.

Appellant has for many years operated a women's retail specialty store in San Francisco. Appellant handles merchandise of the best quality and highest style, characteristics that are reflected in the prices of the merchandise, and appellant counts among its steady and good customers many of the families best financially situated in the Bay Area. The families of the respondents have been good customers of appellant for many years; respondent Mrs. Elstun and her daughter, Mrs. Hihn, for over 30 years.

On April 30, 1948, Mrs. Elstun visited the store to select some dresses. She went to the third floor and was waited upon by a Miss Peterson, a saleslady who had been in the employ of appellant for about 30 years and had known Mrs. Elstun for about 25 years. Miss Peterson showed Mrs. Elstun several dresses in the public showroom while waiting for the arrival of Mrs. Hihn.

When Mrs. Hihn arrived, Miss Peterson took them into a fitting room, a room about 8 feet square, containing two chairs and a small table, with hooks on the wall on which to hang dresses, and but one door for ingress and egress. It was one of 35 fitting rooms situate along a corridor or hallway which led from the public showroom. Miss Peterson carried with her a number of the dresses and hung them on hooks in the fitting room, and immediately was called to the telephone, returning after an absence of four or five minutes. During Miss Peterson's absence, Mrs. Elstun removed her own dress and placed it on a chair in the fitting room, with the brooch securely fastened to it, and proceeded to try on the dresses which Miss Peterson had left in the fitting room. When Miss Peterson returned, she observed that Mrs. Elstun had her own dress off and was putting on one of the other dresses. Miss Peterson did not notice the brooch. She had seen it time and time again, worn in the store by Mrs. Elstun, and was familiar with it. Asked if she had seen the dress with the brooch attached that day, she said, "No, I did not pay any attention, because I was interested in the dresses I was showing."

Yet, the brooch was in plain view, to anyone in the fitting room, until almost the very end of the shopping interview, which lasted about two hours. Mrs. Hihn remembered seeing the brooch throughout that period, until the very last. She observed the dress, with brooch attached, on the

chair, as late as three to five minutes before she and Mrs. Elstun discovered that the dress was gone.

During all that period, Mrs. Elstun and Mrs. Hihn remained in the fitting room. Miss Peterson came and went, bringing dresses and after their rejection taking them away and bringing others. Upon several occasions she left to answer a telephone call. No other person entered the fitting room during that period. When Mrs. Elstun selected some dresses, Miss Peterson picked up those that remained (some from the chair on which Mrs. Elstun had placed her dress) and left to take them to the stock room. Thereupon Mrs. Elstun looked for the dress she had been wearing and discovered it was gone. Upon Miss Peterson's return, Mrs. Hihn said to her, "You have taken mother's dress, and mother's pin is on the dress"; in respect to which Miss Peterson testified, "Well, I just got so upset about it, I just flew out, in two minutes I was in the stock room; when I got in there, there was her mother's dress hanging on the receiving rod. It had been there two or three minutes." The brooch was gone. The practice in the stock room was that when a dress was returned without a hanger it was placed upon a table and a stock-girl would then place it on a hanger and return it to the racks. Mrs. Elstun's dress was not on a hanger in the fitting room, and when found in the stock room was on a hanger, on the receiving rod.

Upon discovering that the brooch was missing, Miss Peterson called the buyer, who called the manager, and he in turn called the house detective. A search of the fitting room and the stock room was made. The detective questioned the two girls who were on duty at the time in the stock room, and several other employees. He also notified the police. About 35 sales people, three stock-room girls and six models employed by appellant have access to the stock room. The detective questioned about five or six of these employees.

One of the questioned findings is "That it is true that at said time and place, defendant, acting by and through its employee and agent, Miss Peterson took possession, and custody of said diamond brooch, without the consent or permission, express or implied, of plaintiffs." This finding is literally true. Miss Peterson did take possession and custody of the dress with the brooch attached to it. She did so without the consent or permission of Mrs. Elstun. Her act in so doing was that of appellant, her employer, because committed during the course of her employment in showing, fitting and selling dresses to appellant's customer, Mrs. Elstun. Appellant's principal criticism of this finding is that Miss Peterson did not know she had possession of the dress or the brooch when she picked up the dress, with brooch attached, and took them from the fitting room across the public showroom toward the stock room. The answer is that this finding is silent on that score. It says nothing about the knowledge or lack of knowledge with which appellant took possession of the brooch.

[1] The other finding which appellant claims is insufficiently supported by the evidence, reads as follows: "* * * it is true that defendant so carelessly and negligently took possession and custody of said dress to which was attached said brooch, and so carelessly and negligently conducted themselves with respect thereto, that as a direct result thereof, said brooch was lost to plaintiffs; that thereby plaintiffs have been damaged in the sum of $4,612.50, the reasonable value of said diamond brooch." To be considered with this finding is the conclusion of law that "defendant became liable to plaintiffs in the amount of $4,612.50 and plaintiffs are entitled to judgment against defendant in said amount, together with their costs of suit." This finding is supported by the evidence. The conclusion is in accordance with law.

[2, 3] The dress with brooch attached lay on a chair in the fitting room, plainly visible to a person in that room, for a period of about two hours. Miss Peterson frequented that room during that period. She knew that Mrs. Elstun had removed her dress. She was familiar with the brooch and knew that Mrs. Elstun was accustomed to wearing it, having observed her wearing it in the store on many previous

occasions. These facts support the implied finding that Miss Peterson, and hence her employer, the appellant, should have known and been aware of the presence and location of the dress and the brooch on this occasion. Charged with this knowledge, appellant, through Miss Peterson, took the dress and brooch into and across appellant's public showroom (which was frequented by customers and other members of the public as well as appellant's employees) into appellant's stock room (frequented by or accessible to more than 40 of appellant's employees) and placed the dress on a table with dresses belonging to appellant. These facts support an implied finding that loss of the brooch was likely to occur if removed from the privacy and relative safety of the fitting room, and that such loss was foreseeable. Miss Peterson's very agitation, when informed that she had taken the dress away and that the brooch was attached to it, was some evidence of the foreseeability of the risk of loss attendant upon such a removal. Such a loss did in fact occur. The monetary measure of that loss to plaintiffs is $4,612.50, the stipulated value of the brooch.

[4, 5] Here are all the elements of an actionable wrong, especially when considered in the light of the duty which appellant owed Mrs. Elstun as its business invitee. A retailer impliedly invites the public to enter his store and do business, and thereby undertakes to exercise reasonable care for the protection of property which the customer properly brings there and necessarily lays aside while doing business pursuant to the invitation. This principle was expressed in Bunnell v. Stern, 1890, 122 N.Y. 539, 25 N.E. 910, at page 911, 10 L.R.A. 481, in these words: "The defendants kept a store, and thus invited the public to come there and trade. In one of its departments they kept ready-made cloaks for sale, and provided mirrors for the use of customers in trying them on, and clerks to aid in the process. They thus invited each lady who came there to buy a cloak, to remove the one she had on, and try on the one that they wished her to purchase, because the invitation to do a given act extends by implication to whatever is known to be necessary in order to do that act." In that case it appeared that the plaintiff customer removed her cloak to try on a new cloak, placing her own on a counter which was the only available place for it. The clerk serving her and the clerk at the counter saw her do it. After the fitting, she discovered that her own cloak was gone. Defendants had no explanation for the loss. "Under these circumstances we think that it became their [defendants'] duty to exercise some care for the plaintiff's cloak, because she had laid it aside upon their invitation, and with their knowledge, and, without question or notice from them, had put it in the only place that she could. The consideration for the implied contract imposing that duty resided in the situation of the plaintiff and her property, for which the defendants were responsible, and in the chance of selling the garment that she had selected." 25 N.E. at page 911. This duty is like the duty of a proprietor to keep his premises safe for his business invitees. "As the defendants were bound to use ordinary care to keep their premises in a safe condition for the access of business visitors, whether expressly or impliedly invited [citations], so, we think, they were bound to use some care for the property of the plaintiff, properly brought there, and necessarily laid aside by their implied invitation in order to attend to the business in hand." 25 N.E. at page 911. Those principles apply here. Appellant, in making available a fitting room for the exclusive use of the customer, acted consistently with its duty of exercising reasonable care for the protection of the dress and brooch which its customer necessarily laid aside while attending to the business in hand. But appellant, charged with notice and knowledge of the brooch as well as of the dress, failed in the performance of that duty, violated that obligation, when it negligently removed the dress and brooch from this place of relative safety. The trier of the facts has so found and the evidence supports his finding.

Appellant contends that the principle enunciated in the Bunnell case does not apply here because the brooch, unlike the dress, was not property necessarily or so

commonly worn as to be within the scope of the invitation unless its presence were brought specially to the notice and attention of appellant. A brief review of the cases upon which appellant relies will demonstrate the fact that they are not essentially inconsistent with the views we have expressed. In Powers v. O'Neill, 89 Hun. 129, 34 N.Y.S. 1007, the plaintiff went to defendant's store to buy a hat. While trying on hats she took off her own and laid it on a counter, placing her purse underneath the crown of her hat. In a very few minutes the purse disappeared. The storekeeper was held not liable, upon the ground that there was no implied invitation to plaintiff to lay down her pocketbook containing her money. "It was not necessarily laid aside by her for the purpose of trying on the bonnet which she intended to purchase, and therefore there was no implied invitation for her to do so." 34 N.Y.S. at pages 1008–1009. In Barnes v. Stern Bros., 89 Misc. 385, 151 N.Y.S. 887, 888, a customer being fitted to a new suit left his own trousers in a dressing room used by others as well as himself. Also, that room bore a sign, "Not responsible for customers' garments or other property, unless left at the credit desk on this floor." He left his wallet containing $185 in his trousers and made no mention of that fact to the salesman. The wallet disappeared. The court held that under these circumstances the storekeeper became bailee of the trousers but not of the wallet and contents, saying, "In the absence of knowledge that plaintiff had left the money in the dressing room, and in the absence of an invitation, either express or implied, so to do, there could be no bailment." 151 N.Y.S. at page 888. In Feder v. Franklin Simon & Co., Sup., 157 N.Y.S. 895, a customer, about to be fitted for a dress, placed her own clothes and purse on a chair. The purse was lost. The court held that the implied invitation to lay aside the coat (known to be necessary in order to transact the business in hand) did not include an invitation to the customer to lay aside, and an assumption by the storekeeper to assume responsibility for, the purse which she was carrying; she could well have tried on the dress and yet continued to keep the purse in her own custody. In Woodruff v. Painter, 150 Pa. 91, 24 A. 621, 16 L.R.A. 451, a customer, about to try on a new suit, took off his coat and vest and, at the suggestion of the salesman, put his watch in a certain drawer. After a time they returned and opened the drawer, but the watch was gone. The trial court granted the storekeeper a nonsuit. The judgment thereon was reversed upon appeal. The reviewing court considered that there were facts sufficient to go to the jury for determination of the relevant issues, including the question whether or not a watch was such a personal belonging as men usually carry that in the selection of a suit of clothes it is necessary or usual to remove it from the person and lay it aside. In Delmour v. Forsythe, Sup., 128 N.Y.S. 649, the plaintiff customer selected several shirtwaists in the general showroom and was ushered by the sales clerk into a small fitting room. Upon entering the fitting room she removed her watch, which had been attached to her coat by a gold pin, then removed her coat and placed both upon a small table in the fitting room. This was done in full view of the sales clerk, who told her to place her things upon this table while she removed her waist for the purpose of being fitted. Upon the conclusion of the fitting, plaintiff could not find her watch. A judgment for plaintiff was affirmed upon appeal upon the ground that defendant was under a duty to exercise some degree of care in reference to plaintiff's coat and watch. The facts justified a finding by the trial court that the storekeeper exercised no care whatever. In conclusion, the reviewing court said, "I think that the evidence in this case presented merely a question of fact, and that the decision of the learned trial justice is sustained by the evidence." 128 N.Y.S. at page 650.

[6, 7] The trend of these decisions is that a storekeeper is charged with the exercise of some degree of care for the protection of those garments which a customer necessarily removes when he tries on new garments at the store. The storekeeper may be charged with the duty of protecting other articles (money, a watch, jewel-

ry) which the customer carries with him and must lay aside while being fitted, depending largely upon the fact that notice of these other articles is brought home to the storekeeper. In the instant case we cannot say as a matter of law that appellant was not chargeable with notice of the brooch. The evidence shows without conflict that the brooch was plainly visible to appellant's representative for a period of two hours, a representative who knew that this particular customer was in the habit of wearing this very brooch. These facts differentiate this case from the Painter, Barnes and Feder cases and assimilate it to the factual situation which obtained in the Woodruff and Delmour cases.

[8] Then there is the additional element of negligent interference with the dress and brooch. Appellant took them from a place of safety to a place of hazard. That is conduct of an affirmative character (no mere failure to deliver goods upon demand) which the trier of the facts found was the efficient cause of the loss. It is somewhat akin to a misdelivery of goods, which the court in Jacobson v. Richards & Hassen Enterprises, 2 Cir., 172 F.2d 464, observed is in marked contrast to a mere nondelivery of goods on demand.

The California case upon which appellant principally relies is Copelin v. Berlin Dye Works & Laundry Co., 168 Cal. 715, 144 P. 961, L.R.A. 1915C, 712. Plaintiff therein delivered some clothes to be cleaned. In a pocket there was a bag which contained rings and earrings. Defendant discovered and returned the rings but found no earrings. The court held that defendant was not legally responsible for loss of the earrings in the absence of knowledge that it possessed them. That is quite understandable. There is nothing about the mere acceptance of the possession of a suit of clothes for cleaning purposes to put one on notice that the pockets contain valuable jewelry, or to charge one with the duty of safely keeping such jewelry unless and until he learns that he has it in his possession.

[9] Appellant also argues that respondents were negligent and that their negligence contributed to the loss of the brooch. That was not pleaded as a defense to the action, nor otherwise presented to the trial court for consideration. It is too late to present that question for the first time upon appeal. See cases cited in 19 Cal.Jur. 681, Negligence, § 104.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

104 Cal.App.2d 713

FAIRES v. PAPPMEIER et al.

Civ. 18057.

District Court of Appeal, Second District, Division 3, California.

June 12, 1951.

Action by W. R. Faires against Waldron Pappmeier, as administrator with-will-annexed of estate of John A. Pappmeier, and others, to force a partition sale of realty. The Superior Court, Los Angeles County, Myron Westover, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that the evidence supported the finding that the property could be partitioned without injury to the rights of the parties.

Judgment modified and affirmed.

1. Partition ⇐77(4)

Co-owner, who was trying to force the sale of realty, had burden of proving partition in kind was improper. Code Civ. Proc. §§ 752a, 763.

2. Partition ⇐77(4)

In action by co-owner to force sale of realty, evidence supported finding that the property could be partitioned without any injury or prejudice to rights of all owners. Code Civ. Proc. §§ 752a, 763.

John F. Bender and Gizella M. Allen, Los Angeles, for appellant.

Hahn & Hahn, Pasadena, Earl D. Killion, North Hollywood, Haas & Home, Los Angeles, for respondents.

SHINN, Presiding Justice.

Appeal by plaintiff from an interlocutory judgment for partition of four acres of land under which referees would allot one-half thereof to plaintiff and the other half to six defendants, as a unit, "quality and quantity to be relatively considered." The points raised on the appeal are that plaintiff should have been allowed counsel fees and costs incurred in the prosecution of the action, and that the court should have ordered the property sold instead of partitioned.

The court found that the expenses of counsel and costs of the respective parties were not for the common benefit of all the parties and should be paid by the respective parties who incurred the same. Respondents agree with appellant that the finding was in error, that counsel fees and costs should be allowed the respective parties who are able to prove themselves entitled thereto and concede that the judgment should be modified accordingly.

We think the second point is not well taken and that the court did not err in ordering a partition. The land, which is unimproved, has a frontage of 330 feet on Anaheim-Telegraph Road and 571.7 feet on Valley View Street, in the County of Los Angeles, and contains 4.3 acres.

It was alleged in the complaint that the land could not be partitioned without great injury to the property and great prejudice to the rights of the parties. Defendants, Helen A. Madden, owner of an undivided one-tenth interest, Charles E. Haas, owner of an undivided one-twentieth interest, Waldron Pappmeier, as administrator with-the-will-annexed of the estate of John A. Pappmeier, owner of an undivided one-tenth interest, Walter G. Jackson and Mildred Mae Jackson, owners of an undivided one-tenth interest, C. C. C. White and Lula M. White owners of an undivided one-tenth interest, George Cunningham Sharp and Agnes S. Sharp, owners of an undivided one-twentieth interest, answered the complaint and denied that the land could not be partitioned without injury or prejudice to the rights of the parties. Under stipulation of the defendants their interests were considered as a unit. They all opposed the sale of the property.

[1, 2] Plaintiff, who had acquired his interest by tax deeds and was endeavoring to force a sale as against the unwilling defendants, had the burden of proving it was not a proper case for partition in kind. Under our statutory law (Code Civ.Proc., secs. 752a and 763), in cases of co-ownership the court may order a sale only where partition cannot be had without great prejudice to the owners. Forced sales are strongly disfavored. Williams v. Wells Fargo Bank, 56 Cal.App.2d 645, 133 P.2d 73. The court here found that the property can be partitioned without any injury or prejudice whatsoever to the rights of the respective parties. The evidence supports this finding.

The parcel is large enough and so situated as to be suitable for partition. Plaintiff expressed the opinion that the land is worth about $1,000 an acre and that dividing it into two parcels would lessen its selling value fifty per cent. This exaggerated opinion was not supported by any plausible reasoning. Plaintiff was pessimistic over the prospect of finding a buyer. He testified that "It is too small for subdivision at present; it would be difficult subdividing now * * *. It is something entirely a matter of the future, or the man who wants to—the small fellow like myself wanting to develop a small piece of property. It is not desirable to sell a property that * * * as isolated as it stands now." There was no evidence that there were other "fellows," large or small, who were interested in buying.

Defendant Charles E. Haas, who had dealt extensively in real property for many years, testified that beyond a doubt the property could be partitioned in kind, and that it was his desire that the property be not sold. He also expressed the opinion that if the land should be divided into two portions the two pieces would sell for the same amount as the whole.

A witness, Louis R. Vincenti, expressed the opinion that the property was capable of physical division into two parcels, each having equal value. He thought the property might bring up to five per cent more sold as one piece than if sold as two pieces, but he was not sure there would be this difference. A witness appointed by the court to consider the matter thought the property should be sold because partition would involve the expense of referees.

Plaintiff made out a weak case for an enforced sale of the property and has an even weaker appeal. The findings have clear and substantial support in the evidence.

The judgment is modified to provide for the allowance of costs and attorneys' fees in the final judgment, and is affirmed as modified; respondents to recover costs of appeal.

WOOD, J., and VALLÉE, JJ., concur.

In re TARRANT'S ESTATE.

McGRATH, Atty. Gen. et al. v. BROWN et al.

Civ. 18226.

District Court of Appeal, Second District, Division 2, California.

June 4, 1951.

Hearing Granted Aug. 2, 1951.*

Proceeding in the matter of the estate of William Tarrant, deceased. Ben H. Brown, administrator C. T. A. of the estate filed his final account and petitioned for instructions relative to distribution and from an order of the Superior Court of Los Angeles County, John Gee Clark, J., holding that a bequest to pension funds by the testator was invalid, J. Howard McGrath, Attorney General of the United States and others appealed. Ben H. Brown, administrator C. T. A. of the estate, the state of California and John Tarrant, are respondents. The District Court of Appeal, McComb, J., held that bequests by the testator to the pension fund of the Canadian Pacific Railway Company to the pension fund of the Great Northern Railway Company and to the pension fund of the Railroad Retirement Board were invalid.

Order affirmed.

1. Charities ⇐10
Wills ⇐10

A bequest to the pension fund of a Canadian railroad company was invalid as not for a "charitable purpose" where it appeared under the rules of the fund that the contribution would not increase the benefits to the beneficiaries of the fund, nor decrease the contributions from the employees. Probate Code, § 27.

See publication Words and Phrases, for other judicial constructions and definitions of "Charitable Purpose".

2. Charities ⇐20(2)
Wills ⇐10

Under the Probate Code, a Canadian railroad could not be made a beneficiary under the will of a California citizen but it could receive a bequest as trustee if such bequest was for a charitable purpose. Probate Code, § 27.

3. Appeal and error ⇐1008(1)

Where trial judge drew proper inferences from the facts, its finding based thereon was binding upon the appellate court.

4. Charities ⇐37

A bequest by a California citizen to the pension fund of a domestic railroad company was invalid where due to the passage of the Railroad Retirement Act, it did not appear that at the present time, there was any separate pension fund for the railroad, and the fund could not be made available to a veteran's association of the railroad which used contributions to aid needy members and their families under doctrine of "Cy-pres". Probate Code, § 27; Railroad Retirement Act of 1935, 45 U.S.C.A. §§ 215–228 note; Interstate Commerce Act, 49 U.S.C.A. § 1 et seq.

See publication Words and Phrases, for other judicial constructions and definitions of "Cy-pres".

* Subsequent opinion 237 P.2d 505.

5. Charities ⇐10
United States ⇐55
Wills ⇐10

A bequest by California citizen to the pension fund of the Railroad Retirement Board was invalid where the bequest would not change established benefits established by the Act but would serve only to reduce the amount necessary to be appropriated by Congress for the purpose of maintaining the fund since the bequest was in effect one to the Government and was not for a "charitable purpose". Probate Code, § 27; Railroad Retirement Act of 1935, 45 U.S.C.A. §§ 215–228 note; Interstate Commerce Act, 49 U.S.C.A. § 1 et seq.

6. Charities ⇐10
United States ⇐55
Wills ⇐10

Where effect of a bequest by a California citizen to the pension fund of the Railroad Retirement Board was in effect a bequest to the Treasury of the United States and would relieve federal tax payers of some of the burden of taxation bequest was not sustainable as for a "charitable purpose". Probate Code, § 27.

7. United States ⇐55

Under the Code, the United States government may not lawfully be named as a legatee under a will. Probate Code, § 27.

Ernest A. Tolin, U. S. Atty., Clyde C. Downing, Asst. U. S. Atty., Chief of Civil Division and James C. R. McCall, Jr., Asst. U. S. Atty., all of Los Angeles, Blek, Wilcox & Donahue, by C. F. Wilcox, Inglewood, for appellants.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondents.

McCOMB, Justice.

Facts: William Tarrant died January 13, 1946. His last will and testament was duly admitted to probate in the County of Los Angeles and the public administrator was appointed administrator with the will annexed. The pertinent provisions of the will on this appeal are as follows:

"Third: I give and bequeath unto the Pension Fund of the Canadian Pacific Railway Company of the Dominion of Canada with General Offices at Montreal, Canada, one-third of my estate.

"Fourth: I give and bequeath unto the Pension Fund of the Great Northern Railway Company, a corporation, with head offices at St. Paul, Minnesota, one-third of my estate.

"Fifth: I give and bequeath unto the Pension Fund of the Railroad Retirement Board with Headquarters at Washington, D. C., which fund is administered by the Treasury Department of the United States Government, one-third of my estate. If said Retirement Board cannot accept, then this one-third to go to the other two Pension Boards mentioned herein in equal parts."

After paying all debts and providing for all charges and expenses of administration, the administrator filed his first and final account and report and petitioned for instructions relative to the distribution of the estate. After a hearing the probate court held that the bequest to the pension funds by the testator was invalid and since decedent had no known heirs the property should escheat to the State of California.

From such order all of the legatees have appealed.

Question: *Were the bequests invalid under Section 27 of the California Probate Code which reads as follows?*

"A testamentary disposition may be made to the state, to counties, to municipal corporations, to natural persons capable by law of taking the property, to unincorporated religious, benevolent or fraternal societies or associations or lodges or branches thereof, and to corporations formed for religious, scientific, literary, or solely educational or hospital or sanatorium purposes, or primarily for the public preservation of forests and natural scenery, or to maintain public libraries, museums or art galleries, or for similar public purposes. No other corporation can take under a will, unless expressly authorized by statute."

[1, 2] This question must be answered in the affirmative.

First: The bequest to the pension fund of the Canadian Pacific Railway Company

(third paragraph of the will) was invalid for the reason stated by The Honorable John Gee Clark, trial judge, in his opinion as follows:

"The nature of the pension fund of the Canadian Pacific Railway Company is disclosed by the deposition of George Armstrong Smyth, Superintendent of Pensions and Staff Registrar in the service of the Canadian Pacific Railway Company at its Head Office at Windsor Station, Montreal.

"The witness testified that, 'The Canadian Pacific Railway Company Pension Trust Fund is a fund wherein are deposited pension contributions of the employees of the Railway Company and any Railway, Steamship or other Company controlled by Canadian Pacific Railway Company, equal to three (3%) percent of the salary or wages earned by such employees. In addition, contributions are made from time to time by Canadian Pacific Railway Company directly to the Trust Fund.'

"The witness produced, in connection with his deposition, Rules and Regulations of the Pension Department, revised to February 28, 1949. It is there revealed in Rule 31, that 'the establishment and continuance of this system of pensions insofar as the Company's contributions are concerned is purely voluntary on the part of the Company, which reserves the right to alter, suspend or discontinue from time to time and in whole or in part its contribution towards pension allowances or to the Trust Fund * * *'

"The Pension Trust Fund is administered by the Canadian Pacific Railway Company as trustee and as such the Company does not have any direct beneficial interest therein.

"It is clear that under Section 27 of the Probate Code, the Canadian Pacific Railway Company itself cannot be made a beneficiary under the will of a California citizen but it may receive a bequest as trustee if such bequest is for a charitable purpose. (Estate of Henderson, 17 Cal.2d 853, 859, 112 P.2d 605). No charitable purpose is expressed in the bequest to the Pension Fund of the Canadian Pacific Railway Company.

"From an examination of the Rules and Regulations, it does not appear that this contribution would in any way increase the benefits to the beneficiaries of such pension fund, nor decrease the contributions from the employees. It appears that the contributions from the employees are insufficient to maintain the fund and that the Canadian Pacific Railway Company supplements those contributions but is careful to assume no obligation so to do. The practical effect of any contribution to the pension fund would be to relieve the Canadian Pacific Railway Company from making a contribution which it would otherwise make in order to maintain the fund. The direct beneficiary therefore of the testator's bounty in the case at bar would in effect be the Canadian Pacific Railway Company which, by the law of California above referred to, is prohibited from taking."

This pension fund falls within the class described in Estate of Henderson, 17 Cal.2d 853, 859, 860, 112 P.2d 605, 609, reading thus:

"If a group of individuals agree to contribute equal amounts into a fund to be used for the benefit of all, such a group may well be said to be non-charitable in nature because each individual is providing only for his own welfare and does not intend to make a free contribution toward the assistance of others. If an outsider, however, receiving no benefits from the organization, makes a gift to it, that gift may well be a charitable one * * *."

[3] The trial judge drew proper inferences from the facts, holding that the bequest would not be charitable and that its effect would be to relieve the railway company of contributions to the pension fund which would make the railway company the direct beneficiary. This finding is binding upon the appellate court and is in accordance with the holding of this court in California Employment Commission v. Bethesda Foundation, 54 Cal.App.2d 348, 128 P.2d 874. In such case defendant had contended it was organized and operated exclusively for charitable purposes and claimed to be exempt from making contributions under the California Unemployment Insur-

ance Act. In sustaining the trial court's findings to the contrary this court said at page 351 of 54 Cal.App.2d, at page 876 of 128 P.2d, "The general rule that the findings of the trial court will not be disturbed on appeal if the record discloses substantial evidence to support them is applicable to the present appeal. All intendments are in favor of the judgment of the lower court. * * * The trial court could draw reasonable inferences from the facts established and base its findings thereon. In making its findings the trial court was not bound by the articles of incorporation of defendant or the fact that it was organized under section 606 of the Civil Code but it could take into consideration the actual conduct of defendant and its methods of operation."

[4] *Second*: The bequest to the pension fund of the Great Northern Railway Company (fourth paragraph of the will) was likewise invalid for these reasons stated by the trial judge which we hereby adopt:

"There is an association, incorporated in July of 1915 under the laws of the State of Minnesota named the Veterans Association of the Great Northern Railway Company and the purposes of the Association as set forth in its Articles are as follows:

" 'The general purpose and plan of operation of the corporation shall be to cultivate social relations among its members; to create and maintain mutual interest in the common welfare of its members and of the Great Northern Railway Company; to increase and diffuse knowledge of railway science, organization and administration; to establish and administer a pension fund for the benefit of its members; to acquire and take by purchase, gift, devise, bequest, etc. * * *'

"Jacob H. Marthaler, President of the Association, testified as follows:

" 'The funds of the Association are used in part for the actual expenses of running the organization, such as for clerical help in keeping our records, and some of the costs of holding conventions are assumed. Outside of actual expenses of organization, all funds are used to aid needy members, their widows and families. The contributions are received through payment of membership fees and annual dues of $3.00 and in addition to a number of officers of the Great Northern Railway Company have made donations to the Association.'

"He further testified that, 'it is the policy of the Association to assist those members who are receiving small pensions or annuities from the Railroad Retirement Board by making quarterly donations to supplement pensions which are inadequate to take care of their everyday living expenses. We have in the past and are at present assisting members or their widows with the payment of taxes, fuel bills, doctor and hospital bills, medicines, etc. * * *'

"It is the contention of this Association that they are entitled to receive the bequest to the Pension Fund of the Great Northern Railway Company.

"The Railroad Retirement Act enacted August 29, 1935 [45 U.S.C.A. §§ 215–228 note] by the Congress of the United States, provided for a general pension system for all employees of carriers subject to the Interstate Commerce Act [49 U.S.C.A. § 1 et seq.]. It does not appear from any of the evidence before the court that there is any separate pension fund at the present time for the Great Northern Railway Company, although one of the purposes of the Veterans Association of the Great Northern Railway Company at the time of its establishment in 1915 was to establish and administer a pension fund for the benefit of its members.

"The only funds which the Veterans Association of the Great Northern Railway Company have to administer are the dues of $3.00 each from the members plus such donations they may receive from interested persons and the funds are not used for the purpose of paying pensions but to aid needy members and their widows and families.

"The court from such testimony cannot infer that the testator intended by a bequest to a non-existent pension fund of the Great Northern Railway Company that a bequest was intended to the Veterans Association of the Great Northern Railway Company and no reasonable application of the doctrine Cy-pres would appear to make it so apply." (See Estate of Zilke, 115 Cal. App. 63, 66, 1 P.2d 475.)

[5] *Third*: The bequest to the pension fund of the Railroad Retirement Board (fifth paragraph of the will) is likewise invalid for the reasons stated by the trial judge as follows:

"It appears that the funds, therefore, which are appropriated for the purpose of paying the pension benefits under the Railroad Retirement Act are appropriated by Congress in such amounts as shall be estimated to be necessary by the Railroad Retirement Board. The amount of the benefits is fixed by law and any donation to this fund would not change these established benefits but would serve only to reduce the amount necessary to be appropriated by Congress for the purpose of maintaining the fund. In effect then, this bequest is indirectly one to the Government of the United States and not for a charitable purpose.

"The employees contribute to the Treasury of the United States and only those making such contribution are entitled to obtain the benefits of the pension fund and the disbursement of such fund is not based in any way upon need. Therefore the contributions to the pension funds would be no more charitable than a contribution to any mutual benefit society or mutual insurance company.

[6] "The effect of such a bequest to the Treasury of the United States would relieve the federal tax payers but the Legislature of the State of California has prohibited such bequest and therefore the court cannot hold that the relief of federal tax payers is a charitable purpose.

"In the Estate of Burnison, 33 Cal.2d 638, 204 P.2d 330, the matter of bequest to the United States Government is discussed and it is there held that such bequests are not permitted under Section 27 of the Probate Code. That case also discusses the Estate of Hendrix, 77 Cal.App.2d 647, 176 P.2d 398, wherein a bequest to the United States Veterans Administration for the purpose of rendering to disabled veterans of the World War, such aid, comfort and assistance as may to them be most helpful and profitably determined by said organization was upheld.

"The trial court in the case at bar was also the trial court in the Hendrix case and apparently rendered a proper decision but upon the erroneous ground that a bequest to the United States was authorized, for the Supreme Court indicated in the Estate of Burnison that the result in the Hendrix case was proper for the reason that it appeared to be a gift for charitable purposes in pursuance of the intent of the donor.

"In the case at bar, no charitable purpose is particularly set forth in any of the bequests to the pension funds and only in the event that these pension funds could be held to be charitable in their nature could such a bequest be held a bequest for charitable purposes.

"It appears clear to the court that these pension funds do not conform to requirements of charitable bequests but are in effect restricted to a class whose participation in the benefits is based upon contribution made by them directly or indirectly to such fund. It further appears that in fact no advantage would accrue to any of the beneficiaries of the pension funds by way of a reduction of their contributions or by an increase in their benefits."

The foregoing discussion is in accordance with the rule announced in Estate of Rive, 98 Cal.App.2d 104, 105, 219 P.2d 475, 476 (hearing denied by the Supreme Court), wherein Mr. Presiding Justice Peters, speaking for the court, says:

[7] "The sole question presented on this appeal is whether the United States government may, in this state, lawfully be named as a legatee under a will. The precise question has been decided adversely to the respondent by the decisions of the Supreme Court of California in Estate of Burnison, 33 Cal.2d 638, 204 P.2d 330, 331, and Estate of Sanborn, 33 Cal.2d 647, 204 P.2d 335, 336. In the Burnison case the California Supreme Court held that a bequest to 'The United States government U. S. A.' was void under section 27 of the Probate Code, while in the Sanborn case a similar ruling was made as to a bequest to the 'United States of America.' The two cases were appealed to the United States Su-

preme Court, which disposed of both appeals in a single decision, United States v. Burnison, 339 U.S. 87, 70 S.Ct. 503, 94 L.Ed. 675, in which it was held that the interpretation of section 27 of the Probate Code by the Supreme Court of California to the effect that the United States government could not lawfully take by will in this state did not violate the supremacy or the equal protection, or the privileges and immunities clauses of the United States Constitution."

The decree is affirmed.

MOORE, P. J., and WILSON, J., concur.

104 Cal.App.2d 526

In re CECALA'S ESTATE.

KILMARTIN v. NASO.

No. 14702.

District Court of Appeal, First District, Division 1, California.

June 1, 1951.

Rehearing Denied June 30, 1951.

Hearing Denied July 26, 1951.

Proceeding in the matter of the estate of Filippo Cecala, deceased. The Superior Court in and for the County of Santa Clara, M. G. Del Mutolo, J., entered an order setting aside certain realty as a homestead to Thomas F. Kilmartin, as administrator with will annexed of the estate of Rosaria Cecala, deceased, and Sarah Naso, as administratrix with the will annexed of the estate of Filippo Cecala, etc., deceased appealed. The District Court of Appeal, Wood, J., held that administrator of the estate of Rosaria Cecala, deceased, was estopped, by the election of Rosaria Cecala, deceased, to take under will of Filippo Cecala, deceased, her husband, and by her enjoyment of life estate which she obtained by that election, from instituting and conducting proceeding which culminated in order which set homestead apart to administrator.

Order reversed.

1. Wills ⇐800

Where husband devised community realty and homestead to wife for life with power to sell any or all of it necessary to secure sufficient funds for her comfortable living, though husband had no power of disposition over homestead, and after the death of the husband the wife elected to take under the will, and decree distributing the estate in accordance with provisions of the will became final, election by wife became res judicata and immune from attack.

2. Homestead ⇐141(1)

Homestead selected from community property of husband and wife, vested, without administration, in wife on death of husband. Probate Code, § 663.

3. Executors and administrators ⇐315(6)
Wills ⇐782(12)

Where husband devised community realty and homestead to wife for life with power to sell any or all of it necessary to secure sufficient funds for her comfortable living, though husband had no power of disposition over homestead, and after the death of the husband the wife elected to take under the will, and decree distributing the estate in accordance with provisions of the will became final, wife was required to treat homestead as belonging to estate of deceased husband and subject to his testamentary disposition.

4. Wills ⇐781

Though a testator can dispose only of his own property, yet if he assumes to dispose of that which belongs to another, such disposition may be confirmed by such other person by accepting under the will a donation, which necessarily implies ratification and confirmation.

5. Gifts ⇐25

A parol gift of homestead property by husband and wife will be enforced by a court of equity when the circumstances of the gift are such that a like gift of realty not impressed with a homestead would be enforced.

6. Wills ⇐423

The admission of later will to probate did not of itself affect final decree which

distributed property of estate of testator in accordance with provisions of earlier will.

7. Courts ⇐472(4)

Where later will was admitted to probate after final decree distributing property of estate of testator in accordance with provisions of earlier will, devisees and legatees named in earlier will had basis for bringing suit in equity against devisees and legatees under earlier will, to charge the latter as trustees for the former on ground that distributees under earlier will were holding property under decree to which they were not entitled, but such questions belonged in court of equity, and probate court did not possess the requisite machinery to try them.

8. Trusts ⇐373

Where later will was admitted to probate after final decree distributing property of estate of testator in accordance with provisions of earlier will, in event of a suit in equity by devisees and legatees named in later will against devisees and legatees under earlier will to charge the latter as trustees for the former, equities, if any, claimed by devisees and legatees under earlier will could be pleaded, ascertained, and declared. Civ.Code, §§ 2273, 2275.

9. Wills ⇐800

Where husband devised community realty and homestead to wife for life with power to sell any or all of it necessary to secure sufficient funds for her comfortable living, though husband had no power of disposition over homestead, and after the death of the husband the wife elected to take under the will, and decree distributing the estate in accordance with provisions of the will became final, administrator of estate of wife was estopped, after her death, by her election to take under will and by her enjoyment of life estate which she obtained by that election, from instituting and conducting proceedings to have homestead set apart to him as administrator, even though a later will of husband had been probated after election by wife. Probate Code, §§ 660 to 668.

Rankin, Oneal, Luckhardt, Center & Hall, M. S. Hall, Foley, Foley, Andreuccetti & Foley, and James W. Foley, all of San Jose, for appellant.

O. H. Speciale, San Jose, for respondent.

FRED B. WOOD, Justice.

Sarah Naso, as administratrix with the will annexed of the estate of Filippo Cecala, has appealed from an order of the superior court which set aside certain real property as a homestead to Thomas F. Kilmartin, as administrator with the will annexed of the estate of Rosaria Cecala.

Filippo and Rosaria Cecala were husband and wife. During their married life they acquired as community property a 15.-775-acre parcel of land on Redmond Road, and an undivided one-fourth interest in a 23-acre parcel on Almaden Road, Los Gatos, California. On May 1, 1933, a declaration of homestead was filed on the Redmond Road property. Filippo died February 12, 1935, leaving surviving him his widow, Rosaria, and three children, Sarah Naso, Rosa Anzalone, and Rosario Cecala. The widow Rosaria offered for probate a will of Filippo dated September 11, 1933. On January 13, 1937, it was admitted to probate and Rosaria was appointed executrix. Filippo in his will, after directing payment of his debts and funeral expenses, declared that "All the remainder of my property and estate, * * * of which I die seized or possessed, I hereby give to my said wife Rosaria Cecala" (with power to sell any or all of it if necessary to have sufficient funds for her comfortable living) and "at her death the said property shall belong to my said children Sarah Naso, Rosa Anzalone, and Rosario Cecala as follows, to-wit:" $500, to Sarah; the Almaden Road property, to Rosa; the Redmond Road property, to Rosario.

The inventory filed by Rosaria described the Redmond Road property and the one-fourth interest in the Almaden Road property as belonging to the estate of Filippo. Appended to the inventory was a statement by Rosaria as executrix that "So far as the same can be ascertained by me, I find that all of the Real Property of said Estate hereinabove described is community prop-

erty of the Estate of said Deceased within named." In addition, the inventory was verified by Rosaria, who in the verification said that "the annexed inventory contains a true statement of all the estate of said Deceased [Filippo Cecala], which has come to the knowledge and possession of said Executrix * * *"

In her petition for final distribution, Rosaria stated that Filippo during his lifetime executed a homestead covering the Redmond Road property and "That the said widow Rosaria Cecala waives hereby the right of survivorship in said Homestead in order to carry out the purpose and intent of the last Will and Testament of her said deceased husband; and said widow, the petitioner herein, does hereby make her election to take the property given to her in accordance with said last Will and Testament." The decree of final distribution, filed October 7, 1941, found that Filippo did execute the homestead as stated in the petition for final distribution, and further found "that said widow Rosaria Cecala waived her right of selection under the community property laws of California, and of her right of survivorship in said Homestead in order to carry out the purpose and intent of decedent in the said last Will and Testament; and said widow, Rosaria Cecala, made her voluntary election, and did elect to take the property given to her in accordance with said last Will and Testament," and ordered, adjudged and decreed the estate distributed to Rosaria and the children "in accordance with said last Will and Testament of said decedent."

May 9, 1946, a will executed by Filippo February 9, 1935, was filed with the clerk of the court. April 9, 1948, after the death of Rosaria, the 1935 will, after contest and a trial before a jury, was admitted to probate. Sarah Naso was appointed administratrix with the will annexed. By the terms of this will, Filippo gave all his property to his wife for life and then to the three children, stating in the will that if the children should not want the property then it should be valued and "it is to be agreed among the three of my children that Siril [Rosario] Cecala is to have" the Redmond Road property, and if his share is worth more than the shares of his sisters, he to reimburse them for the difference. He gave the Almaden Road property to the two sisters, Rosa and Sarah, in equal shares. This will was attested by four witnesses, including Filippo's wife Rosaria. The order admitting the 1935 will to probate was affirmed upon appeal in Estate of Cecala, 92 Cal.App.2d 834, 208 P.2d 436 (petition for hearing by the Supreme Court denied Sept. 12, 1949). September 16, 1949, Kilmartin filed a petition to set the homestead aside to the estate of Rosaria. The court appointed appraisers, who appraised the property as of the value of $4,715 at the time the homestead was selected, and $11,000 at the time of Filippo's death. They found that the property could be divided without material injury and a portion including the dwelling house set apart to the party entitled to the homestead, which part they appraised at less than $5,000. May 8, 1950, the court filed its order confirming said report and setting aside to the estate of Rosaria the portion which included the dwelling house. That is the order appealed from.

[1] Save for the possible effect of the discovery and probate of the 1935 will, the election which Rosaria made to relinquish her right to the homestead and take under the will was valid and effective. When the decree distributing the estate in accordance with the provisions of the 1933 will became final, that election by Rosaria became res adjudicata and immune from attack.

[2, 3] This homestead, selected from the community property of Filippo and Rosaria vested (without administration) in Rosaria upon the death of Filippo. Probate Code, § 663. Filippo had no power of disposition over this property, yet he undertook by his will to dispose of it and of all property of the community, giving his wife a life interest in all, with the power of sale of any or all of it if necessary for her comfortable living. She, desiring to take that which Filippo tendered her under the will, did so with her attention expressly directed to the fact that she could not accept the benefits given by the will and at the same time assert her right t

the homestead as against the dominion which the testator by his will asserted over the homestead property. If she chose to take under the will, she must treat the homestead as belonging to the estate of Filippo and subject to his testamentary disposition.

[4] It was early ascertained and declared in this state that while it is true that a testator can dispose only of his own property yet if he assumes to dispose of that which belongs to another, such disposition may be confirmed by such other person by accepting under the will a donation, which necessarily implies such ratification and confirmation. Morrison v. Bowman, 1865, 29 Cal. 337, 347–352. That principle has been consistently recognized and applied in later decisions, notably in Noe v. Splivalo, 1880, 54 Cal. 207, and Estate of Emerson, 1947, 82 Cal.App.2d 510, 186 P.2d 734. The greater number of decisions in this line have involved the election of a surviving spouse to take under the will of the other member of the community, relinquishing all right to the community property which the survivor might have independently of the will. The principle applies to any other kind of property right which one must relinquish if he desires to take under such a will. This was recognized in respect to the right of a surviving spouse to a homestead in Williams v. Williams, 170 Cal. 625, 151 P. 10, although the facts of that case did not justify the application of the principle. In the Williams case it appeared that the wife made a declaration of homestead upon her separate property. She died having willed a life estate in all her property to her husband with remainder over to her children. The husband, named as executor in the will, caused it to be probated, and after administration the decree of final distribution awarded all of the property to the husband and children in accordance with the will. However, the homestead property constituted the wife's entire estate at the time of her death. The doctrine of election did not apply in such a case, where the husband stood to derive under the will no property right or benefit which was not already his without administration and independently of the will. That is not this case. This is a case in which the testator assumed to dispose of, as his own, the homestead, the wife's half of the community, and his own half of the community property. By making the election, she stood to benefit to the extent of a life interest in, and a power of sale over, Filippo's half of the community. Her relinquishment of her community property rights by the election which she made to take under Filippo's will, became conclusive after the decree of distribution in his estate became final. See Cunha v. Hughes, 122 Cal. 111, 112–113, 54 P. 535. The same element of conclusiveness attaches to her election to relinquish her right to the homestead property. The fact that community property is subject to administration where as homestead property is not, is of no significance. The principle of election is of broader application. It applies to a son who voluntarily takes under his father's will. He cannot later claim that some of the property given by the will belonged and still belongs to the son. He is estopped by the decree of distribution from urging his title to the property. When he and other parties interested in the will and the estate were before the probate court, he was "then called on to disaffirm the will, and not having then done so, he affirmed it in all its provisions." Noe v. Splivalo, supra, 54 Cal. 207, 210.

[5] Equity applies the principle of estoppel, when circumstances are appropriate, irrespective of the homestead character of the property involved. A parol gift of homestead property by a husband and wife will be enforced by a court of equity when the circumstances of the gift are such that a like gift of real property not impressed with a homestead would be enforced. Kinsell v. Thomas, 18 Cal.App. 683, 124 P. 220. In the Kinsell case the court, upon denying a rehearing, gave special consideration to the Civil Code sections which prescribed the manner in which a homestead may be conveyed or encumbered and held them inapplicable to a parol gift of homestead property made under circumstances which render it inequitable for the donor to disavow the gift. Said the court: "In other words, the enforcement by courts of equity of verbal contracts for the sale or conveyance of land does not proceed upon

the theory that the statutes requiring contracts for that purpose to be in writing are invalid or should not be strictly adhered to, but solely upon the theory that a party entering into a verbal agreement to convey his land to another should not be permitted in equity to withdraw therefrom or refuse to execute such agreement and to shield such act, if the same be unconscientious and will operate as a fraud upon the rights of the other party, behind the statute. And we have been shown no reason, and we frankly confess that we can conceive of none, why an oral agreement to sell land upon which there subsists at the time of the making of such agreement a homestead of married persons, such agreement having been jointly made by the husband and wife for whose benefit such homestead has been declared, should not as well, when the exigencies of the situation justify it, be subject to the government of equitable principles, appropriate in equity to such agreements, as are such agreements involving real property upon which there is no homestead"; and, "As stated, equity does not interpose relief as to such agreements upon the theory that the statutory requirement that they shall be committed to writing in order to be enforceable in law is invalid or should not be complied with. On the contrary, equity regards such statutory requirements as of binding force in law; but, acting *in personam* and operating directly upon the consciences of the parties to such agreements equity merely says that a party to such an agreement will be estopped from standing on his *legal* rights in support of his refusal to carry out his part of the agreement where the circumstances, as here, disclose that such conduct on his part would be unconscientious and work a fraud upon the rights of the other party." 18 Cal.App. at pages 695 and 696, 124 P. at pages 225 and 226.

For like reason, the doctrine of election applies, when the circumstances are appropriate, regardless of the character of the property which the devisee might otherwise claim as his or her own, whether community or separate property or a homestead.

Respondent seeks to avoid these consequences by citation of and quotation from various decisions which we have examined and find inapplicable. For example, respondent relies heavily upon Dixon v. Russell, 9 Cal.2d 262, 70 P.2d 196, in support of his point that Rosaria's written waiver of her homestead right under the 1933 will did not destroy that right because the law prescribes the sole method for the abandonment of a homestead right. The Dixon case did deal with an attempted abandonment of a homestead right by a wife to her husband, as a part of a property settlement between them, but which took the form of deeds separately executed by each to the other. This was deemed an ineffective abandonment, because section 1243 of the Civil Code declares that a homestead can be abandoned only by a declaration of abandonment or a grant thereof executed and acknowledged "By the husband and wife, * * * if the claimant is married". That requires the joint and concurrent execution of one and the same instrument by husband and wife, if living. The same code section requires the claimant, if not married, to execute and acknowledge the instrument of abandonment, and section 1244 of the Civil Code requires the instrument to be recorded in the same office as the declaration of homestead. Rosaria's waiver and declaration of election, included in her petition for distribution, presumably was not acknowledged and, we assume, was not recorded in the same office as was the declaration of homestead. But respondent overlooks the fact that Rosaria's written waiver and election did not operate as an instrument abandoning her homestead right. Instead, it evidenced the fact that she took under the will with knowledge that in so taking she would be estopped from asserting her homestead right. In other words, when she exercised her right of election, the law interposed to prevent her and her successors from later asserting any claim, such as the homestead right, inconsistent with the acceptance of the benefits which she received under the will.

Another case relied upon by respondent is Selinger v. Milly, 51 Cal.App.2d 286, 124 P.2d 631. In that case, a widow acted as executrix of her husband's will, and in-

cluded homestead property in the inventory as a portion of her husband's estate. The decree of final distribution awarded her a life interest in all of the residue of the estate, including the homestead property. Several years later, she petitioned for and obtained an order, under section 1723 of the Code of Civil Procedure (now Prob. Code, § 1170), establishing the fact of her husband's death, for the purpose of establishing of record the fact that the homestead became her sole property upon his death. The court, in the Selinger case, held that the decree of distribution in the estate of the husband did not divest the widow of her title to the homestead property, and that her conduct in the administration of his estate and allegations made by her in that proceeding did not serve to create an estoppel as against her or those claiming under her. Evidently the court did not consider that the doctrine of election was called into play during the course of the administration of that estate, for we find in the opinion no discussion or mention of the doctrine of election. That decision is inapplicable to a case, such as the one before us, in which the doctrine of election clearly is applicable.

Nor is Gaines v. California Trust Company, 48 Cal.App.2d 709, 121 P.2d 28, applicable. That was an action by a widow to cancel a waiver and election to take under her husband's will, which she signed during the lifetime of the husband. It further appeared that she did not read either the will or the waiver, and did not have independent advice in the matter. In view of sections 158 and 2235 of the Civil Code, the court held that the husband and wife occupied confidential relations, that her agreement was presumptively entered into by her without sufficient consideration and under undue influence, and that she was entitled to cancel her written waiver and election. There are no such circumstances in the instant case.

Hart v. Taber, 161 Cal. 20, 118 P. 252, also invoked by respondent, did not involve an election to take under a will. The husband died intestate. The homestead, of course, immediately vested in the wife without administration. She was appointed administratrix of his estate. The final decree in that estate purported to distribute the homestead property, appraised as part of the estate, one-half to the widow and one-half to the children of the intestate. The court found nothing in that situation which estopped the widow from asserting her homestead right. Particularly, it did not involve an election upon her part to take under a will benefits not otherwise available to her.

[6–8] The admission of the 1935 will to probate did not of itself affect the final decree which distributed the property of the estate of Filippo in accordance with the provisions of his earlier will. The admission of the 1935 will to probate was not an attack, direct or collateral, upon the decree of distribution. It was the exercise of a function of the probate court which established the status of the 1935 instrument as a will. With the establishment of that status, the devisees and legatees named in the 1935 will have a basis for bringing suit in equity against the devisees and legatees under the 1933 will, to charge the latter as trustees for the former upon the ground that the distributees under the 1933 will are holding property under the decree to which they are not entitled. Such questions belong in a court of equity. The probate court does not possess the requisite machinery to try them. Estate of Walker, 160 Cal. 547, 117 P. 510, 36 L.R.A.,N.S. 89; see, also, Bacon v. Bacon, 150 Cal. 477, 481, 89 P. 317. In such a suit, equities, if any, claimed by any of the involuntary trustees may be pleaded, ascertained and declared. See Morrison v. Bowman, supra, 29 Cal. 337, at page 353, concerning the right to reimbursement of a person who, believing he was a trustee, expended money necessary for the preservation of the trust estate; Civ.Code, § 2273, concerning indemnification of a trustee; and Civ.Code, § 2275, and Title Ins. & Trust Co. v. California Dev. Co., 171 Cal. 173, 220, 152 P. 542, to the effect that an involuntary trustee, who becomes such through his own fault, has no right to reimbursement.

[9] Rosaria's successor, Kilmartin, administrator of her estate, was estopped, by her election to take under the 1933 will and her enjoyment of the life estate which she

obtained by that election, from instituting and conducting the 1949–1950 proceeding under sections 660 to 668, inclusive, of the Probate Code which culminated in the order which set the homestead apart to him as such administrator.

The order appealed from is reversed.

PETERS, P. J., and BRAY, J., concur.

104 Cal.App.2d 640

MORTGAGE FINANCE CORP. et al. v. WATSON.

No. 15011.

District Court of Appeal, First District, Division 1, California.

June 11, 1951.

Mortgage Finance Corporation and May C. Stock applied to the Superior Court in and for the City and County of San Francisco for a restraining order against D. D. Watson, real estate commissioner of the State of California, to restrain contemplated hearings on charges of violations of the Business and Professions Code. The Superior Court, Theresa Meikle, J., denied the application and petitioner appealed. The Court of Appeals held that since judicial relief was not sought until three days before the scheduled hearing, which had already started, and publicity had already been given to the charges, the extraordinary relief should not be granted.

Petition denied.

1. Administrative law and procedure ⇐229, 658, 674

Normally a litigant must exhaust administrative remedies, by awaiting ruling of administrative agency, appealing if such ruling is adverse, and seeking supersedeas.

2. Administrative law and procedure ⇐232 Injunction ⇐108

Inadequacy of administrative remedy where irremedial injury is threatened, may, in limited cases, warrant immediate injunctive relief.

3. Administrative law and procedure ⇐233 Injunction ⇐108

The District Court of Appeal would not issue restraining order against hearing in proceeding to discipline licensee of Real Estate Commissioner, sought on theory that hearing would irreparably ruin licensee's credit and standing, where licensee did not seek judicial relief until three days before the hearing, hearing had already started and publicity had already been given to the charges.

Johnson, Morgan, Thorne & Speed, San Jose, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Deputy Atty. Gen., for respondent.

PER CURIAM.

On April 3, 1951, Petitioner was served with an accusation filed by a Deputy Real Estate Commissioner, charging petitioner with certain violations of the provisions of the Business & Professions Code and requesting discipline of petitioner, a licensee of respondent. A hearing before a hearing officer was set for today, June 11, 1951, and is presently going on. On June 8, 1951, petitioner applied to the Superior Court for a restraining order to restrain the contemplated hearing on the ground that respondent was illegally proceeding to hold the hearing and that petitioner would suffer irreparable injury if such illegal hearing was held. The Superior Court denied the application and petitioner has appealed. It now asks this Court to restrain the hearing on the ground that such restraint is necessary in aid of our appellate jurisdiction. It is claimed that an appeal from any order of the respondent would be worthless because, so it is averred, if such illegal order is issued the credit and standing of petitioner would be irreparably ruined.

[1–3] The normal procedure would be for the petitioner to await a ruling of the administrative agency, to appeal if adverse, and to seek before the agency or the courts a supersedeas. Normally a litigant must exhaust these administrative remedies before he can properly appeal to the courts. See United States v. Superior Court, 19

Cal.2d 189–194, 120 P.2d 26. Of course the inadequacy of the administrative remedy where irreparable injury is threatened may, in certain limited cases, warrant immediate injunctive relief, but we do not think petitioner has brought itself within this exception.

In view of the fact that judicial relief was not sought until three days before the scheduled hearing, and in view of the fact that the status quo now existing is that the hearing has already started, and in view of the fact that the alleged irreparable injury is in our opinion more imaginary than real, in that publicity has already been given to the charges and to the fact that a hearing is being held, we do not think this court should grant the extraordinary relief requested.

The petition for a restraining order is denied.

104 Cal.App.2d 463

CITY OF SANTA MONICA v. JONES et al.

MAC MONNIES et al. v. PACIFIC ELECTRIC RY. CO. et al.

Civ. 17839.

District Court of Appeal, Second District, Division 1, California.

May 28, 1951.

Hearing Denied July 26, 1951.

Action by the City of Santa Monica, a municipal corporation, against Georgina S. Jones, and others, to condemn realty for a public use. Alice Mac Monnies, and others, filed a cross-complaint against the Pacific Electric Railway Company, a corporation, and others. The Superior Court of Los Angeles County, Carl A. Stutsman, J., entered judgment for plaintiff and Georgina S. Jones and Alice Mac Monnies and others, appealed. The District Court of Appeal, Hanson, J., held that the heirs at law of the original grantors of the land in question were not entitled to any part of the award in the condemnation proceeding.

Affirmed.

1. Eminent domain ⇐158

In condemnation proceeding by city, the heirs of the original grantors of property who answered the complaint and filed a cross-complaint had the burden of proving that some one or more of the conditions in the deed by their predecessor grantors had been breached and that such breach either had or would in a reasonably short time have vested the property absolutely in them, or that for some other legal reason the property would in a reasonably short time have vested in them.

2. Railroads ⇐72(3)

A provision in a deed that the grantee railroad should maintain a depot in a particular city was a mere covenant and not a condition to deed.

3. Railroads ⇐82(3)

Where deed contained a provision that the grantee railroad should maintain a depot in a particular city, and railroad maintained a freight depot at the location which was entirely suitable for passengers, there was no breach of the provision of deed, even though it be considered a condition rather than a mere covenant.

4. Railroads ⇐82(3)

Where deed to a railroad company contained a condition that the grantee should not erect any structure on the property granted except depot and such other structures as may be needed strictly for railroad purposes, the fact that railroad permitted a signboard company to erect and maintain upon the property certain advertising signboards was not such a breach of the condition so as to authorize the heirs of the grantor to base a reverter of the realty on that ground.

5. Railroads ⇐82(3)

Where deed to railroad contained a condition that no part of the property conveyed should be used for anything but railroad purposes, but neither the grantors, during their lifetimes, nor any of their heirs at law demanded that the railroad should cease and desist from allowing a bus company to park its buses on the property, the alleged breach of condition did not amount to a forfeiture. Civ.Code, § 1442.

6. Deeds ⇐168

The grantor has reasonable time after breach within which to declare a forfeiture or elect not to declare a forfeiture, and if he fails to declare a forfeiture within that time, his power to do so has expired.

7. Railroads ⇐82(3)

Where deed to a railroad company contained a provision that the railroad should run a daily passenger train from one city to another, in view of fact that the line over the property in question was mainly a commuter line, the fact that the railroad failed to run a daily passenger train on six holidays during a year did not constitute such a breach of one of the conditions as to declare a forfeiture.

8. Railroads ⇐82(3)

Where deed to a railroad company contained a provision that the land in question should only be used for railroad purposes, the fact that the railroad was not aware of the fact that the Federal Postal Department made use of a portion of the property as a part of its helicopter landing field did not constitute a breach of a condition so as to authorize a forfeiture.

9. Reversions ⇐1

Upon the occurrence of a stated event in a grant of a fee-simple defeasible estate, the possibility of reverter takes effect in possession immediately, whereas on the happening of events named in a deed of fee simple subject to a condition subsequent, the possessory interest does not vest immediately in the one having the right of entry for breach of condition, for he must elect to terminate granted estate before possessory interest vests in him.

10. Eminent domain ⇐156

Where deed to railroad contained conditions that the property should not be used except for railroad purposes, that the railroad should run daily passenger trains and that no structure of any kind should be erected on the property except strictly for railroad purposes, but grantors and their heirs had never sought a re-entry of the property by declaring a forfeiture of any of the conditions, the heirs of grantors were not entitled to any part of the condemnation award for the taking of a part of the property.

11. Eminent domain ⇐156
Railroads ⇐82(3)

Where deed to a railroad contained a provision that property should revert whenever the railroad shall cease to run daily passenger trains over the railroad, the fact that the railroad had at several times in the past applied to the proper authorities for permission to cease operating its railroad for passenger travel did not mean there was a probability of a reverter within a reasonable time so as to entitle the heirs of the grantor to an award in a condemnation proceeding by the municipal authorities.

12. Adverse possession ⇐114(1)

In condemnation proceeding by a city, the evidence sustained finding of trial court that a railroad had adverse possession of a strip of property which was part of the land condemned.

H. Kenneth Hutchinson, Los Angeles, for appellants.

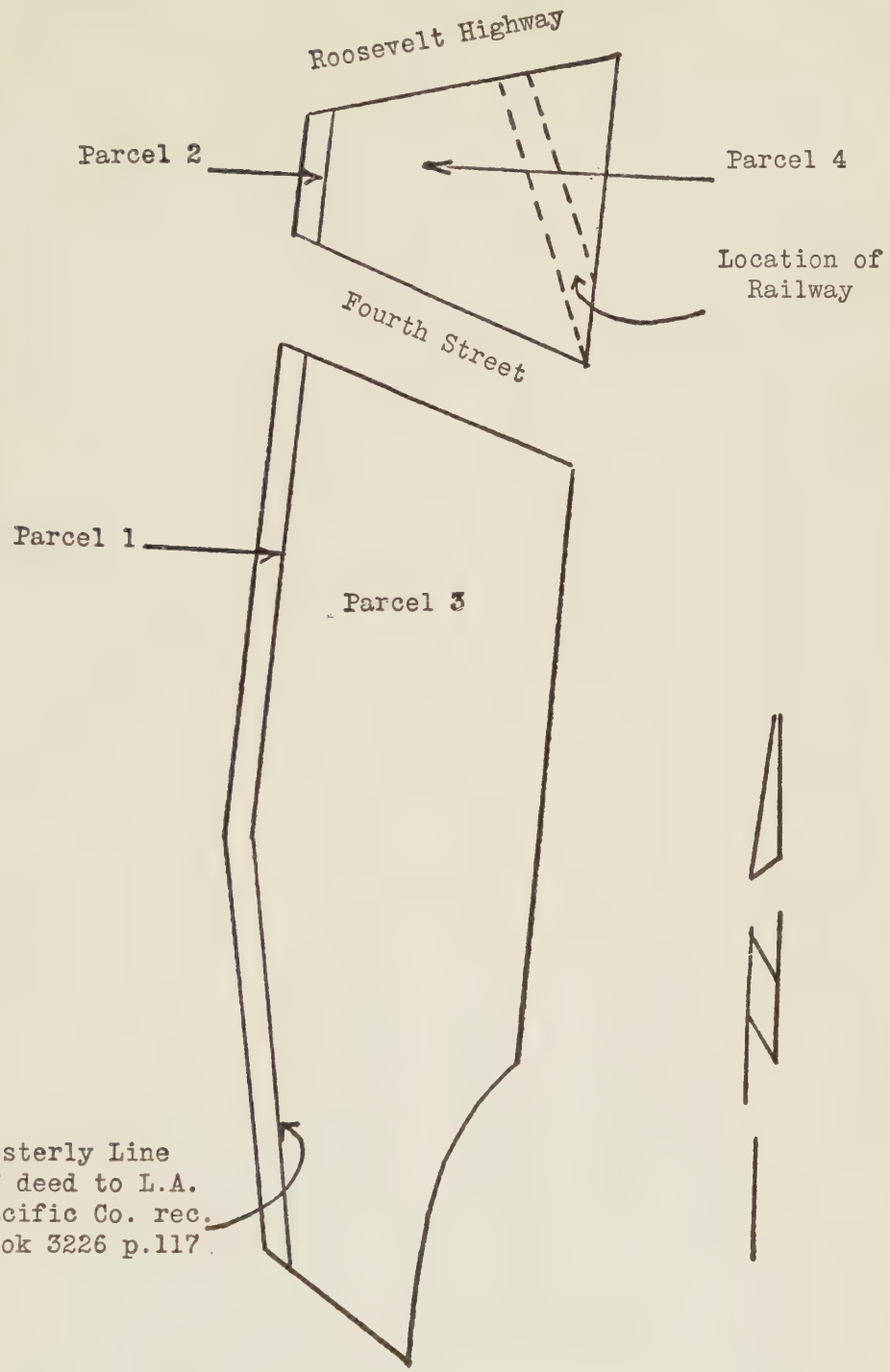
Royal M. Sorensen, Santa Monica, Hill, Farrer & Burrill, Los Angeles, for respondent City of Santa Monica.

C. W. Cornell and E. D. Yeomans, Los Angeles, for respondents Pacific Electric Ry. Co. and Chemical Bank & Trust Co.

HANSON, Justice pro tem.

The *first* question presented in this action, instituted by the City of Santa Monica to condemn realty for a public use, is whether the heirs at law of the original grantors, of what is conceded by the parties to be a fee on condition, are entitled to all or a part of an award for the taking of a part of the property, upon the theory that because of a breach of the conditions of the grant, the heirs were revested with the estate granted or if not so vested that the vesting thereof was so imminent as to permit of their participation in the award.

The *second* question presented is whether the respondent, Pacific Electric Railway Company—a co-defendant with the appellants in this case—has by adverse possession become vested with title to a strip of land 15 feet in width along the entire westerly side of the land which was conveyed by the grantors. On the map set forth


Roosevelt Highway
Parcel 2
Parcel 4
Location of Railway
Fourth Street
Parcel 1
Parcel 3
Westerly Line of deed to L.A. Pacific Co. rec. Book 3226 p.117
N

herein the strip as condemned is shown as parcels 1 and 2; the property conveyed by the fee simple defeasible deeds, to the extent it is condemned, is shown as 3 and 4. The remaining portions of the property (not condemned), described in the deeds, lying to the north, the east, and the south are not shown on the map. It is enough to say that at the date of the condemnation the rail line of Pacific Electric ran wholly on the uncondemned property, except as it crossed parcel 4.

The trial court found (1) that the fee to the 15-foot strip (parcels 1 and 2) was vested in respondent railway by adverse possession and (2) that the appellants were not entitled to participate in the condemnation award as to parcels 3 and 4.

[1] Inasmuch as neither the grantors nor their heirs had made a re-entry of the premises or its equivalent prior to the condemnation action or sought or procured an adjudication for conditions broken, the heirs who answered the complaint in condemnation and filed a cross-complaint against Pacific Electric Railway Company had the burden of proving (1) that some one or more of the conditions in the deeds had been breached and that such breach either had or would in a reasonably short time have vested the property absolutely in them, *or* (2) that for some other legal reason the property would in a reasonably short time have vested in them. We pass to a recital of the facts which are germane to a decision of the case.

In the early nineties the City of Santa Monica was without any rail connection with the City of Los Angeles or with any other town or city. In that decade the Southern California Railway Company, a predecessor of the respondent Pacific Electric Railway Company, decided to build and operate a "steam railroad" with one terminus in Santa Monica and another in Los Angeles. To that end it sought and procured in 1895–6 properties for its use in the then town of Santa Monica, including the property involved in this action, with the exception of the 15-foot strip heretofore mentioned. The property described in the deeds, one to the Southern California Railway Company and the other to one Gillis, both predecessors in title to the respondent, was owned by U. S. Senator John P. Jones of the state of Nevada, one of the early founders of Santa Monica, and Arcadia B. de Baker of Los Angeles. The record does not disclose that either of these two joint grantors owned any other property, except the 15-foot strip adjacent to the property conveyed, which would in any manner have been benefited, by the conditions or covenants in the deeds. Likewise it is not shown that the present heirs at law who are here 55 years later seeking to participate in the award, own any property in Santa Monica which would be affected by any breach of the conditions of the deeds.

With these preliminary facts stated, we think it important, before we turn to a consideration of the language used in the deeds, to observe that appellants contend that the third deed (Exhibit "C") conveys a fee simple (of parcels 3 and 4) subject to conditions subsequent and not a fee simple determinable. As respondents' position is that the contention, on the facts of this case, is a matter of no importance, we are not called upon to decide the question and so will assume for the purposes of this case that appellants' contention is correct.

The first deed (Exhibit "A") executed and delivered in 1895 by the grantors Jones, et al., granted merely an easement of a right of way to the railway subject to certain covenants or conditions subsequent; the second deed executed in 1896 by the same grantors conveyed a fee simple subject to conditions to one Gillis, who in turn conveyed by a deed the fee he obtained to a predecessor of the railway company on substantially the same covenants or conditions subsequent. As the conditions or covenants in each of these three deeds vary but slightly, and are entirely immaterial, we state the conditions of the second deed *as the composite deed* amplified by the specific language of the first, to the extent it is not detailed by the language in the second deed. The second deed conveys a fee simple title to the land described as parcels 3 and 4, and other land not involved in the condemnation, upon the condition [stated here most favorably to appellants] that the

property conveyed should "revert" to the grantors, their heirs or assigns (1) whenever the property shall not be used for railway purposes or (2) whenever the railway company shall cease to run daily passenger trains over the railroad or (3) whenever any structure of any kind is erected by the company on the property except depots and such other structures as may be needed strictly for railroad purposes. The further "condition" that the railway shall construct and maintain a substantial and suitable depot within the limits of Santa Monica to accommodate passengers in getting on and off from the trains, and that such trains shall stop at said depot for the purpose of discharging and receiving passengers, is, we think, plainly a mere covenant and not a condition. See Hawley v. Kafitz, 148 Cal. 393, 83 P. 248, 3 L.R.A.,N.S., 741.

At the time the deeds were executed and delivered it was contemplated by the parties thereto, as heretofore indicated, that a steam railroad would be built with a terminus in Santa Monica and another in Los Angeles. Nevertheless, instead of operating trains propelled by steam the railway company operated from the beginning trains propelled by electricity.

One of the so-called conditions of the deed, as has been stated, is that the railway company should run daily passenger trains and for a breach thereof for a period of six months, the property conveyed by the grantors was to "revert" to the grantors or their heirs. As early as the year 1925, while both the original grantors apparently were alive, the railway company reduced its passenger trains to one train running daily (except Sundays and holidays) from Santa Monica to Los Angeles and another running from Los Angeles to Santa Monica. That this action on the part of the railway company was never classed as a breach by the original grantors and was never so charged by their heirs at law prior to the condemnation is the record in this case. "Daily" has always meant every day in the week except Sunday. Hence, there never was a breach of this particular condition set forth in the deed, unless it be the failure to run a passenger train, each way, *on holidays*, a point we shall discuss later in this opinion.

[2, 3] The so-called condition that the railway company should maintain a depot in Santa Monica is a mere covenant and not a condition. If it may be regarded as a condition it was, even so, not breached. This for the reason that the company maintains a freight depot, entirely suitable for passengers, seeking to get on or alight from the present daily train operated by it. The so-called condition does not require that the depot shall be used exclusively for passengers. Moreover, it may be added that the train stops at almost every street crossing to enable passengers to board or disembark from the trains. What more is required to meet the condition mentioned is far from clear to us. The "condition," which we regard as being a mere covenant, sought to impose upon the railway company an obligation to provide, as a minimum, one depot in Santa Monica where passengers could alight from or embark upon a steam train. Steam trains during the period in question stopped only at one depot in each town. We read the requirement of the deed with respect to its background and intent. So read it is plain that in no event has there been a breach of the "condition."

[4] Another "condition" set forth in the deeds is that the railway company should not erect any "structure" on the property granted "except depot and such other structures as may be needed strictly for railway purposes." It is contended that this condition was breached in that the company ever since 1927—a period of a quarter of a century—has, for a consideration, permitted a signboard company to erect and maintain upon the property, advertising signboards removable by order of the railway company upon 24 hours' notice. These signboards it is contended violate the condition in the deed against the erection of "structures" on the property not "needed strictly for railway purposes." Not only are we of the view that signboards were not "structures," within the meaning of that word as used in the deeds, but even if they were the heirs were not entitled to base a reverter of the realty on that ground, short of any

demand for a removal thereof. The contention of appellants is quite too tenuous to merit serious or any consideration by this court. It may be added that the cases quite generally regard a billboard as not being in the category of either a building or structure. Cf. Ritter v. Thompson, 102 Ark. 442, 144 S.W. 910; Lawson v. Georgia Southern & F. Ry. Co., 142 Ga. 14, 82 S.E. 233.

[5, 6] It is next contended that as the railway company since 1937 has leased from month to month a part of the property to a bus company for the purpose of parking its busses thereon such use is contrary to the condition that no part of the property should be used for any but railway purposes. Again it appears that the grantors did not during their lifetimes nor have their heirs at law since, demanded that the railway company should cease and desist in so doing. We decline, as did the trial court, to raise this type of an alleged breach to the dignity of a breach giving rise to a forfeiture. Civ.Code, sec. 1442. Moreover, as there is no showing by the heirs that they or their predecessors ever objected to the use of the property to park busses or place signboards thereon we see no occasion to grant any relief, whether they knew or did not know of the alleged violations. If they were not interested enough to check the property for violations, the violations must be regarded as altogether too minor to warrant forfeiture of a fee property, where, as here, it does not appear that any harm or benefit could accrue to the heirs. After all the law does not regard mere trifles as a basis for forfeiture. As has been said the sound rule, as gathered from the decisions, is that "The grantor has a reasonable time after breach within which to declare a forfeiture or to elect not to declare a forfeiture; if he fails to declare a forfeiture within that time, his power to do so has expired." 1 Simes, Law of Future Interests, sec. 170, p. 307.

[7] There remains for consideration with respect to the alleged breaches of conditions in the deeds, the contention that the failure of the railway company to run a passenger train on six holidays in each year constitutes a breach of one of the conditions. In their statement of the facts of the case appellants say: "The Santa Monica Air Line (the rail line here involved) handled a large volume of freight business but little passenger service. Since 1920 the traffic on respondent Railway lines had materially decreased. Said Line in particular had never handled substantial passenger traffic. The total number of passengers carried by this line on a week day does not average over forty, and only two or three of those boarding the train in the City of Santa Monica. On Sundays and holidays there is no need for passenger service because these passengers are strictly commuters and do not work on these days. There is also little passenger traffic on Saturday * * *. Respondent Railway maintains other railway and bus service to Santa Monica. It operates a daily service on these lines, including Sundays and holidays. These lines, however, do not pass through any of the property sought to be condemned although they pass reasonably close. * * * The operation of the Santa Monica Air Line has been an unprofitable venture to respondent Railway for a long period of time. For this reason said respondent has made several attempts to secure consent of governmental authorities to abandon passenger service on said line, but up to October, 1949, all have been denied * * *." The last application by the railway (we may interpolate) was made in 1944. In view of the foregoing concession it is plain that the alleged breach is too infinitesimal upon which to base a forfeiture.

[8] A further contention made by appellants is that the conditions of the deeds were breached because the federal postal department made use of a portion of the property as a part of its helicopter landing field. The short answer to the contention is that the evidence discloses the railway company was not aware of the trespass. The company owed the heirs no duty of policing the property against the federal government.

From what has been said it follows that the trial court rightly held that the breaches of the conditions as claimed did not warrant basing a forfeiture thereon and as a result

a so-called "reverter" of the property to the appellants. Further reasons sustaining the trial court in its denial of any relief to appellants as to parcels 3 and 4 will now be discussed.

In their answer to the City's complaint the appellants, as defendants, aver they are the owners of an undivided three-quarters interest (the heirs at law entitled to the remaining ¼ interest did not answer or appeal) in fee simple to the property described in the deeds, "subject to an easement in favor of Pacific Electric Railway Company, * * *, such easement to cease whenever * * * [it] shall cease to use said real property for railway purposes, or shall cease for a period of Six (6) months to run daily passenger trains over the railroad across said land." Accordingly, it will be observed that these defendant-appellants fail to aver that other provisions in the deed such as those that pertain to the erection and maintenance of residences or other structures, or such as require the construction and maintenance of a depot are "conditions." Moreover, the answer does not aver that any of the so-called conditions narrated in the deeds have been breached by the railway company. Instead the answer avers (ignoring the conveyance of the fee to Gillis) that appellants are the owners in fee simple of the property described in Exhibit "A," subject to an easement in favor of the railway company, "such easement to cease whenever the * * * Company, * * *, shall cease to use said real property * * *." This averment, as a matter of pleading, and as an admission concedes, that there had been no breach of condition or, if so, it is plain that appellants must be regarded as having waived it. To us it seems altogether probable that appellants filed their answer upon the assumption that as the property taken by the City could not in the future be used for railway purposes by the company, for that reason alone it would revert and hence that appellants were entitled to the award. Any such view, however, is directly contrary to well-established principles of law.

As was said in the leading case of First Reformed Dutch Church v. Croswell, 210 App.Div. 294, 206 N.Y.S. 132, 133, appeal dismissed 239 N.Y. 625, 147 N.E. 222, "The premises in question did in fact cease to be used for the maintenance of a church thereupon. The disuser, however, was a consequence, not a cause, of a loss of title by the plaintiff. The city of New York, in condemnation proceedings, seized the estate of the plaintiff. It also seized the rights of reverter belonging to the heirs at law of the grantors. The seizure was of the entire title, wherever resident by a single act of appropriation. There was, therefore, no interval of time between the seizure of the plaintiff's estate and the seizure of the rights of the heirs at law during which there could have been a reverter of title to the heirs because of a church disuser of the premises necessarily consequent upon the seizure. At the moment of appropriation there had been no disuser. At that moment the estate then being enjoyed by the plaintiff might have continued forever. At that moment the rights of the heirs were mere possibilities. These rights possessed no value capable of estimate. All that was valuable was the estate of the plaintiff. Therefore the money paid in by the city of New York should be paid to the plaintiff as for the only thing of value taken."

The case up to this point has been dealt with upon the assumption, as contended for by the appellants, that a mere breach of a condition subsequent (which breach we have shown did not exist) prior to a condemnation of the property automatically permits the heirs at law of the grantor of a fee simple on condition subsequent to participate in the award of a subsequent condemnation. The rule of law is otherwise.

[9] In the case of a fee simple defeasible the grantor and his heirs are vested with the "possibility of a reverter," as distinguished from a "right of entry" or a "power of termination" in the case of a fee simple subject to a condition subsequent. 1 Simes, Law of Future Interests, sec. 159, p. 282; sec. 163, p. 291; sec. 176, p. 318; 2 Powell on Real Property, sec. 188, p. 40; sec. 191, pp. 56–57; 1 Tiffany, Real Property, 3d ed., secs. 188 and 220, pp.

302 and 383. In short, upon the occurrence of the stated event in a grant of a fee simple defeasible the possibility of reverter takes effect in possession immediately, "whereas, on the happening of the event named" in the deed of a fee simple subject to a condition subsequent "the possessory interest does not vest immediately in the one having the right of entry for breach of condition; he must elect to terminate the granted estate before a possessory interest vests in him." 1 Simes, Law of Future Interests, sec. 177, p. 321.

[10] Accordingly, if in the instant case there had been a material breach of one of the conditions subsequent the heirs would nevertheless have had no right to participate in the award. This for the reason that the breach is not regarded as a breach until the grantor or his heirs elect to give it the requisite vitality by declaring a forfeiture based thereon by the process of reentry or its legal equivalent. Unlike a fee simple defeasible upon a limitation the breach does not cause an automatic reverter. "Strictly speaking, the owner of a right of entry for breach of condition has a privilege and a power, but not a right; for by a right, in the strict sense, is meant a claim which may be enforced by legal machinery of some sort, and until an election to forfeit for breach, there is no such right in the one for whose benefit the condition exists. * * * By reason of the analysis just stated, there is a tendency to call the right of entry for breach of condition a power of termination." 1 Simes, Law of Future Interests, sec. 159, pp. 281–282. Such is the usage employed by Rest., Property, secs. 57 and 155, and 2 Powell on Real Property, sec. 188, p. 40; sec. 191, pp. 56–57; sec. 281, p. 482; and 1 Tiffany, Real Property, 3d ed., secs. 188 and 220, pp. 302 and 383.

The Restatement of Property, sec. 16, classes both the historical fee simple defeasible and the fee simple on condition subsequent as being fee simple defeasibles. The distinction between the two types of estate, as we have set them forth above, is, however, maintained. See secs. 23 and 24 and secs. 44 and 45.

A further contention urged upon us is that even though we hold that the heirs could not participate in the award by reason of breaches of the conditions prior to the condemnation, nevertheless, they should be held to have a right of participation, because a reverter of the property was probable in a reasonably short time. The "right" is predicated upon the language found in Rest., Property, sec. 53, comment c, and upon three decisions.

In one of these cases, a decision by a judge of the U. S. District Court in United States v. 2,184.81 Acres of Land, D. C., 45 F.Supp. 681, the court applied the rule of the Restatement holding that reverter was imminent and hence that the heirs should participate in the condemnation award. Another of the cases is likewise by a U. S. District Judge who in United States v. 1119.15 Acres of Land, D. C., 44 F.Supp. 449, quotes the Restatement, sec. 53, comment c, but held on the facts before him that no reverter was imminent. The remaining case cited by appellants is Romero v. Department of Public Works, 17 Cal.2d 189, 109 P.2d 662, 665. The latter is not an authority for appellants' contention. In that case the court expressed in substance the views we have here stated, but it held that as the plaintiffs, the holders of the "right of re-entry" and as owners of adjoining lands, had by their complaint alleged a special value in the land taken, distinct from the value of the land, they had stated a cause of action and, hence that the demurrer to the complaint was erroneously sustained. See comment on the case in 29 Cal.L.Rev. 525. We have no such case here.

[11] The contention of appellants just mentioned rests on the fact that respondent has several times in the past and as late as in 1944 applied to the proper state and city authorities for permission to cease operating its railway for passenger travel. In that connection we observe that all such applications have been denied. Nevertheless, appellant appears to be of the view that the railway will succeed in getting the necessary approval and if not will be forced to abandon the property because of the loss

it is sustaining in running its passenger car. The trial judge on the facts before him found there was no probability of a reverter within a reasonable time. We think on the record before him he could not have found otherwise. It is here of interest to note that the Supreme Court of New York in Carter v. New York Cent. R. Co., Sup., 73 N.Y.S.2d 610, 613 (affirmed by the Court of Appeals), 298 N.Y. 540, 80 N.E.2d 671, a case almost on all fours with the instant case, said:

"From the contentions made in the condemnation proceeding and the demand of the plaintiffs for admission of facts, it would appear that plaintiffs are basing their claim of breach of condition upon the fact that in the year 1926 defendant applied to the Transit Commission for permission to discontinue the Inwood Station and the Transit Commission granted this permission. The fallacy of this contention is, of course, that mere permission to discontinue is not the equivalent of actual discontinuance. The fact is that the Inwood freight station was not actually discontinued until several months after title to the property in controversy vested in the City of New York.

"If plaintiffs are relying on the vesting of title in the City as a breach of the condition, their contention must fail. First Reformed Dutch Church v. Croswell, 210 App.Div. 294, 206 N.Y.S. 132, appeal dismissed 239 N.Y. 625, 147 N.E. 222.

"The first occasion upon which any of the heirs of Samuel Thomson claimed title to the property in question was the filing of their claim in the condemnation proceeding on November 30, 1929. There is no claim that any reentry or attempted reentry was made at any time prior to the vesting of title in the City on April 30, 1927. As of the date of vesting in the City the title of this property was in the defendant.

"It is well settled that upon condemnation of property held by a grantee under a deed containing a condition subsequent providing for a reverter to the grantor or his heirs upon termination of the use provided in the condition, the rights of reverter of the grantor and his heirs are terminated and the award for the property belongs to the grantee. First Reformed Dutch Church v. Croswell, supra; Matter of City of New York (Cortelyou), 265 App.Div. 875, 38 N.Y.S.2d 25, affirmed 291 N.Y. 501, 50 N.E.2d 645.

"In the First Reformed Dutch Church case it was held that even in the case of a deed containing a limitation rather than a condition, the condemnation terminated the rights of reverter of the heirs."

We come to the second question mentioned in the opening paragraph of this opinion —the question whether respondent railway by adverse possession was vested with a fee simple absolute title to the 15-foot strip along the entire westerly side of the land which was conveyed by the deeds.

The record discloses that the railway company's predecessor took possession of this strip at the time it took possession of the land conveyed by the deed executed in 1895. As the deed conveyed property by a metes and bounds description it is quite possible that the parties intended to include the strip in the deed, but through error in the description it was not included. The fact that neither the grantors nor their heirs ever exercised any possession or control of the strip nor did they ever pay any taxes thereon tends to aid the inference.

[12] But be that as it may it appears a deed executed on January 21, 1925 (duly recorded) by the Southern Pacific Railroad Company to the Pacific Electric Railway Company conveyed in terms not only parcels 3 and 4, but also parcels 1 and 2 although the Southern Pacific had no record title to the strips, parcels 1 and 2. The record further shows that not only did the Pacific Electric continue to exercise dominion and control over these strips, but it annually paid the taxes thereon. Parcels 1 and 2 were used generally by the railway in the same manner as it used parcels 3 and 4 and accordingly, as the trial court found and rightly concluded the railway was vested with the fee thereof. We do not pause to discuss other defenses raised by respondent railway such as waiver, laches and the statute of limitations.

Appellants' further contention that the findings, in some instances, are not as specific as they should be, and partake of the nature of conclusions is true, but nevertheless, is not prejudicial. The court did find the factual situation as we have narrated it and that was sufficient.

The judgment should be and it is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

104 Cal.App.2d 477

NEWT OLSON LUMBER CO. v. CUE et al.

WHITEHURST et al. v. FIDELITY & CASUALTY CO. OF NEW YORK
(two cases).

GARDNER v. CUE et al.
Civ. 7869, 7870.

District Court of Appeal, Third District, California.
May 28, 1951.

The Newt Olson Lumber Company and R. Gardner, respectively, brought separate actions, consolidated for trial, against Clifford Cue, Joel A. Whitehurst, William S. Whitehurst, and Elizabeth Whitehurst to foreclose materialmen's liens on premises of defendants Whitehurst, who filed cross-complaints against The Fidelity and Casualty Company of New York on a surety bond. From a judgment of the Superior Court, Merced County, H. S. Shaffer and R. R. Sischo, JJ., for plaintiff, defendants Whitehurst and cross-defendant appealed. The District Court of Appeal, Peek, J., held that failure of defendants Whitehurst to file notice of completion of work by defendant Cue, as contractor for alterations on premises occupied by defendants Whitehurst, within ten days after such completion, extended the time for filing of plaintiff's lien claims from 30 to 90 days after completion of the work.

Judgment affirmed.

1. Mechanics' liens ⇐132(1)

Failure of owners of premises, occupied by them when contractor completed alterations thereof, to file notice of completion within ten days thereafter, extended time for filing claims for materialmen's liens from 30 to 90 days after such completion under statute. Code Civ.Proc. § 1187.

2. Appeal and error ⇐656(3)

Where record on appeal discloses no findings by trial court on material question as to which evidence was undisputed, District Court of Appeal will amend trial court's fact findings by adding findings of facts shown by such evidence. Code Civ. Proc. § 956a.

Linneman, Burgess & Telles, Dos Palos, for appellants.

D. Oliver Germino, Los Banos, Ray W. Hays, Fresno, for respondents.

PEEK, Justice.

The present controversy arose out of an action instituted by plaintiff Olson Lumber Company against the defendants Cue and Mr. and Mrs. Whitehurst to foreclose a materialmen's lien, and a second action filed by plaintiff Gardner against the same defendants to foreclose a mechanic's lien. The Whitehursts answered and cross-complained against the Fidelity and Casualty Company on its bond. Upon stipulation the two cases were consolidated for trial and following a judgment favorable to plaintiff, the bonding company and the Whitehursts separately appeal to this court.

The record shows that defendant Cue, a licensed building contractor, undertook to make certain major alterations on the premises occupied by the Whitehursts. Cue also contracted with the lumber company for certain building materials to be used in said alterations, and said materials were so furnished by the company. He made a similar agreement with plaintiff Gardner, who agreed to and did furnish certain materials and the plumbing fixtures necessary on the Whitehursts premises.

Plaintiffs' complaint alleged, and the defendants' answers admitted, that a notice of completion was filed on October 11, 1948. It was further alleged and also admitted that the lumber company first furnished materials between February 21 and September 13, 1948 and that Gardner furnished materials and labor between March 4 and September 6, 1948. The Whitehursts by their cross-complaint alleged that The Fidelity and Casualty Company was jointly liable under its surety bond for any loss they might sustain by reason of the filing of such liens, and prayed that said company be brought in as a party defendant, and the court so ordered.

At the trial it was established by uncontradicted testimony that all work on the building was completed by September 18, 1948. It was also established by uncontradicted testimony that the Whitehursts were in possession of the premises during the latter part of August 1948. There was further uncontradicted evidence that plaintiffs' notices of claims of lien were mailed on November 9 and recorded on November 12, 1948. At the conclusion of the hearing the court, among other things, found that on November 9, 1948, plaintiffs filed their claims of lien; that such liens were recorded on November 12, 1948, and that each of the plaintiffs had a lien on the premises. Upon motion for a new trial the judgment, which was entered in favor of plaintiffs, was reduced to the amount of the bond, to-wit, $3885.33, and it is from that judgment that the appeal is taken.

The sole question presented to this court is whether valid liens were ever created. It is appellants' contention, both at the trial and on appeal, that said notices were not filed within thirty days after completion of the improvements as required by Section 1187 of the Code of Civil Procedure.

The portions of that section pertinent to the question herein presented, are that any person other than the original contractor who has furnished labor and materials shall have thirty days after completion of the work as a whole in which to file a claim of lien. It is further provided that for the purposes of the act the occupation of the structure, accompanied by cessation of work or the acceptance by the owner or the cessation of work for thirty days shall be the equivalent of completion. Lastly, the section provides that should the owner fail to file notice of completion as provided in the chapter within ten days after there has been cessation of work for a period of thirty days, "* * * then all persons claiming the benefit of this chapter, shall have 90 days after the completion of said work of improvement within which to file their claims or lien."

Since it is readily apparent from the record before us that this appeal can be disposed of by application of the portion of Section 1187 above quoted, the additional argument made by plaintiffs in support of the judgment becomes immaterial.

[1] As previously noted it is undisputed that the Whitehursts were occupying the premises in question at the time all work ceased on September 18, 1948, and hence under the provisions of said section 1187 such occupation is deemed the equivalent of completion, see Nevada County Lumber Company v. Janiss, 25 Cal.App.2d 579, 582, 78 P.2d 200, and the owner would have ten days thereafter in which to file his notice of completion. But the notice of completion was not filed until approximately twenty-three days after the date of the completion of the work. Thus, their failure to file said notice of completion as provided in said section extended to ninety days the time in which plaintiffs could file their claims of liens. C. Ganahl Lumber Co. v. Thompson, 205 Cal. 354, 356, 270 P. 965.

[2] Although the evidence on this point is undisputed the record discloses no findings by the trial court in this regard. It would appear that there is a case falling squarely within the purpose and intent of Section 956a of the Code of Civil Procedure. Therefore the findings of fact in case number 18613 are amended by adding paragraph IX thereto to read as follows: "The court further finds that all construction work on defendants' premises ceased

on September 18, 1948, on which date the defendants Whitehurst were in occupancy of said premises", and that the findings of fact in case number 18614 are amended by adding paragraph IV thereto to read as follows: "The court further finds that all construction work on defendants' premises ceased on September 18, 1948, on which date the defendants Whitehurst were in occupancy of said premises."

The judgment is affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.

MALLOY v. FONG et al.

S. F. 18230, 18231.

Supreme Court of California, in Bank.

June 1, 1951.

Rehearing Denied June 28, 1951.

Clinton Malloy, a minor, by James I. Malloy, his guardian ad litem, brought action against William Peter Fong, Wilbur J. Antisdale, the Presbytery of San Francisco, a religious corporation, and others, to recover for injuries sustained by the plaintiff in an automobile accident. The Superior Court, San Francisco County, Sylvain J. Lazarus, J., denied the motions of Fong and Antisdale for judgment notwithstanding the verdict and granted that of the Presbytery and granted the motion of Antisdale for a new trial, and the plaintiff appealed. The Supreme Court, Traynor, J., held that charitable corporations are liable for their torts, whether a particular plaintiff has paid for charity received or not, that evidence sustained finding that Antisdale was an employee of the Presbytery and that he was negligent and his negligence was cause of injury to plaintiff and that as both Antisdale and Fong were agents of the Presbytery doctrine respondeat superior was not applicable to their relationship and it was error to instruct jury that they might find Antisdale liable for Fong's negligence.

Judgment in favor of Presbytery of San Francisco reversed and the trial court directed to enter a judgment against the Presbytery in accordance with verdict of the jury. The order granting a new trial as to Antisdale affirmed.

Prior opinion, 220 P.2d 48.

1. Negligence ⇐105
Torts ⇐16

The declared public policy of state that every one is responsible not only for result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in management of his property or person, admits of no exception based on objectives, however laudable, of the tort-feasor. Civ.Code, § 1714.

2. Negligence ⇐8

No one is obliged by law to assist a stranger, even though he can do so by a mere word, and without the slightest danger to himself but once he has undertaken to render assistance law imposes on him a duty of care toward person assisted.

3. Charities ⇐45(2)

Charitable corporations are liable for their torts whether or not a particular plaintiff has paid for the charity received. Civ.Code, § 1714.

4. Religious societies ⇐31(5)

Verdict against Presbytery in action by Bible school student for injuries sustained due to alleged negligence of minister and his assistant in operation of automobile while transporting children to church recreational center involved finding that social and recreational activities of local church were controlled by Presbytery and was supported by evidence that local church was in embryonic stage at time of accident and that, in view of that fact, its activities were conducted by Presbytery.

5. Religious societies ⇐30

Rule of respondeat superior applies to ecclesiastical bodies as well as to other employers.

6. Principal and agent ⇐3(2)

Whether a person performing work for another is an agent or an independent contractor depends primarily on whether one for whom work is done has legal right to control activities of alleged agent.

7. Principal and agent ⇐1

The power of the principal to terminate the services of agent gives him means of controlling agent's activities since right to immediately discharge involves right of control.

8. Principal and agent ⇐1

It is not essential that principal's right of control be exercised or that there be actual supervision of the work of agent since existence of right of control and supervision establishes existence of agency relationship.

9. Automobiles ⇐244(26)

Evidence that Presbytery had right to install and remove its ministers, to approve or disapprove their transfer to other jurisdictions, and to supervise and control activities of local churches, particularly those in mission stage sustained finding that minister of local church which was in mission stage was agent of Presbytery in operation of automobile while transporting children to

recreational center during which time collision resulted in which plaintiff child was injured.

10. Principal and agent ⇐1

Tests invoked in determining whether one is an agent or whether one performing services is engaged in a distinct occupation or business, are kind of occupation, with reference to whether, in locality, work is usually done under direction of principal or by specialist without supervision, skill required in particular occupation, whether principal or workman supplies instrumentalities, tools, and place of work for person doing work, length of time for which services are to be performed, method of payment, whether by time or by job, whether work is part of regular business of principal and whether parties believe they are creating relationship of employer-employee.

11. Automobiles ⇐244(36, 37)

Evidence that minister conducting Bible school for children permitted and participated in race between his automobile and station wagon driven by his assistant, causing both vehicles to travel at an excessive speed, and forcing assistant's automobile to enter intersection on wrong side of roadway thus causing accident in which plaintiff, a member of Bible school was injured, and that minister permitted plaintiff, among others, to ride on running boards of vehicles sustained finding that minister's negligence caused injuries of which plaintiff complained.

12. Automobiles ⇐193(8)

Where minister placed in charge of church mission by Presbytery was acting in scope of his agency in transporting children attending vacation Bible school to recreational center at time automobile collision occurred which resulted in injuries of which plaintiff child complained, Presbytery was liable for injuries sustained by plaintiff.

13. Automobiles ⇐193(4, 8)

Where minister conducting Bible school for children was aided by divinity student who was driving one of the automobiles containing children which minister and student were taking to recreational ground at time collision occurred which injured plaintiff, and minister was agent of Presbytery, student was a subagent and verdict against Presbytery for plaintiff's injuries could be supported not only on negligence of minister but that of student. Civ.Code, § 2351.

14. Principal and agent ⇐8, 14(2)

An agency relationship may be informally created and no particular words are necessary, nor need there be consideration and all that is required is conduct by each party manifesting acceptance of a relationship whereby one of them is to perform work for the other under the latter's direction.

15. Automobiles ⇐244(26)

Evidence that divinity student, with minister's knowledge and consent, performed duties in connection with conduct of church Bible school for which minister was responsible, that student's performance of those duties was subject to minister's supervision and control, and that his services could be terminated by minister any time, supported conclusion that student was a sub-agent acting within scope of his agency at time automobile accident occurred between automobile driven by student and that of a third party while student was taking children attending church Bible school to recreational center, and conclusion was not negatived by fact that student was not paid for his services. Civ.Code, §§ 2349, 2351.

16. Religious societies ⇐11

Where purpose clause of articles of incorporation of Presbytery of Presbyterian church included express purposes of promoting, maintaining and sustaining in whole or in part religious services in Presbyterian churches and missions, to strengthen and extend work and interests of General Assembly of Presbyterian church in United States and to carry on any other business, and to exercise any other powers which might be necessary, proper or convenient to be carried on or exercised in connection with any of the foregoing purposes or incident thereto, Presbytery's supervision of religious activities of church in mission stage and at which church Bible school for children was

conducted, was included within broad scope of language.

17. Appeal and error ⇐933(4)

Where defendant's motion for new trial on all statutory grounds was granted, but court's order specified no ground on which it was made, since insufficiency of evidence to support verdict was not specified, it would be assumed that order granting motion was not based on that ground. Code Civ.Proc. § 657.

18. Automobiles ⇐181(3)

Where transportation of children attending Bible school to play ground for a recreational period was integral part of conduct of Bible school and attendance of children at Bible school was at least a mutual benefit to children and church, and conduct of such school was authorized by church laws and daily open-recreational period were designed to induce parents to send their children to school and plaintiff, who was injured in automobile collision while being transported from Bible school to recreational area, attended Bible school financed in part by his parents' contributions to church and by their payments to defray expenses incidental to running of school, compensation was given for plaintiff's ride in automobile operated by agent of church Presbytery within meaning of automobile guest statute. Vehicle Code, § 403.

19. Master and servant ⇐310

The doctrine of respondeat superior is not applicable to relationship between a supervisor and his subordinate employees. Civ.Code, § 2351.

20. Master and servant ⇐310

Statute providing that a sub-agent, lawfully appointed, represents principal in like matter with original agent and original agent is not responsible to third persons for acts of sub-agent exempts superior employees from vicarious liability to third persons for tortious conduct of subordinate. Civ.Code, § 2351.

21. Automobiles ⇐246(42)
New trial ⇐41(3)

Where minister conducting Bible school for children and divinity student who was assisting minister in transportation of children from Bible school to recreational area were agents of Presbytery at time of automobile collision in which plaintiff, who was attending Bible school, was injured, and there was conflict in evidence as to whether minister himself was negligent, it was error to instruct jury that they might find minister liable for student's negligence and as it could not be determined whether jury based its verdict against minister on that ground or on erroneous agency instruction that he could be found liable for student's negligence, minister's motion for new trial was properly granted.

M. Mitchell Bourquin, Healy & Walcom, Jacobs, Blanckenburg & May and John J. Healy, all of San Francisco, for appellant.

Clarence A. Linn, San Francisco, Robert W. Macdonald, Oakland, Dan Hadsell, San Francisco, Roscoe D. Jones, Oakland, Raymond L. Hanson, Cooley, Crowley & Gaither and Louis V. Crowley, all of San Francisco, for respondents.

TRAYNOR, Justice.

Plaintiff brought this action for damages for personal injuries allegedly caused by the concurrent negligence of defendants Holmes, Fong, and Antisdale. Plaintiff alleged that Fong and Antisdale were acting as agents of defendant Presbytery of San Francisco. The jury exonerated defendant Holmes, but returned a verdict in favor of plaintiff in the amount of $41,500 against defendants Fong, Antisdale, and the Presbytery of San Francisco. On motion of defendant Presbytery, the trial court entered a judgment notwithstanding the verdict as to it. Defendant Antisdale's motion for new trial was granted. Defendant Fong's motion for judgment notwithstanding the verdict was denied. Plaintiff appeals from the order granting a new trial as to defendant Antisdale and from that part of the judgment that denies recovery against the Presbytery. Defendant Fong has not appealed.

During the summer vacation of 1943, plaintiff, then a boy of thirteen, attended a vacation Bible school conducted at the San Mateo Presbyterian Church for the

children of members of the Church, then a "mission" under the jurisdiction of defendant Presbytery of San Francisco. Defendant Antisdale, pastor of the Church, was in charge of the school and gave the Bible instruction. The Bible classes were supplemented by classes in arts and crafts and by supervised recreation at a nearby playground to which the children were taken in automobiles and from which they were returned to the Church at the conclusion of the recreation period.

Antisdale became ill several days before July 1, 1943, the day plaintiff was injured, and was unable to conduct the school. It was therefore left without effective supervision and without an instructor qualified to conduct the Bible classes. Defendant Fong, a 19-year-old divinity student, was at that time vacationing at the home of his guardian, Dr. Jones, a retired Presbyterian minister, in San Mateo. Fong agreed to conduct the Bible instruction in Antisdale's absence so that Antisdale might stay home and rest. In addition to conducting the Bible classes, Fong drove the children to the playground for their recreation period in his guardian's automobile, a Ford station wagon lent to him for that purpose.

Antisdale returned to the Church on the day of the accident, but he was occupied in his office the greater part of the morning, and Fong remained in charge of the class. At the conclusion of the Bible instruction, Fong released the children to wait outside the Church for transportation to the playground for the recreation period. Antisdale emerged from his office to see the children climbing into Fong's station wagon and several boys, including plaintiff, standing on the running boards. Antisdale then informed the children that he would take some of them in his car to relieve the congestion in the station wagon, and several of them entered the back seat of his car. Two of the boys left Fong's station wagon and stood on the running boards of Antisdale's car. The other children remained in Fong's station wagon, plaintiff standing on the left running board and another boy standing on the right running board. Antisdale testified that he ordered the children off the running boards. It is undisputed, however, that Antisdale did not insist on compliance with his order and that the children continued to stand on the running boards of his car and Fong's.

The Church was located on Twenty-fifth Avenue in San Mateo, a street running east and west; the playground to which the children were being taken was located on Twenty-eighth Avenue, several blocks west of the Church. Twenty-eighth Avenue is intersected east of the playground by Isabelle Avenue, a street running north and south. The two vehicles left for the playground, driving west on Twenty-fifth Avenue, Antisdale's car in the lead, closely followed by Fong's station wagon. They then turned south to Twenty-eighth Avenue and again headed west toward the playground. During the trip the children in each vehicle were shouting and challenging the children in the other vehicle to a race to the playground. Although the evidence is conflicting on this point, there is testimony that Fong and Antisdale entered into the spirit of the competition and increased the speed of their vehicles. After the vehicles turned west on Twenty-eighth Avenue, Fong pulled out to the left and endeavored to pass Antisdale, who increased the speed of his car to prevent Fong from passing. Fong pulled up parallel to Antisdale but was unable to pass him because Antisdale had increased his speed. Twenty-eighth Avenue has only one lane for vehicular traffic proceeding in each direction, so that Fong's station wagon during the time he was attempting to pass Antisdale was being driven well over in the left-hand lane, almost to the opposite curb. The two vehicles approached the intersection of Twenty-eighth and Isabelle Avenues in that position, Fong still unsuccessfully attempting to pass Antisdale. Antisdale stopped his car at the intersection, but Fong proceeded out into the intersection at an excessive rate of speed, still on the left-hand side of the road. Defendant Holmes was driving her car north on Isa-

belle Avenue and had just pulled out into the intersection when Fong drove by her. The vehicles were too close for her to stop in time and, according to her testimony, Fong made no effort to stop. Her right front fender and Fong's station wagon collided, striking plaintiff standing on the left running board. As a result of the collision, plaintiff lost his left leg below the knee and sustained injuries of a permanently disabling nature to his right leg, necessitating prolonged hospitalization and medical treatment.

Plaintiff's complaint was in three counts. In the first count he alleged that Fong was the agent of Antisdale and the Presbytery, that he was a passenger in Fong's car at the time of the accident, and that the accident was caused by the concurrent negligence of defendants Fong and Holmes. In the second count he alleged that Antisdale was the agent of the Presbytery, and that his negligence was a cause of the injuries to plaintiff in that he "negligently and carelessly increased the speed of his said Chevrolet sedan automobile, so as to render it impossible for said Ford Station Wagon [driven by Fong], in which plaintiff was riding, to pass and return to the right side of the roadway, so that the two (2) vehicles ran abreast in to the intersection of said 28th Avenue with Isabelle Avenue, proximately causing and precipitating a collision between said Ford Station Wagon in which plaintiff was riding and that said Chevrolet sedan automobile being driven by defendant Eleanor Holmes." In the third count, plaintiff alleged that Antisdale and Fong were negligent in failing to exercise proper care for the safety of the children for whom they were responsible in that they negligently permitted several of them, including plaintiff, to ride on the running boards of the two vehicles, and that such negligence was a proximate cause of plaintiff's injuries.

Defendants Antisdale, Fong, and Holmes answered, denying negligence and pleading that plaintiff was contributively negligent. Defendant Presbytery denied that Fong was the agent of Antisdale, or that either of them was its agent, or that plaintiff was a passenger in Fong's station wagon. It pleaded three defenses: (1) that plaintiff was contributively negligent; (2) that the sole cause of the accident was the negligence of defendant Holmes; and (3) that it is a charitable corporation, engaged solely in the propagation of religion and "does not contemplate the distribution of gains, profits or dividends to its members, and that at no time has it engaged in any activity other than the propagation of religion. That this defendant has at all times exercised due and reasonable care in the selection of its servants and agents."

Plaintiff contends that there is substantian evidence to support the verdict of the jury, that there were neither errors of law nor irregularity in the proceedings at the trial, and that the trial court improperly granted defendants' motions for judgment notwithstanding the verdict and for a new trial. In support of the judgment notwithstanding the verdict, the Presbytery contends that, as a charitable corporation, it is not liable to non-paying beneficiaries for the torts of its agents, and that, as a matter of law, neither Fong nor Antisdale were its agents at the time of the accident. In support of the order granting a new trial, Antisdale contends that the trial court committed error in the giving of two instructions: one, that the jury could find against Antisdale if they found that Fong was his agent and was negligent; the other, that a verdict might be returned against Fong and against Antisdale as his principal, even though the jury found Fong guilty only of ordinary or gross negligence, if it also found that plaintiff was a passenger and not a guest in Fong's station wagon. Antisdale contends that, as a matter of law, Fong was not his agent and plaintiff was a guest in Fong's station wagon, and that the instructions were therefore prejudicially erroneous in that they submitted to the jury as a question of fact a matter that was one of law and "at the least *permitted* the jury to find such a relation" when in fact none existed. Edwards v. Freeman, 34 Cal.2d 589, 594, 212 P.2d 883, 886.

Plaintiff's Appeal from the Judgment for the Presbytery of San Francisco

The Presbytery contends that, as a charitable corporation, it is exempted from liability to non-paying beneficiaries by the holding of this court in Thomas v. German General Benevolent Society, 168 Cal. 183, 188, 141 P. 1186, 1188, that "where one accepts the benefit of a public or of a private charity he exempts by implied contract the benefactor from liability for the negligence of the servants in administering the charity, if the benefactor has used due care in the selection of those servants." Lewis v. Young Mens Christian Ass'n, 206 Cal. 115, 116, 273 P. 580; Bardinelli v. Church of All Nations, 23 Cal. App.2d 713, 714–715, 73 P.2d 1264; Young v. Boy Scouts of America, 9 Cal.App.2d 760, 764, 51 P.2d 191; Ritchie v. Long Beach Com. Hospt. Ass'n, 139 Cal.App. 688, 690, 34 P.2d 771; Stonaker v. Big Sisters Hospital, 116 Cal.App. 375, 379, 2 P.2d 520; Hallinan v. Prindle, 17 Cal.App. 2d 656, 669, 62 P.2d 1075; Shane v. Hospital of the Good Samaritan, 2 Cal.App. 2d 334, 335–340, 37 P.2d 1066; cf. Phoenix Assurance Co., Limited, of London v. Salvation Army, 83 Cal.App. 455, 456, 461–462, 256 P. 1106.

The theory of the Thomas case, however, was abandoned by this court in Silva v. Providence Hospital, 14 Cal.2d 762, 775, 97 P.2d 798, 804, and England v. Hospital of the Good Samaritan, 14 Cal.2d 791, 97 P.2d 813, for the reason that "the implied contract doctrine has been used to rationalize a result and is not based upon the intention of the parties, as legal principle requires." Those cases held that a charitable hospital was liable to a paying patient for injuries resulting from the negligence of a nurse.

The Presbytery contends that the Silva and England cases are limited to the facts presented therein and do not require the complete abandonment of the doctrine of charitable immunity. It contends that, since the plaintiffs in those cases were paying patients of the defendant hospitals, the decisions therein state a rule applicable only to paying beneficiaries of the activities of charitable corporations. It is contended that as to nonpaying recipients of charity the rule of the Thomas case is still applicable.

It is true, as the Presbytery asserts, that the plaintiffs in the Silva and England cases paid for the services they received. It does not follow, however, that the reasoning applied in those cases is limited to paying beneficiaries. The theories advanced by the earlier decisions or urged by the Presbytery in support of the partial retention of the doctrine of charitable immunity are as applicable to paying beneficiaries as to those who do not pay. If the theories discussed and discarded by this court in the Silva and England cases do not justify immunity from liability in the case of a paying beneficiary, there is no logical justification for clinging to them in the case of the beneficiary who does not pay. Mulliner v. Evangelischer Diakonniessenverein, 144 Minn. 392, 397, 398, 175 N.W. 699; Sheehan v. North Country Com. Hospt., 273 N.Y. 163, 166, 7 N.E.2d 28, 109 A.L.R. 1197; Dillon v. Rockaway Beach Hospital, 284 N.Y. 176, 180, 30 N.E.2d 373; Hewett v. Woman's Hospit. Aid Ass'n, 73 N.H. 556, 564, 64 A. 190, 7 L.R.A., N.S., 496; Foster v. Roman Catholic Diocese of Vermont, 116 Vt. 124, 70 A.2d 230, 234–235; see, 28 Cal.L.Rev. 530, 533.

"Abolition of the immunity as to the paying patient is justified as the last short step but one to extinction. Retention for the nonpaying patient is the least defensible and most unfortunate of the distinction's refinements. He, least of all, is able to bear the burden. More than all others, he has no choice. He is the last person the donor would wish to go without indemnity. With everyone else protected, the additional burden of protecting him cannot break the trust. He should be the first to have reparation, not last and least among those who receive it. So stripped of foundation, the distinction falls. It should fall in line with, not away from, the trend which has brought it about. The immunity should go and the object of the charity should be placed on a par with all others." Rutledge, J., in President and Directors of

Georgetown College v. Hughes, 76 U.S.App. D.C. 123, 130 F.2d 810, 827.

The Presbytery asserts that this court adopted a distinction based on payment in Humphreys v. San Francisco Area Council, 22 Cal.2d 436, 139 P.2d 941. It misconstrues that decision. A judgment for defendant was there affirmed on the ground, not that it was a charity and therefore immune, but that the plaintiff had given no compensation for the ride he received in the vehicle in which he was injured and was, therefore, under Vehicle Code section 403, a guest not entitled to recover in the absence of wilful misconduct or intoxication on the part of the driver. This court did not pass upon the extent of defendant's liability as a charitable corporation for the reason that under section 403 no actionable wrong had been committed. Humphreys v. San Francisco Area Council, 22 Cal.2d 436, 443–444, 139 P.2d 941; see also, Edwards v. Hollywood Canteen, 27 Cal.2d 802, 812, 167 P.2d 729.

[1, 2] The Presbytery contends that public policy requires the preservation of its immunity from liability for torts committed by its agents on nonpaying beneficiaries of its charity. The declared public policy of this state, however, is contrary to that view: "Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person * * *." Civil Code, § 1714. That policy admits of no exception based upon the objectives, however laudable, of the tortfeasor. See also Mulliner v. Evangelischer Diakonniessenverein, 144 Minn. 392, 398, 175 N.W. 699. As was said in the Silva case, supra: "[N]o one is obliged by law to assist a stranger, even though he can do so by a mere word, and without the slightest danger to himself. However, once he has undertaken to render assistance the law imposes upon him a duty of care toward the person assisted. Restatement of Law of Torts, sec. 324; McLeod v. Rawson, 215 Mass. 257, 102 N.E. 429, 46 L.R.A., N.S., 547; Hoyt v. Tilton, 81 N.H. 477, 128 A. 688. * * * Professor Harper, in his book 'The Law of Torts', points out that 'the immunity of charitable corporations in tort is based upon very dubious grounds'. Continuing, he concludes: 'It would seem that a sound social policy ought, in fact, to require such organizations to make just compensation for harm legally caused by their activities under the same circumstances as individuals before they carry on their charitable activities. The policy of the law requiring individuals to be just before generous seems equally applicable to charitable corporations. To require an injured individual to forego compensation for harm when he is otherwise entitled thereto, because the injury was committed by the servants of a charity, is to require him to make an unreasonable contribution to the charity, against his will, and a rule of law imposing such burdens can not be regarded as socially desirable nor consistent with sound policy.' Sec. 294." Silva v. Providence Hospital, 14 Cal.2d 762, 775, 97 P.2d 798, 804. "The incorporated charity should respond as do private individuals, business corporations and others, when it does good in the wrong way." Pres & Dir. of Georgetown College v. Hughes, supra, 130 F.2d 810, 828. The dictum in Thomas v. German General Benevolent Society, 168 Cal. 183, 188, 141 P. 1186, and the decisions following it are disapproved.

[3] It has been suggested that plaintiff in effect paid for the services rendered by the Daily Vacation Bible School, inasmuch as his parents made contributions for the support of the school. These contributions, however, were voluntary and anonymous and unlike the scheduled charges for medical and hospital care that were paid by the plaintiffs in the Silva and England cases. It is not certain, therefore, that plaintiff could qualify as a "paying beneficiary" of the charity in this case. In any event, a consideration of this question is not necessary in view of our decision that charitable corporations are liable for their torts whether or not a particular plaintiff has paid for the charity received.

The Presbytery next contends that Antisdale and Fong were not agents of the Presbytery.

The evidence introduced at the trial shows that the Presbyterian denomination in this country is an integrated ecclesiastical organization. There are four principal levels of authority: the General Assembly, the Synods, the Presbyteries, and the local Churches or "Sessions." As the name "Presbyterian" suggests, the Presbytery is a vital unit of this organization, and it has extensive powers of control over the churches within its jurisdiction. In practice, such power is seldom exercised over firmly established, thriving congregations, but there are at least three situations where this authority is of great importance: (1) before a local church is fully established, missionary activities are conducted by the Presbytery; (2) when a church becomes too large, the Presbytery supervises its division into smaller churches and has the power to apportion property among them; see Wheelock v. First Presbyterian Church of Los Angeles, 119 Cal. 477, 482, 51 P. 841; (3) in a declining neighborhood, when a church is no longer able to function successfully by itself, the Presbytery takes over. See Tabor v. Presbyterian Church, Dissolution Case, 347 Pa. 263, 32 A.2d 196.

[4] Plaintiff contends that at the time of the accident the San Mateo Presbyterian Church was in the "mission" stage, that the Presbytery was therefore directly engaged in promoting Presbyterianism in that area, and that the Daily Vacation Bible School was an integral part of this activity by the Presbytery. Early in the trial this issue was emphasized by comments of the trial court to the jury; the jurors were expressly told to look for the degree to which the Presbytery conducted the social and recreational activities of the San Mateo Church. "In other words, if those matters were left to the local church to be solved and were controlled by the local organization, then the Presbytery wouldn't be involved." The verdict against the Presbytery necessarily involves a finding by the jury that these matters were not left to the local Church. This finding is sufficiently supported by evidence that the San Mateo Church was in an embryonic stage at the time of the accident and that, in view of that fact, its activities were conducted by the Presbytery.

The missionary character of the local Church is suggested by the fact that its property was held by the Presbytery. The Presbytery held the lease for the building where the services and Bible classes were conducted. The rental on this building was nominally paid by the Church, but for most of this amount it received a monthly subsidy from the War Emergency Fund of the national Presbyterian organization. Not until after the incorporation of the Church in 1945, almost two years after the accident, did the Presbytery convey to the Church other land on which the present edifice is located. The San Mateo Church did not pay all of Antisdale's salary; it received a monthly subsidy for this purpose from the National Board of Missions.

Antisdale himself testified that the Church was in an embryonic stage and was considered a mission church. Later, following a recess at the trial, he testified that he did not know what the technical definition of a mission church is, that "I believe it must be one that is solely supported by the National Mission Board, and I do not think it could quite qualify as that." Whether or not the Church was a mission in a technical ecclesiastical sense, the fact that it was considered a mission church attests strongly to its embryonic character and indicates that there was a close working relationship between the Church and the Presbytery.

The Presbytery had the power to approve or disapprove Antisdale's selection as minister. Following his installation in that office by the Presbytery, he was not responsible to the local Church but only to the Presbytery. The Presbytery, not the Church, had the power to remove him. Furthermore, he could not transfer to another pastorate without the permission of the Presbytery, and in fact he was a member of the Presbytery rather than of the local Church.

As the judicatory in charge of all Presbyterian churches in the San Francisco Bay area, the Presbytery of San Francisco had primary responsibility for the extension of the Presbyterian movement into new localities in that region. It was the Presbytery that organized the San Mateo group in

1942 and undertook the task of transforming it into a full-fledged church. During this early period, the Presbytery not only held the Church property but was in charge of Church activities. Speaking of churches in the mission stage, an officer of the defendant Presbytery testified: "that really is the place where the presbytery does exercise control." The establishment and maintenance of religious education for children was an important part of the Presbytery's project in San Mateo. The jury could properly conclude, therefore, that the agents who conducted the Daily Vacation Bible School were the agents of the Presbytery.

It bears emphasis that we are not here called upon to determine the liability of the Presbytery for negligence in the activities of a fully established and independently incorporated Presbyterian church which has passed the mission stage.

[5] The Presbytery has cited a number of decisions in other states to the effect that bishops and similar ecclesiastical bodies are not liable for the torts of local ministers. None of these cases involved supervision of a mission church. Furthermore, some were contract actions and turned upon specific findings that the act of the subordinate was beyond his contractual authority, Leahey v. Williams, 141 Mass. 345, 355–357, 6 N.E. 78; Davidsville First National Bank v. St. John's Church, 296 Pa. 467, 472, 146 A. 102, or that an alleged agency by estoppel had not been proved. Reifsnyder v. Dougherty, 301 Pa. 328, 333–334, 152 A. 98. In Carini v. Beaven, 219 Mass. 117, 106 N.E. 589, L.R.A.1915B 825, the plaintiff did not rely upon the doctrine of respondeat superior but alleged the violation of a duty owed directly by the defendant bishop; the case turned solely on principles of negligence and proximate cause. In Magnuson v. O'Dea, 75 Wash. 574, 135 P. 640, 48 L.R.A.,N.S., 327, Ann. Cas.1915B 1230, the appeal did not concern the bishop as a bishop, but as an individual, and involved allegations that he had himself participated in the tortious conduct. The action of the trial court in dismissing the suit as to the bishop in his corporate capacity was not discussed on appeal, but it is significant that under local decisions the doctrine of charitable immunity was applicable. Richardson v. Carbon Hill Coal. Co., 10 Wash. 648, 655, 39 P. 95; Tribble v. Missionary Sisters of the Sacred Heart, 137 Wash. 326, 329–330, 242 P. 372. Once the claim of charitable immunity is rejected, there is no compelling reason for not applying the rule of respondeat superior to ecclesiastical bodies as it applies to other employers.

The Presbytery contends that even if Antisdale was engaged in work for the Presbytery, he was an independent contractor for whose negligence the Presbytery was not responsible.

[6–9] Whether a person performing work for another is an agent or an independent contractor depends primarily upon whether the one for whom the work is done has the legal right to control the activities of the alleged agent. Edwards v. Freeman, 34 Cal.2d 589, 592, 593, 212 P.2d 883; Empire Star Mines Co. v. Calif. Emp. Comm., 28 Cal.2d 33, 43, 168 P.2d 686. The power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities. "The right to immediately discharge involves the right of control." Riskin v. Industrial Accident Comm., 23 Cal.2d 248, 253, 255, 144 P.2d 16, 19; Ryan v. Farrell, 208 Cal. 200, 202–203, 280 P. 945; Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 417, 156 P. 491; Chapman v. Edwards, 133 Cal.App. 72, 77, 79, 24 P.2d 211; Yucaipa Farmers Cooperative Ass'n v. Industrial Accident Comm., 55 Cal.App.2d 234, 237, 130 P.2d 146. It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship. Empire Star Mines Co. v. Calif. Emp. Comm., 28 Cal.2d 33, 43, 168 P.2d 686. The evidence clearly supports the conclusion of the jury that such control existed in the present case. The right of the Presbytery to install and remove its ministers, to approve or disapprove their transfer to other jurisdictions, and to supervise and control

the activities of the local churches, particularly those in the mission stage, is inconsistent with a contrary conclusion.

[10] Other tests are sometimes invoked, in addition to the power of control, in determining whether one is an agent. They reinforce the conclusion that Antisdale was an agent and not an independent contractor. As listed in Empire Star Mines Co. v. Calif. Emp.Comm., supra (cf. Rest., Agency, § 220), they include: "(a) [W]hether or not the one performing services is engaged in a distinct occupation or business." Antisdale was not engaged in an independent occupation in the sense that he contracted with different churches to perform various pastoral services on a job basis; the evidence shows that he was engaged solely in his work with the San Mateo Church and that he could accept no other assignments as a Presbyterian minister without the consent of the Presbytery. "(b) [T]he kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision." In the locality in question, as well as elsewhere, the work of a pastor of a Presbyterian church is subject to the same supervision by the Presbytery as outlined above. "(c) [T]he skill required in the particular occupation." The element of skill is closely linked to the policy considerations that render one free from liability for the acts of an independent contractor. A property owner, for example, may be unable to understand the intricacies of erecting a building upon his land—the most that he can ordinarily be expected to do is to use care in the selection of a construction contractor. The Presbytery contends that the services here involved were "professional," like those rendered by a physician or an attorney, and that as a matter of law a minister should be regarded as an independent contractor. The skills possessed by Antisdale were also possessed by the Presbytery; it was the Presbytery in fact that determined that he was qualified for this position, whereas medical, legal, or construction experts are examined and licensed by State authority. None of the duties performed by Antisdale were too complicated for efficient supervision by the Presbytery. "(d) [W]hether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work." Although the vehicles used at the time of the accident were supplied by Antisdale and Fong, the principal instrumentalities of Antisdale's work were the property of the employer; for example, the property on which the church services and the classes of the Daily Vacation Bible School were held was leased for the Church by the Presbytery. "(e) [T]he length of time for which the services are to be performed." Antisdale was officially ordained and installed by the Presbytery in 1943; he transferred to the South Hollywood Church in 1945. So far as anything in the evidence suggests, his employment in San Mateo was on an indefinite basis. "(f) [T]he method of payment, whether by the time or by the job." Antisdale was paid by the month. "(g) [W]hether or not the work is a part of the regular business of the principal." All the activities of the Church, including the Daily Vacation Bible School, revolved around the office of the pastor. "(h) [W]hether or not the parties believe they are creating the relationship of employer-employee." There is no evidence that at the time Antisdale was employed either he or the Presbytery gave any thought to the distinction between agent and independent contractor.

[11, 12] Although the evidence as to Antisdale's negligence is conflicting, there is substantial evidence to support the finding that he was negligent and that his negligence was a cause of the injury to plaintiff. Such a finding is supported on either of two grounds: (1) that Antisdale negligently permitted and participated in a race between his automobile and the station wagon driven by Fong, causing both vehicles to travel at an excessive speed, and forcing Fong to enter the intersection of Twenty-eighth and Isabelle Avenues on the wrong side of the roadway, thus causing the accident; and (2) that Antisdale was negligent in permitting plaintiff among others to ride on the running boards of the vehicles, and that such negligence caused the injuries of which plaintiff complains. It is clear that Antisdale was act-

ing in the scope of his agency at the time the tort was committed. As his principal, the Presbytery is liable for injuries to plaintiff resulting therefrom.

[13] The verdict against the Presbytery may be supported not only on Antisdale's negligence but on that of Fong as well. Civil Code section 2351 provides: "A subagent, lawfully appointed, represents the principal in like manner with the original agent * * *." Antisdale was an agent of the Presbytery, i.e., the "original" agent, and he lawfully appointed Fong a subagent.

[14] An agency relationship may be informally created. No particular words are necessary, nor need there be consideration. All that is required is conduct by each party manifesting acceptance of a relationship whereby one of them is to perform work for the other under the latter's direction. See 1 Cal.Jur., Agency, 694, 696, §§ 5, 7; Restatement, Agency, §§ 15, 16, 26, 34, 225.

There is ample evidence to support a finding that Antisdale and Fong entered into just such a relationship. Antisdale, as pastor of the Church, was in charge of the Vacation Bible School. It was his responsibility to supervise and control the instruction and all activities connected with the school. He was in charge of the transportation of the children from the Church to the playground and of their return to the Church. He had authority to direct the activities of the children attending the school and to direct them into vehicles for transportation to the playground. He determined how long the children should remain at the playground and when they should be returned to the Church.

For three days, while Antisdale was ill, Fong performed these duties for him. Fong was not a mere volunteer performing incidental services for the school; his participation was essential to the conduct of the school since, in Antisdale's absence, he was the only person available to conduct Bible instruction. Fong's performance of duties for which Antisdale was responsible did not cease upon the latter's return to the school. On the day of the accident, although Antisdale had returned to the school, Fong continued to conduct the Bible class. Antisdale's own testimony shows that when Fong released the children for transportation to the playground, Antisdale took charge of the movement. He directed several of the children to leave Fong's station wagon and to get into his own automobile. He allowed the other children, including plaintiff, to remain with Fong, although he had room for several more children in his own automobile. He led the way to the playground, with Fong following closely behind. At all times Antisdale had full authority over the children in Fong's vehicle as well as in his own, and he was responsible for their conduct and safety. If Antisdale had had any doubts about Fong's driving ability or responsibility, he could have refused him permission to drive the children to the playground. Fong's continued connection with the school was possible only because Antisdale gave his consent, and it could have been severed by Antisdale at any time.

[15] The evidence that Fong, with Antisdale's knowledge and consent, performed duties for which the latter was responsible, that his performance of those duties was subject to Antisdale's supervision and control, and that his services could be terminated by Antisdale at any time, supports the conclusion that Fong was a subagent acting within the scope of his agency at the time of the accident. This conclusion is not negatived by the fact that Fong was not paid. Restatement, Agency, § 225; see also Graf v. Harvey, 79 Cal.App.2d 64, 69, 179 P.2d 348; Navarro v. Somerfeld, 35 Cal.App.2d 35, 37–38, 94 P.2d 623; 1 Cal.Jur., Agency, 790, § 79.

Edwards v. Freeman, 34 Cal.2d 589, 212 P.2d 883, does not compel a contrary result. In that case, this court held that it was an error to permit the jury to find that plaintiff was the principal of her son so as to impute his negligence to her to bar her recovery for injuries caused by the concurrent negligence of her son and the defendant. The defendant attempted to justify the submission of the issue to the jury by evidence that plaintiff had requested her son to drive her to town to

get her glasses fixed and that the accident occurred in the course of that errand. This court held, however, that since the undisputed evidence established that plaintiff had no authority over her son or legal power to control his activities, the route he took, or his operation of his automobile, no agency relationship existed as a matter of law. There was in that case no "affirmative evidence adequate to show that * * * either the plaintiff was actually exercising control over the manner of operation of the car or the relationship of plaintiff and her son was such as to give plaintiff a legally cognizable right to control or command the son in his operation of the machine." 34 Cal.2d 589, 593, 212 P.2d 883, 885. The decision was based on the absence of evidence of plaintiff's right to control her son's operation of the automobile in which she rode, and not, as Antisdale implies, on the conclusion that, as a matter of law, no agency relationship can arise out of the performance of services as a gratuitous favor. Cf. Graf v. Harvey, 79 Cal.App.2d 64, 69, 179 P.2d 348. It is not applicable to the present appeal, in which there is ample evidence that Antisdale had the legal right to control and supervise Fong's activities, and to sever his connection with the school at any time.

The evidence shows that Daily Vacation Bible Schools were conducted by virtually all churches of the Presbyterian denomination, including those within the area governed by the Presbytery of San Francisco, and in fact the Daily Vacation Bible School of the San Mateo Church antedated Antisdale's arrival there. In many respects the organization of such schools is similar to that of Sunday Schools and necessarily involves the work of volunteer teachers who assist the minister. Antisdale testified that the children were divided into age groups and that he gave the Bible instruction to those of plaintiff's age and above. There were classes in handwork and classes in worship and the supervised recreation periods. Extensive volunteer assistance was customarily rendered by the friends and members of the Church. Authority to organize the school and its staff was inherent in the nature and scope of Antisdale's duties. Fong was appointed in the exercise of this authority, and therefore, under the provisions of section 2351 of the Civil Code, the Presbytery may be held liable for Fong's negligence. Civil Code, § 2349; Malmstrom v. Bridges, 8 Cal.App.2d 5, 8, 47 P.2d 336; Rice v. Trinity County, 110 Cal. 247, 251, 42 P. 809; Seymour v. Oelrichs, 162 Cal. 318, 323, 122 P. 847; Greig v. Riordan, 99 Cal. 316, 322, 33 P. 913; Daily Telegram v. Ocean View Oil Co., 65 Cal.App. 608, 611–612, 224 P. 1006; Julian v. Schwartz, 16 Cal.App.2d 310, 328, 60 P.2d 887; Thompson v. Gibb, 1 Cal.Unrep. 173, 183–184; 2 Am.Jur. [Agency] 145, 156–159, §§ 180, 197–199. See also Bank of California v. Western Union Telegraph Co., 52 Cal. 280, 289; Gates v. Daley, 54 Cal. App. 654, 655–656, 202 P. 467; Hollidge v. Duncan, 199 Mass. 121, 123, 85 N.E. 186, 17 L.R.A., N.S., 982; Campbell v. Trimble, 75 Tex. 270, 271–272, 12 S.W. 863; Mechem, The Liability of a Master for the Negligence of a Stranger Assisting His Servant, 3 Mich.L.Rev. 198; Thyssen v. Davenport Ice & Cold Storage Co., 134 Iowa 749, 112 N.W. 177, 13 L.R.A., N.S., 572; Geiss v. Twin City Taxicab Co., 120 Minn. 368, 139 N.W. 611, 45 L.R.A., N.S., 382.

[16] The Presbytery next contends that the corporation that is a defendant in this suit is not the same as the religious entity that supervises the Presbyterian ministers and churches of the San Francisco area. It is claimed that the defendant corporation was organized solely to hold property of the local Presbyterian groups and is not "an operating agency of the church." The articles of incorporation of the defendant show an intention to incorporate the Presbytery *as such*—the preamble states that "the religious association heretofore and now known as and called the Presbytery of San Francisco * * * is hereby incorporated * * *." The purpose clause, moreover, evinces no such limited objective as is now claimed. The express purposes include: "to promote, maintain and sustain in whole or in part, religious services in Presbyterian churches and

missions," "to strengthen and extend the work and interests of the General Assembly of the Presbyterian church in the United States of America," and "to carry on any other business, and to exercise any other powers which may be necessary, proper or convenient to be carried on or exercised in connection with any of the foregoing purposes or incident thereto." The Presbytery's supervision of the religious activities of the San Mateo Church is included within the broad scope of this language, which is simply a statement of the total purposes of the Presbytery before as well as after the incorporation.

Plaintiff's Appeal from the Order Granting a New Trial

[17] After the denial of his motion for judgment notwithstanding the verdict, Antisdale moved for a new trial on all statutory grounds. His motion was granted, but the court's order specified no ground upon which it was made. Since insufficiency of the evidence to support the verdict was not specified, it must be assumed that the order granting the motion was not based on that ground. Code of Civil Procedure section 657; Adams v. American President Lines, Ltd., 23 Cal.2d 681, 683, 146 P.2d 1.

In support of the motion for new trial, Antisdale contends that the trial court improperly instructed the jury that they might determine as a question of fact whether plaintiff was a guest or a passenger [1] in Fong's station wagon, whereas, he claims, plaintiff was a guest as a matter of law and a verdict against Fong, and Antisdale as Fong's principal, could not therefore rest on a finding that Fong failed to use ordinary care for plaintiff's safety. He contends that, since the evidence discloses that Fong performed his services gratuitously and no compensation was paid for plaintiff's ride to the playground, the only permissible finding is that plaintiff was a guest in the station wagon. Plaintiff contends that there is substantial evidence to support the inference that compensation was paid for the ride within the meaning of section 403 and that it was therefore proper to submit the question to the jury.

It is immaterial that Fong performed the services gratuitously; he performed those services as the agent of the Presbytery in discharging Antisdale's duty to transport the children to the playground for their recreation period. It is sufficient therefore if Antisdale, the Church, or the Presbytery received a benefit from the transportation of plaintiff to the playground.

The transportation of plaintiff to the playground for the recreation period was not an isolated transaction; it was an integral part of the conduct of the Bible school as one of the normal activities of the San Mateo Presbyterian Church. It is undisputed that the attendance of the children at the Bible school was at least of mutual benefit to the children and the Church. The conduct of such schools was authorized by the Church laws, and it was to the interest of the Church and the Presbytery that parents send their children to the school. Antisdale had a large number of handbills printed urging attendance at the school. The children had recently been released from secular schools for their summer vacation, and many parents wanted their children to spend the time in the open air. It is not an unreasonable inference that the daily open-air recreation periods were designed to induce these parents to send their children to the school and did induce them to do so. Such an inference negatives the theory that no compensation was given for the transportation to such recreation periods. "[B]enefits or considerations other than cash or its equivalent may be 'compensation,' * * *."

1 "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of such vehicle or against any other person legally liable for the conduct of such driver on account of personal injury to or the death of such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or wilful misconduct of said driver." Vehicle Code section 403.

Humphreys v. San Francisco Area Council, 22 Cal.2d 436, 442, 139 P.2d 941, 944; Calif. Casualty Indemnity Exchange v. Industrial Accident Comm., 21 Cal.2d 461, 464, 132 P.2d 815; Darling v. Dreamland Bedding & Upholstering Co., 44 Cal.App. 2d 253, 257, 112 P.2d 338; Piercy v. Zeiss, 8 Cal.App.2d 595, 598, 47 P.2d 818; Crawford v. Foster, 110 Cal.App. 81, 84, 293 P. 841.

The Bible school was an integral part of the activities of the Church, and the recreation period an integral part of the Bible school. The conduct of the school was in part financed by the general funds of the Church. In addition, the evidence discloses that contributions were solicited from the parents of children attending the school "to defray the expenses incidental to the running of the school." Antisdale testified that contributions were solicited weekly by giving the children envelopes to take home for the enclosure of contributions from their parents. Plaintiff testified that his parents made contributions therefor.

[18] It is clear therefore that plaintiff attended a Bible school financed in part by parents' contributions to the Church and by their payments to "defray the expenses incidental to the running of the school." Plaintiff's status is analagous to that of a student at a public school who is given free school bus service and who is considered a passenger in the bus by virtue of his parents' contribution to school expenses by the payment of taxes. Smith v. Fall River Joint Union High School District, 118 Cal.App. 673, 679, 5 P.2d 930; see also Shannon v. Central-Gaither Union School District, 133 Cal.App. 124, 128, 23 P.2d 769. It may reasonably be inferred from this evidence that compensation was given for plaintiff's ride within the meaning of section 403. Kruzie v. Sanders, 23 Cal.2d 237, 242, 143 P.2d 704; Druzanich v. Criley, 19 Cal.2d 439, 443, 122 P.2d 53; Swink v. Gardena Club, 65 Cal.App.2d 674, 677–678, 151 P.2d 313; Carey v. City of Oakland, 44 Cal.App.2d 503, 507–509, 112 P.2d 714; Boyson v. Porter, 10 Cal.App.2d 431, 436, 52 P.2d 582.

Humphreys v. San Francisco Area Council, 22 Cal.2d 436, 139 P.2d 941, is not in point. In that case, this court affirmed a judgment for defendant on the trial court's finding that plaintiff was in fact a guest. It was specifically recognized that a finding that he was a passenger in the vehicle would also be supported by the evidence, and that the resolution of conflicting evidence was for the trier of fact.

Antisdale next contends that it was improper for the trial court to instruct the jury that they might find him to be Fong's principal and therefore liable for Fong's negligence. We have already discussed the relationships between the Presbytery and Antisdale and between the Presbytery and Fong, and we have accepted plaintiff's contention that both Antisdale and Fong were agents of the Presbytery. Antisdale expressly adopts this contention and relies in addition on Civil Code section 2351, which provides: "A subagent, lawfully appointed, represents the principal in like manner with the original agent; and the original agent is not responsible to third persons for the acts of the subagent."

[19–21] The doctrine of respondeat superior is not applicable to the relationship between a supervisor and his subordinate employees. The supervisor occupies an economic and legal position quite different from that of the employer. It is not the supervisor's work that is being performed, nor does he share in the profits which the employees' conduct is designed to produce. In the usual situation, furthermore, he, like his subordinates, is a wage-earner, and he is seldom able to respond in damages to an appreciably greater extent than they. For these reasons, the law has shifted financial responsibility from the supervisor, who exercises immediate control, to the employer, who exercises ultimate control and for whose benefit the work is done. Bank of California v. Western Union Telegraph Co., 52 Cal. 280, 288–292. Section 2351 of the Civil Code codifies this principle and has been uniformly interpreted to exempt superior employees from vicarious liability to third persons for the tortious conduct of sub-

ordinates. Hilton v. Oliver, 204 Cal. 535, 539, 269, P. 425, 61 A.L.R. 297; Handley v. Lombardi, 122 Cal.App. 22, 29, 9 P.2d 867; Barton v. McDermott, 108 Cal.App. 372, 384, 291 P. 591; City of Los Angeles v. Los Angeles Pacific Navigation Co., 84 Cal.App. 413, 419, 258 P. 409. See also Restatement, Agency, section 358(1); Ellis v. Southern Railway, 72 S.C. 465, 473, 52 S.E. 228, 2 L.R.A., N.S., 378; 61 A.L.R. 290. It was therefore error to instruct the jury that they might find Antisdale liable for Fong's negligence. Since there was a substantial conflict in the evidence as to whether Antisdale himself was negligent, it cannot be determined whether the jury based its verdict against Antisdale on that ground or on the erroneous agency instructions that he could be found liable for Fong's negligence. Under these circumstances it was proper for the trial court to grant the motion for new trial. Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 169, 170–171, 153 P.2d 338; Bieser v. Davies, 119 Cal.App. 659, 663, 7 P.2d 388; Middleton v. California Street Cable Railway Co., 73 Cal. App.2d 641, 646–647, 167 P.2d 239; see also Oettinger v. Stewart, 24 Cal.2d 133, 140, 148 P.2d 19, 156 A.L.R. 1221. This determination does not affect the Presbytery, for it is clearly liable for Fong's negligence whether or not the jury based its verdict against Antisdale on the ground that Antisdale was negligent.

The judgment in favor of the Presbytery of San Francisco is reversed, and the trial court is directed to enter a judgment against the Presbytery in accordance with the verdict of the jury. The order granting a new trial as to Antisdale is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, and SPENCE, JJ., concur.

SCHAUER, Justice.

I concur in the judgment. In so doing I think it proper to note, however, that in my view[1] Fong was a mere volunteer over whose conduct neither Antisdale nor The Presbytery had any authority or right to exercise control and whose negligence cannot be related to them on the theory of respondeat superior. It would follow that the judgment to be entered against The Presbytery as directed by the majority should not stand as against a motion for new trial or an appeal (see Lauritsen v. Goldsmith (1929), 99 Cal.App. 671, 676, 279 P. 168; Ferran v. Mulcrevy (1935), 9 Cal.App.2d 129, 131–133, 48 P.2d 984; Sutherland v. Palme (1949), 93 Cal.App. 2d 307, 314–315, 208 P.2d 1035; Fortier Trans. Co. v. Union Packing Co. (1950), 96 Cal.App.2d 748, 756–757, 216 P.2d 470), for the same reasons which the majority hold require a new trial as to Antisdale; i. e., liability of The Presbytery turns upon liability of Antisdale, and if a new trial is proper as to the latter it is likewise required as to The Presbytery.

SHENK, J., concurs.

Rehearing denied; SHENK and SCHAUER, JJ., dissenting.

1. For the reasons and upon the grounds more fully discussed in the opinion prepared by Mr. Justice Goodell for the District Court of Appeal, First Appellate District, Division Two, which discussion appears at pages 52–53 of the opinion as reported in 220 P.2d 48.

104 Cal.App.2d 594

CROSS v. SUPERIOR COURT IN AND FOR COUNTY OF SANTA CLARA et al.

Civ. 14924.

District Court of Appeal, First District, Division 1, California.

June 5, 1951.

Nancy Cross brought a proceeding for a writ of mandate requiring the Superior Court in and for the County of Santa Clara to order William R. MacKay, Official Court Reporter, real party in interest, to return to petitioner the amount of an alleged overcharge for preparing a transcript on appeal and copies thereof. The District Court of Appeal, Peters, P. J., held that the reporter could not collect for more than the original transcript and one copy thereof, in the ab-

sence of a clear and explicit order for an extra copy, so that petitioner was entitled to return of an additional amount charged for an extra copy not ordered by her.

Peremptory writ granted.

1. Appeal and error ⇐619

The trial court and, where necessary, appellate court, have complete control over preparation of record on appeal, and where trial court refuses relief sought in matter of such preparation, appellate court has inherent power to pass on all questions dealing therewith.

2. Appeal and error ⇐371

A formal notice to prepare reporter's transcript on appeal does not authorize reporter to prepare and charge for more than original transcript and one copy thereof, as called for by Rules on Appeal, and he cannot collect for an extra copy without showing clear and explicit order therefor. Rules on Appeal, rule 4(a, d).

3. Appeal and error ⇐371

An appellant, formally requesting preparation of transcript by superior court reporter, without designating number of copies required, was entitled to return of amount of reporter's overcharge because of his preparation of extra copy one copy called for by Rules on Appeal, in absence of order by appellant for extra copy. Rules on Appeal, rule 4(a, d).

4. Courts ⇐57(2)

A superior court reporter was not guilty of such bad faith as to warrant imposition of exemplary damages for his collection of excessive amount for preparing transcript on appeal as result of preparing extra copy not ordered by appellant in view of referee's finding that controversy was largely result of misunderstanding and that both parties acted in good faith and a superior court judge's affidavit that he tendered appellant, on reporter's behalf, a check for amount of excessive charge. Rules on Appeal, rule 4(a, d).

5. Interest ⇐50

A superior court judge's tender to appellant of check, on court reporter's behalf, for excessive amount charged for preparing transcript on appeal and copies thereof, on condition that appellant sign release designating payment as settlement of doubtful and disputed claim, was sufficient to stop running of interest on amount of excessive charge. Rules on appeal, rule 4(a, d).

Nancy Cross, Stanford, in pro. per.

Alfred B. Britton, Jr., San Jose, for respondent.

PETERS, Presiding Justice.

The petition for a writ of mandate is submitted.

This case involves a dispute over the proper charge for the preparation by the court reporter of the reporter's transcript on an appeal.

The facts, as disclosed by the pleadings of the parties, are as follows: Nancy Cross, the petitioner, desired to appeal in the action of Cross v. Tustin, Cal.App., 231 P.2d 59. She filed her notice of appeal, and the notice to prepare transcripts, as required by Rule 4 of the Rules on Appeal. The court reporter, William R. MacKay, estimated the cost of preparing the reporter's transcript at $283.50, and this information was given by the clerk to petitioner. Petitioner, after unsuccessfully attempting to secure a reconsideration of this estimate, deposited the estimated sum with the clerk. After the transcript was prepared, the trial court fixed its cost at $234.75, ordered that sum paid to the reporter, and the balance of $48.75 returned to petitioner. The figure of $234.75 was based on the reporter's estimate of the number of folios for an original and two copies. Thereafter, by actual word count, it was ascertained that the reporter had overcharged the litigant $26.85, for the original and two copies, and it was further ascertained that, if the litigant had ordered only an original and one copy, the proper charge should have been $161.70, in which event there was an overcharge of $73.05. The reporter offered to refund the admitted overcharge of $26.85, but claimed that the petitioner had ordered an original and two copies. Petitioner claimed that

she had ordered but one copy. She tried, by various proceedings in the trial court, to have that court pass upon this disputed question of fact, but that court refused to do so. She thereupon applied to this court for a writ of mandate.

[1] There can be no doubt of the propriety of this remedy. The trial court, and, where necessary, the appellate court, have complete control over the preparation of the record on appeal. Where relief is refused by the trial court, the appellate court has inherent power to pass upon all questions dealing with the preparation of the record on appeal. Darcy v. Moore, 49 Cal.App.2d 694, 122 P.2d 281.

When it appeared to this court that the basic question in dispute was whether the petitioner had ordered one or two copies of the transcript, this court appointed the Hon. Andrew R. Schottky, Judge of the Superior Court of Mariposa County, as its referee with instructions to take evidence and to make a finding on this disputed question of fact. Thereafter, Judge Schottky held a hearing, took evidence on the issue, and filed his report and findings. He found, among other things, that petitioner, who is not a lawyer, "did not order an original and two copies, but only intended to order, and only did order, one copy." That basic finding is amply supported by the evidence, is in accord with the substantial weight of the evidence, and is adopted as the finding of this court.

[2, 3] The record in this case shows that the formal request for the preparation of the reporter's transcript required by Rule 4(a) was filed by petitioner with the clerk. She did not there designate the number of copies required. The rules do not require such designation. Rule 4(d) requires that the reporter, within a designated period, must file with the clerk "an original and one copy of the reporter's transcript". There is nothing in the Rules to indicate that a normal notice to prepare the transcript authorizes the reporter to prepare and charge for more than the transcript called for by the Rules, that is, for more than an original and one copy. It may be true that, for convenience, litigants or lawyers frequently order an additional copy or copies of the reporter's transcript, but before the reporter can collect for more than an original and one copy he must show that such was ordered. Such order must be clear and explicit. A reporter cannot collect for an extra copy simply because he assumes that the litigant might desire it. Thus, it is quite apparent that the reporter has been paid the sum of $73.05 in excess of the amount due him, and that that sum should be repaid to petitioner.

[4, 5] Petitioner claims that throughout these proceedings the reporter has acted in bad faith, and that exemplary damages should be assessed against him. Aside from the fact that it is extremely doubtful whether this court in this type of proceeding could or should award exemplary damages, we do not think the evidence shows that degree of bad faith that would warrant the imposition of exemplary damages. The referee found that the "controversy is largely the result of a misunderstanding, and both parties undoubtedly acted in good faith." The affidavit of Judge Byrl R. Salsman, a judge of the Superior Court to whom this matter was assigned in the trial court until petitioner filed an affidavit of bias and prejudice against him and he voluntarily stepped aside, avers that on January 22, 1951, he tendered to petitioner a check for $73.05 on behalf of the reporter, but she refused to accept it. This hardly shows bad faith on the part of the reporter. While this offer was made contingent upon petitioner signing a release designating the payment as the settlement of a "doubtful" and "disputed" claim, this was a reasonable condition to attach to the offer of compromise. Such offer was sufficient to stop the running of interest.

Petitioner is entitled to a return of her $73.05 plus interest at 7% per annum from September 5, 1950, when she made her deposit, until January 22, 1951, when the tender of the refund was made.

Let a peremptory writ issue so providing.

BRAY and FRED B. WOOD, JJ., concur.

CALDWELL et al. v. RUSSELL et al.
Civ. 18085.

District Court of Appeal, Second District, Division 2, California.

June 12, 1951.

Rehearing Granted July 2, 1951.

See 234 P.2d 270. *

Action by Fidelia Dunn Caldwell and Martha Sciaroni against Clifford Russell, and others to recover for injuries sustained when automobile collided with a parked truck, wherein Antoinette Lloyd Sciaroni, as administratrix of the estate of Martha Mae Sciaroni, deceased, was substituted in lieu of Martha Sciaroni. From a judgment of the Superior Court, Los Angeles County, Frederick F. Houser, J., in favor of the defendants, the plaintiffs appealed. The Court of Appeals, Moore, P. J., held that there was no error in the giving and refusing of certain instructions and that error in instruction giving defendant truck driver benefit of presumption of due care was not prejudicial.

Judgment affirmed.

1. Trial ⇐260(8)

In action for injuries sustained by passengers in automobile which struck truck, refusal of specific instruction that driver of automobile was entitled to presumption that she exercised due care was not error where court instructed that each party was entitled to presumption that every person takes ordinary care of his own concerns, notwithstanding that driver died during suit and administratrix was substituted as a party.

2. Executors and administrators ⇐439

An administratrix substituted as party plaintiff has no personal interest in action and appears merely in a representative capacity. Code Civ.Proc, § 385.

3. Appeal and error ⇐1064(1)
Automobiles ⇐246(60)

In action for injuries sustained by passengers in automobile which struck truck, instruction that each party was entitled to presumption of ordinary care was erroneous in as much as it gave driver of truck benefit of presumption but error was not prejudicial in view of qualification "in the absence of evidence to the contrary" and other instructions.

4. Negligence ⇐121(1)

A party testifying as to his conduct in, and events leading up to, accident is not entitled to presumption of due care, but jury must rely upon such testimony as proof of his freedom from negligence.

5. Appeal and error ⇐1067
Trial ⇐260(8)

In action for injuries sustained by passengers in automobile which struck parked truck, refusal of instruction that defendant rather than plaintiff must prove that it was not practicable for defendant to park elsewhere was not prejudicial, in view of instruction on substance of statute relating to parking on highway and in view of fact that plaintiff proved that it was practicable for truck driver to park elsewhere. Vehicle Code, § 582.

6. Trial ⇐241

In action arising out of collision between automobile and parked truck, instruction pursuant to statute requiring that vehicles be driven within a single lane where road is divided into three or more lanes was proper in view of evidence that highway consisted of six clearly marked traffic lanes, three each way. Vehicle Code, § 526.

7. Automobiles ⇐246(13)

In action arising out of collision of automobile with parked truck, trial court properly instructed that terms "paved" or "improved portion of highway" as used in provision of Vehicle Code with respect to parking on highway means that portion of highway ordinarily used for vehicular traffic. Vehicle Code, § 582.

8. Automobiles ⇐245(17)

In action arising out of a collision of automobile with parked truck at point where hard surface at outer edge of highway rose 8 inches in distance of four feet, whether such surface constituted a "curb" was a question for jury. Vehicle Code, § 582.

9. Automobiles ⇐246(13)

In action arising out of collision of automobile with parked truck, instruction that "curb" as applied to state highway was a stone or row of stones or similar

* Subsequent opinion 234 P.2d 270.

construction of concrete, wood or other material along margin of highway was proper. Vehicle Code, § 582.

Stutsman, Hackett & Nagel, Fresno, Abe Levin, Hollywood, Chase, Rotchford, Downen & Drukker, Donn B. Downen, Jr., and Otto M. Kaus, all of Los Angeles, for appellants.

Knight, Gitelson & Ashton, Los Angeles, and Leon Savitch, Los Angeles, of Counsel for respondent, Clifford Russell.

Ray L. Chesebro, City Atty., Gilmore Tillman, Chief Asst. City Atty., for Water and Power, Gerald Luhman, Deputy City Atty., Wendell Mackay, Deputy City Atty., all of Los Angeles, for respondent, Department of Water and Power of the City of Los Angeles.

MOORE, Presiding Justice.

Fidelia Dunn Caldwell and Martha Sciaroni sued to recover for injuries and damages received when Mrs. Caldwell's automobile, operated by Mrs. Sciaroni, collided with the rear-end of a truck parked adjacent to the west curb of Lankershim boulevard in the city of Los Angeles. The truck was the property of respondent Department of Water and Power of the City of Los Angeles and at the time of the accident was in the custody of its employee, respondent Russell. During the pendency of the suit Mrs. Sciaroni deceased from causes unrelated to the accident and at the time of trial the administratrix of her estate, Antoinette Lloyd Sciaroni, was substituted as a party plaintiff.

Respondents denied all material allegations of their negligence and alleged contributory negligence on the part of appellants. The latter appeal from the judgment entered upon a verdict denying them relief.

Appellants concede that the record contains evidence establishing negligence on the part of Mrs. Sciaroni and that such negligence is imputed to Mrs. Caldwell. Consequently, no attack is made as to the sufficiency of the evidence but reversal is demanded on the ground that the court erred in the giving and refusing of a number of instructions.

Lankershim boulevard, a north-south highway at the point of the collision, is approximately seventy feet wide. A double white line is painted down its center. Twelve feet to the west thereof is a single white line. The highway is paved with a heavy duty asphalt from its center westerly 23 feet. The twelve feet adjacent to the curb is composed of a rock and oil pavement two inches thick, two thirds of which serves as a shoulder and four feet is constructed as a sloping curb. Thus a gutter effect or depression exists approximately four feet from the west edge of the pavement. The center 46 feet of the boulevard is its main traveled portion.

At the time of the accident, Russell was parked on the west side of Lankershim boulevard with his right wheels within one foot of the extreme edge of the highway and his left wheels approximately a foot or two east of the flow line of the gutter. He had just reentered the cab of his truck after checking supplies in its rear when the truck was struck by the Caldwell vehicle.

Mrs. Caldwell testified that her vehicle was proceeding southerly with Mrs. Sciaroni at the wheel in the center lane on the west side of the roadway. Before reaching respondents' truck, a black sedan passed them on the left, crowded them over, cut into their lane and sped on without touching the Caldwell car. Mrs. Sciaroni applied the brakes, swerved to the right, and collided with the rear of the truck.

[1] Appellants' first ground for reversal is that the court erred in refusing to instruct the jury specifically that Mrs. Sciaroni was entitled to the presumption that she had exercised due care. The fallacy of such contention is manifest to him who reads the instruction given, to wit: "At the outset of this trial, each party was entitled to the presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law. These presumptions are a form of prima facie evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. When there is other

evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the presumption (and any evidence that may support the presumption), to determine which, if either, preponderates. Such deliberations, of course, shall be related to, and in accordance with, my instructions on the burden of proof."

[2] Appellants argue that Mrs. Sciaroni was not a "party" to the suit and therefore was not benefited by this instruction. Such contention would lead to error. Although Mrs. Sciaroni was not technically a party to the action after her decease, nevertheless her administratrix has no personal interest in the action and appears merely in a representative capacity. Code Civ.Proc. § 385; Campbell v. West, 93 Cal. 653, 657, 29 P. 219, 645. It would be an overly strict and unreasonable interpretation of the instruction to hold that it did not extend the benefit of the presumption of due care to the deceased. The jury could not reasonably have considered otherwise than that decedent was a "party" within the meaning of the court's instruction. The pleadings and the evidence show that she was a party involved in the accident. The jury was instructed that she was driving the Caldwell car, that she had subsequently died, and that her personal representative was entitled only to such special damages as were incurred for hospitalization and treatment of her injuries.

[3, 4] However, the giving of the instruction was erroneous inasmuch as it also gave respondent Russell the benefit of this presumption of due care. Where a party has testified as to his conduct in, and of the events leading up to, an accident in which he was an actor, he is not entitled to the presumption in his favor, but the jury must rely strictly upon such testimony as proof of his freedom from negligence. Speck v. Sarver, 20 Cal.2d 585, 587–588, 128 P.2d 16. From the mere announcement of the doctrine, it is not to be inferred that the error in giving the instruction is prejudicial. Numerous decisions have recognized error in such instruction, yet their authors have declined to recognize the necessity for a reversal of the judgment. Speck v. Sarver, supra; Tuttle v. Crawford, 8 Cal. 2d 126, 133, 63 P.2d 1128; Rogers v. Interstate Transit Co., 212 Cal. 36, 39, 297 P. 884. Considering all the circumstances of the case, it is not apparent that either appellant was prejudiced by the instruction. It is itself qualified by the phrase, "in the absence of evidence to the contrary." Thus the jury was free to weigh and consider the conflicting evidence. Furthermore, the jury was fully and properly instructed on all matters pertaining to the possible negligence of both decedent and respondent Russell. Contributory negligence, ordinary care and proximate cause were all defined in the instructions. Such circumstances are similar to those in Speck v. Sarver.

Appellants urge the applicability of the decision in Cole v. Ridings, 95 Cal.App.2d 136, 212 P.2d 597, where this very instruction was deemed reversible error. That is true, but the opinion therein reveals a sharp conflict on the issue of contributory negligence. Such error was also indicated to be prejudicial solely by virtue of other erroneous instructions also given.

[5] Appellants contend that the court erred in refusing the following instruction: "You are instructed that if you find that the defendants in this action stopped or otherwise parked their vehicle at a point in the highway other than a business or residence district, and that such roadway was not bounded by adjacent curbs, then a prima facie case of negligence has been established against the defendants. There is no duty upon the part of the plaintiff to prove that it was practicable for the defendants to park some other place than on the paved or improved or main travelled portion of the highway, but on the contrary, once the fact of having so parked has been established, it is encumbent upon defendants to prove that it was not practicable to park or stop at any other place."

The prejudice asserted is that by virtue of the court's failure to give this instruction, the court in effect instructed the jury that the burden of proving the practicability of Russell's parking elsewhere was on the appellants when the authorities are to the

contrary. Thomson v. Bayless, 24 Cal.2d 543, 546, 150 P.2d 413. However, the jury was fully and correctly instructed [1] on the substance of section 582 of the Vehicle Code which was the basis of appellants' requested instruction. Moreover, appellants assumed the burden of proving and did prove that it was practicable for Russell to park elsewhere. No evidence to the contrary was introduced and in fact Russell himself virtually admitted he stopped at that location only for his own conven-

1. "You are instructed that at the time of the accident Section 582 of the Vehicle Code of the State of California provided as follows: 'Upon any highway outside of a business or residence district no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of the highway when it is practicable to stop, park or so leave such vehicle off such part or portion of said highway. This section shall not apply upon a highway where the roadway is bounded by adjacent curbs.'

"You are instructed that it has been established as a matter of law that the roadway at the place of the occurrence of the accident, which is the subject of this litigation, was a highway outside of a business or residence district within the meaning of Section 582 of the Vehicle Code.

"You are instructed that the terms 'paved' or 'improved portion of the highway' as used in Section 582 of the Vehicle Code, at the time of the accident mean that portion of the highway ordinarily used for vehicular travel.

"You are instructed that in ascertaining whether or not it was practicable to park a non-disabled truck, as is involved in the present litigation, off the highway, you must consider not only the physical conditions immediately to the right of the place at which the truck was parked, but also any other possible parking space to which the vehicle might reasonably be taken within a reasonable distance.

"You are instructed that the common meaning of the word 'curb' as applied to a state highway is a stone or row of stones or similar construction of concrete, wood or other material along the margin of the highway set aside for vehicular use and a restraint and protection to the adjoining sidewalk space.

"You are instructed that Section 588 of the Vehicle Code of the State of California in full force and effect at the time of the occurrence of this accident insofar as it is pertinent to this action reads as follows: 'Except as otherwise provided in this section every vehicle stopped or parked upon a roadway where there are adjacent curbs shall be so stopped or parked with the right-hand wheels of such vehicle parallel with and within eighteen inches of the right-hand curb.' The above vehicle section just quoted is only applicable if you first find that the State highway at the point where the accident occurred was actually bounded by curbs within the definition of the same as given to you by the court.

"Conduct which is in violation of Section 526 or 582 or 588 of the Vehicle Code of the State of California just read to you constitutes negligence per se, that is; negligence as a matter of law. This means that if the evidence supports a finding, and you do find, that a person did so conduct himself, it requires a presumption that he (or she) was negligent. However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence. In this connection, you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes, not of his own intended making, induce him, without moral fault, to do otherwise.

"You have been instructed that conduct which was in violation of certain sections of the Motor Vehicle Code just read to you constitutes negligence per se, that this means that if the evidence supports a finding and you do find that a person did so conduct himself, it requires a presumption that he was negligent. In this connection you are further instructed that such presumption is not conclusive; that it may be overcome by other evidence tending to show that under all the circumstances surrounding the event, the conduct in question is excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence. You should, however, be cautioned that in applying this instruction to an alleged violation of Section 582 of the Vehicle Code, namely that section covering stopping, standing or parking outside of business or residence districts, a deliberate, unlawful parking in violation of said section for reasons of personal convenience only, is not excusable or justifiable."

ience. It follows that no prejudicial error has been demonstrated.

[6] Also, there was no error in the giving of an instruction that pursuant to the Vehicle Code section 526 a vehicle shall be driven within a single lane whenever a roadway has been divided into three or more clearly marked lanes of traffic. Contrary to appellants' argument that no evidence supports the giving of such an instruction, the record reveals testimony of appellant Caldwell that the highway consisted of six traffic lanes, three each way. The evidence established that such lanes were "clearly marked" either by painted lines or differences in the texture and composition of the highway surface. In any case, no prejudice is shown.

[7] Neither is there error in the giving of an instruction "that the terms 'paved' or 'improved portion of the highway' as used in section 582 of the Vehicle Code, at the time of the accident, mean that portion of the highway ordinarily used for vehicular travel." It was held in Ketchum v. Pattee, 37 Cal.App.2d 122, 127, 98 P.2d 1051, that "improved" refers to the usually traveled roadway, and the opinion on this point was in no sense dictum as contended by appellants.

[8, 9] Appellants urge as error the court's instruction in regard to what constituted a curb. The instruction given was as follows: "You are instructed that the common meaning of the word 'curb' as applied to a state highway is a stone or row of stones or similar construction of concrete, wood or other material along the margin of the highway set aside for vehicular use, and a restraint and protection to the adjoining sidewalk space."

It is appellants' contention that a curb cannot be constructed of macadam and an instruction to this effect was offered. Their theory is that this sloping four feet, rising eight inches in this distance, could not, as a matter of law, be considered curbing. However, no good reason appears why it could not be a curb within the meaning of the Vehicle Code. The witness Harding, a civil engineer in charge of designing streets in Los Angeles, testified that this slope was one of a number of types of curbing used in this city. Whether a curb did exist at the point where the truck was parked was therefore properly a question of fact for the jury's determination. The instruction given was proper, curbing having been judicially defined to include wood, stone, cement or any other material. Lyman v. Town of Cicero, 222 Ill. 379, 78 N.E. 830.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

104 Cal.App.2d 621

HARPER v. VALLEJO HOUSING AUTHORITY et al.

Civ. 7805.

District Court of Appeal, Third District, California.

June 6, 1951.

E. H. Harper, guardian ad litem of Mary Naomi Harper, a minor, on behalf of said minor, brought an action against Vallejo Housing Authority, a corporation, and Joe Robbins, for injuries received by the minor when automobile driven by the individual defendant struck the minor while the individual defendant was backing his automobile and the minor was walking across a paved recreational area located in housing project. The Superior Court, Solano County, Joseph M. Raines, J., rendered a judgment for plaintiff and the defendant housing authority appealed. The District Court of Appeal, Van Dyke, J., held, inter alia, that whether a dangerous or defective condition existed when minor was struck was for a jury under the evidence.

Judgment affirmed.

1. Landlord and tenant ⇐164(1)

Conduct of Housing Authority in permitting recreational area in housing project to be so used by drivers and owners of motor vehicles as to render area dangerous and defective for recreational use may con-

stitute actionable negligence. Gen.Laws, Act 3483, § 1 et seq.

2. Landlord and tenant ⇐169(11)

In action for injuries suffered by minor when minor was walking across paved recreational area and was struck by individual defendant's automobile which individual defendant was backing, whether a dangerous or defective condition existed when minor was struck so as to render defendant Housing Authority liable for negligence was for jury under evidence that defendant Housing Authority had designated areas in housing project as recreational areas, had paved a portion of area in which minor was struck, and constructed ramps over gutters to give vehicles access to area, and had knowingly acquiesced in use of area for parking of automobiles for repair, and in some instances had permitted automobiles to be garaged about area. Gen.Laws, Act 3483, § 1 et seq.

3. Negligence ⇐61(2), 62(3)

If an injury is produced by concurrent effect of two separate wrongful acts, each act is "proximate cause" of injury, and neither act can operate as an efficient "intervening cause" with regard to the other.

See publication Words and Phrases, for other judicial constructions and definitions of "Intervening Cause" and "Proximate Cause".

4. Negligence ⇐61(2)

Fact that neither party could reasonably anticipate occurrence of other concurrent cause will not shield him from liability so long as his own negligence was a cause of injury.

5. Landlord and tenant ⇐164(1)

Alleged negligent action of motorist in backing into minor child of tenant who was walking across recreational area of housing project would not be an efficient intervening cause with regard to alleged negligence of Housing Authority in permitting recreation area to be so used by drivers and owners of motor vehicles as to render area dangerous and defective for recreational use, and alleged negligence of motorist would not relieve Housing Authority of liability for injuries to minor child of tenant if produced by concurrent effect of negligence of both Housing Authority and motorist.

6. Landlord and tenant ⇐164(1), 167(8)

A possessor of land who leases a part thereof and retains in his own possession any part which lessee is entitled to use as appurtenant to part leased to him is subject to liability to his lessee and others lawfully upon land with consent of lessee or a sublessee for bodily harm caused to them by a dangerous condition upon that part of land retained in lessor's control, if lessor by exercise of reasonable care could have discovered condition and unreasonable risk involved therein and could have made condition safe.

7. Negligence ⇐95(1)

A child is not barred from recovery for injuries by contributory negligence of parents of child either in their custody of child or otherwise.

8. Release ⇐27

A release executed by tenants in housing project, whereunder tenant agreed to release landlord Housing Authority from liability for injury to tenant or members of tenant's household, did not attempt to contract away rights of minor child of tenant and did not relieve Authority from liability for injuries sustained by such minor child when minor child was struck by automobile while walking across recreational area which Authority allegedly negligently permitted to be so used by drivers and owners of motor vehicles as to render area dangerous and defective for recreational use.

9. Landlord and tenant ⇐164(1)

Housing Authority, although a State agency, was in fact a business enterprise and would be liable for injury to minor child of a tenant in housing project if injury was caused by negligence of Authority in permitting recreational area in housing project to be so used by drivers and owners of motor vehicles as to render area dangerous and defective for recreational use.

10. States ⇐197

Generally where a public agency is liable in tort, claims need not be filed with governing authority before action can be

brought for damages resulting from negligence of agency, unless legislature has required filing of a claim precedent to action.

11. Landlord and tenant ⇐169(1)

Fact that no claim was filed by or in behalf of minor with Housing Authority or any governmental agency, did not preclude maintenance of action against Housing Authority for injuries to minor allegedly resulting from negligence of Authority in permitting recreational area in housing project to be so used by drivers and owners of motor vehicles as to render area dangerous and defective for recreational use, in absence of statute requiring filing of such claims. Gen.Laws, Act 3483, § 18; Gen. Laws, Act 5149; Government Code, §§ 16000–16054.

12. Trial ⇐194(16)

In action for injuries sustained by minor child of tenant in housing project when struck by an automobile which backed into minor when minor was walking across recreational area in housing project, wherein negligence of which Housing Authority was alleged to have been guilty was that of permitting recreational area to be so used by drivers and owners of motor vehicles as to render recreational area dangerous and defective for recreational use, portion of requested instruction that Housing Authority owed no duty to plaintiff to restrict use of recreational area, nor to barricade against motorists driving over recreational area, would have instructed jury upon a fact question for jury and was properly refused to Authority.

13. Trial ⇐251(8)

In action for injuries sustained by minor child of tenant in housing project when struck by an automobile which backed into minor when minor was walking across recreational area in housing project, wherein negligence of which Housing Authority was alleged to have been guilty was that of permitting recreational area to be so used by drivers and owners of motor vehicles as to render recreational area dangerous and defective for recreational use, portion of requested instruction that recreational area was neither dangerous nor defective because so constructed that motor vehicle could be readily driven upon it, related to matter foreign to issues and was properly refused to Authority.

14. Trial ⇐251(8)

In action for injuries sustained by minor child of tenant in housing project when struck by an automobile which backed into minor when minor was walking across recreational area in housing project, wherein negligence of which Housing Authority was alleged to have been guilty was that permitting recreational area to be so used by drivers and owners of motor vehicles as to render recreational area dangerous and defective for recreational use, requested instruction that if recreational apparatus called "monkey bars", at which minor had been playing before minor started to walk across recreational area, were visible and obvious, Authority had no duty to provide fences or barriers to apprise individuals of presence of such recreational apparatus, was not applicable to issues and was properly refused to Authority.

Dunnell, Herbert & Dunnell, Fairfield, for appellant.

Taft, Wright & Hopkins, Vallejo, for respondent.

VAN DYKE, Justice.

This action was brought by E. H. Harper as guardian ad litem of his daughter Mary, a minor, who at the time of the accident, wherein she received the injuries on account of which this suit was brought, was an infant two years of age. Her parents were tenants of a dwelling leased to them by the appellant Vallejo Housing Authority and situated within a housing project known as Chabot Acres in Vallejo. In various places within the project were areas designated on the plat of the project as playgrounds or play areas and one of these was the scene of the accident. The area, which lies between two rows of project houses, is located off the street, but ramps over street gutters give vehicular access to it. A portion of the area, measuring about 50 x 150 feet, had been paved, and close to the block of pavement there had been in-

stalled a structure made up of iron pipes or bars which the witnesses called "monkey bars". These things were done by the Authority. Children used the monkey bars; both adults and children used the paved area for recreation. Over the course of several years before the accident the Authority had permitted, or at least knowingly acquiesced in, the use of the entire area by persons desiring to park motor vehicles, to repair them, and in some instances to garage them in small garages located about the area by the owners of these vehicles. At the time of the accident defendant Joe Robbins was moving a motor vehicle in close proximity to the paved area and to the monkey bars. While backing up his vehicle he ran against the minor, Mary Harper, inflicting physical injury. A few minutes before she was hurt the child had been playing at the bars. When struck she and two other children were walking across the area. A jury returned a verdict in the sum of $1,750 in favor of plaintiff and respondent. Both the suit and the recovery were limited to general damages suffered by the minor. Robbins has not appealed.

[1] The negligence of which the Authority was alleged to have been guilty was that of permitting the recreational area to be so used by drivers and owners of motor vehicles as to render the area dangerous and defective for recreational use. That such conduct on the part of those in charge of such an area may constitute actionable negligence has been held by the appellate courts of this State in a number of cases. See Bauman v. City & County of San Francisco, 42 Cal.App.2d 144, 108 P.2d 989; Taylor v. Oakland Scavenger Co., 17 Cal.2d 594, 110 P.2d 1044.

[2] Appellant contends that as a matter of law no dangerous nor defective condition existed on the premises at the time the accident occurred. We think this question was one of fact for the jury to determine, and that the evidence furnishes support for its determination. What constitutes a dangerous or a defective condition cannot be settled by hard and fast rules. Each case must depend upon its own state of facts; and it is generally a question of fact for the jury to determine. Bauman v. City & County of San Francisco, supra. As stated by the court in the cited case:

"* * * The jury was justified in finding that the playground was dangerous and defective for any of the following reasons: That the playground was rendered dangerous or defective by the negligence of appellant in permitting the playing of hard baseball in dangerous proximity to the sand box; that under the circumstances here existing it was the duty of appellant, if hard baseball was to be permitted to be played in the north end of the field, to erect some barrier for the protection of those playing in the small children's section; or the appellant negligently failed to properly supervise the playground by either failing to prevent the boys from playing hard baseball in dangerous proximity to the small children's section or in negligently failing to keep the small children away from the sand box while hard baseball was being played nearby. There can be no doubt that a dangerous or defective condition can be created by the use or general plan of operation of government operated property, as well as by a structural defect. Huff v. Compton City Grammar School Dist., 92 Cal.App. 44, 267 P. 918." [42 Cal.App.2d 144, 108 P.2d 994.]

We think what has been quoted is applicable to the situation presented by the record here. Not only was the play area between the rows of houses originally intended for use as such by the Authority operating the project, but to its knowledge it had been used as such and it had indicated that such was at least one of its main purposes by improving a portion as stated heretofore and by the installation of the monkey bars for the use of children. To permit concurrent use by owners of motor vehicles, even to a limited extent, could by the jury have been found to have created a continuous, dangerous condition.

[3–5] Appellant contends that any negligence upon its part cannot be held here to have been a proximate cause of the minor's injuries. The same contention was made in Taylor v. Oakland Scavenger Co., supra, a school yard case. The injury had been in-

flicted by the truck of the scavenger company and both the company and the school district had been held liable. Each defendant argued that the negligence of the other was the only proximate cause of the injury and the court said:

"* * * If an injury is produced by the concurrent effect of two separate wrongful acts, each is a proximate cause of the injury, and neither can operate as an efficient intervening cause with regard to the other. * * * The fact that neither party could reasonably anticipate the occurrence of the other concurrent cause will not shield him from liability so long as his own negligence was one of the causes of the injury." [17 Cal.2d 594, 110 P.2d 1049.]

What is there said answers the contention of the appellant here with respect to proximate cause.

[6, 7] Appellant contends that the minor child stood in the shoes of its parents, and was entitled to recover only if the parents were so entitled if one of them had been injured. But the liability of the appellant was grounded upon that of a possessor of land "who leases a part thereof and retains in his own possession any other part which the lessee is entitled to use as appurtenant to the part leased to him". Such a possessor "is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sub-lessee for bodily harm caused to them by a dangerous condition upon that part of the land retained in the lessor's control, if the lessor by the exercise of reasonable care could have discovered the condition and the unreasonable risk involved therein and could have made the condition safe." (Restatement of Torts, Sec. 360.) We are not concerned here with liability to the lessee nor with any negligence of the parents in permitting the child to go upon the playground area for the parents sought no recovery here; and if they were negligent in respect of their care of the child still "A child is not barred from recovery by the contributory negligence of its parents either in their custody of the child or otherwise." (Restatement of Torts, Sec. 488.)

[8] Appellant contends that a release clause contained in the lease executed by the minor's parents and by the Authority whereby the dwelling in which the parents and the minor lived was leased by the Authority to them constitutes a bar to the child's recovery here. That clause read as follows: "The tenant agrees to release the landlord * * * from liability for any injury to the tenant or the members of his household, resulting from any cause whatsoever, excepting only any such injury or damage resulting from the wilful acts of such representatives, agents and employees." The release is unavailing to protect the appellant from its negligent injury of the minor child. It is executed by the parents and covers those matters which on their own behalf they purported to cover by it. We may assume here that it would bar them from recovering damages accruing to themselves, as for medical, surgical and hospital expenses in caring for their injured child. But this is a suit by the child through her guardian ad litem for injuries suffered to herself from the accident. The parents did not by the release attempt to contract away the child's rights. It is unnecessary to discuss the question of whether or not they could lawfully have done so.

[9] No claim for damages was filed by or in behalf of the minor with the appellant or with any governmental agency, and appellant contends that this is fatal to the cause of action. The tort liability of Housing Authorities was given extended consideration in the case of Muses v. Housing Authority, 83 Cal.App.2d 489, 189 P.2d 305, and it was there held that such Authorities, although State agencies, are in truth and in fact business enterprises and are liable for their torts. The Supreme Court denied a petition for a hearing. We find ourselves in agreement with the ruling made in that case and hold that the appellant here was engaged in a business enterprise and was liable for its negligence therein.

[10, 11] It is not a general rule that, where a public agency is liable in tort, claims must be filed with the governing authority before action can be brought. If

there is liability it follows that the injured person has a cause of action to enforce the same. And if the Legislature has not seen fit as to any public agency to require the filing of a claim precedent to action then no such condition is imposed. The support, therefore, for this contention of appellant that a claim must have been filed must be found in a statute which so declares.

The act creating Housing Authorities, Deering's General Laws, Act 3483, and other legislative enactments applicable to them contain no requirements that claims against them shall be filed with the governing body thereof. Their obligations are by the Legislature declared not to be debts of the city or county in which they operate nor of the State nor of any subdivision thereof, and it is further declared that those bodies shall not be liable thereon. Deering's General Laws, Act 3483, § 18. None of the claims statutes declare expressly that Housing Authorities are within their provisions.

An examination of the claims statutes discussed in the briefs shows the following: Claims against the State are governed by Government Code, §§ 16000–16054. These sections apply to proprietary activities of the State. People v. Superior Court, 29 Cal.2d 754, 178 P.2d 1. It is apparent that the sections have to do with claims enforcible against the State through suits culminating in judgments and it is equally apparent that the provisions of these sections could not apply to such an action as the case at bar which is upon a liability which the statute has expressly declared shall not be the liability of the State. It is also suggested that the action comes within the embrace of Act 5149 of the General Laws dealing with liability in damages of municipalities, counties, cities and counties and school districts where the injuries result from a defective or dangerous condition of public property. It is contended in this respect that the Authorities are municipalities within the meaning of the act referred to. A consideration of the legislation creating the Authorities shows that they cannot be held to be municipalities within the meaning of the claims legislation referred to. They bear no resemblance to what we commonly refer to as a municipality, and although they are declared by the act of their creation to exercise governmental functions, we see nothing in that language justifying their inclusion within the statutes as municipalities. We conclude that neither expressly nor by implication do the various claims statutes brought to our attention in the briefs and considered by us independent thereof require the filing of any claim as a condition precedent to an action against a Housing Authority.

[12, 13] Appellant further contends that the court erred in refusing to give two instructions requested by it at the trial of the action. By the first instruction they asked the court to tell the jury that the Housing Authority owed the plaintiff here no duty to restrict the use of the playground nor to barricade against motorists driving over it. This part of the instruction clearly would have instructed the jury upon a question of fact which, as we have held, was for its determination and the court therefore properly refused that part of the instruction. By the rest of the requested instruction the court would have told the jury that the playground was neither dangerous nor defective just because it was so constructed that motor vehicles could be readily driven upon it. The negligence complained of was in the allowance by the Authority of the use of the playground area by motor vehicles, and no contention was advanced, at least during the trial of the action, that there was any actionable negligence in the matter covered by the instruction. The court, therefore, properly refused to instruct upon a matter which in reality was foreign to the issues.

[14] The next instruction complained of would have had the trial court tell the jury that if the recreational apparatus, the "monkey bars", were visible and obvious then the Authority was under no duty to provide fences or barriers for the purpose of apprising individuals of the presence of said recreational apparatus. This requested instruction is as little applicable to the facts and issues as the one we have just discussed. Certainly an appellate court would

not be justified in reversing a judgment otherwise properly arrived at through a refusal to give these instructions, in view of the fact that the record shows the jury to have been fully instructed upon the law applicable to the issues they were to resolve.

The judgment is affirmed.

ADAMS, P. J., and DEIRUP, Justice pro tem., concur.

104 Cal.App.2d 688

PEOPLE v. MOORHEAD et al.

Cr. 4557.

District Court of Appeal, Second District, Division 1, California.

June 12, 1951.

Rehearing Denied June 25, 1951.

Paul G. Moorhead and Andrew J. Downey were convicted of grand theft, committed by continuing to accept down payments from prospective purchasers of lots after it was certain that their subdividing and building enterprise could not succeed, and they appealed from judgments rendered by the Superior Court of Los Angeles County, David Coleman, J., and from verdicts of the jury and from orders denying motions for new trial. The District Court of Appeal, Drapeau, J., held that the evidence sustained the convictions.

Convictions affirmed and appeals from verdicts dismissed.

1. Larceny ⇐55

Contentions of insufficiency of evidence to support counts of information are answered if a theory of theft which will meet the test of reasonable doubt may be drawn from the evidence. Pen.Code, § 484.

2. Embezzlement ⇐1
False pretenses ⇐1
Larceny ⇐1

The Penal Code now amalgamates the crimes of larceny, embezzlement, false pretenses and kindred crimes under the cognomen of theft. Pen.Code, § 484.

3. Embezzlement ⇐1
False pretenses ⇐20
Larceny ⇐1

Under statutory definition of "theft", distinctions between embezzlement, larceny and other elements of stealing are unimportant and crime is complete if a man takes property not his own with intent to take it. Pen.Code, § 484.

See publication Words and Phrases, for other judicial constructions and definitions of "Theft".

4. Embezzlement ⇐1
False pretenses ⇐1

The theft statute makes it a crime for any person by any false or fraudulent representation or pretense to defraud any other person and to fraudulently appropriate property which has been entrusted to him. Pen.Code, § 484.

5. Embezzlement ⇐44(1)

Evidence sustained conviction of theft in the form of embezzlement, committed by continuing to accept down payments from prospective purchasers of lots after it was certain that defendants' subdividing and construction enterprise could not succeed. Pen.Code, § 503.

6. Criminal law ⇐369(2), 371(12), 372(1)

Evidence of other acts of a similar nature may be admitted in criminal cases to prove a material fact or where they tend to show motive, scheme, plan or system.

7. Criminal law ⇐1169(11)

In prosecution for theft in the form of embezzlement, committed by continuing to accept down payments from prospective purchasers of lots after it was certain that defendants' subdividing and building enterprise could not succeed, admission in evidence of substituted set of indemnity bonds given in connection with the enterprise was not prejudicial error.

8. Criminal law ⇐813

In prosecution for theft in form of embezzlement, committed by continuing to accept down payments from prospective purchasers of lots after it was certain that defendants' subdividing and building en-

terprise could not succeed, instruction that if moneys deposited were to be used for particular purpose and were to be refunded if certain loans were not obtained, and if such loans were not obtained, the deposits constituted trust funds and were refundable and could not be diverted, was an abstract statement of fact and not objectionable.

9. Criminal law ⇐808½

In prosecution for theft in form of embezzlement, committed by accepting down payments from prosepective purchasers of lots after it was certain that subdividing and building enterprise could not succeed, instruction in language of statutes governing subdividers was not erroneous.

Youngdahl & Glick and Peter J. Youngdahl, all of Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondents.

DRAPEAU, Justice.

In an information containing twenty-one counts, defendants were jointly charged with the crime of grand theft. Counts one and fifteen were dismissed. The jury found defendant Moorhead guilty, and defendant Downey not guilty, as to count two. Verdicts were returned finding both defendants guilty as charged in the remaining counts. Defendants' applications for probation and their motions for new trial were denied.

From the ensuing judgments of conviction, from the verdicts of the jury and from the orders denying their motions for new trial, defendants appeal.

Count one charged grand theft of $5,000 from Wilshire Escrow Company and Eric and Ida C. Flodine on February 13, 1948; Count two, grand theft of $550 from defendants' corporation, Safeway Homes, Ltd., on February 2, 1948; all other counts charged grand theft of sums of money from various individuals.

The following points are urged on this appeal: (1) The verdicts are contrary to the law and the evidence. (2) The court erred (a) in its rulings on the admission of evidence; (b) in the giving of certain instructions; and (c) in refusing to grant the motions for new trial.

Appellants Moorhead and Downey, as president and vice-president, respectively, of Safeway Homes, Ltd., a corporation, purchased a tract of unsubdivided land in Redondo Beach in the fall of 1947. They assumed a trust deed for $99,100 in favor of Eric and Ida C. Flodine, the original owners of the land. This document provided for release of individual lots from the lien thereof upon payment of $700. No payments were ever made on the trust deed nor under the release clause, Mr. Flodine testifying at the trial that he foreclosed the trust deed in March of 1949.

Appellants proceeded with the preliminary grading and improvement of the land, and employed a draftsman to make drawings of prospective dwellings to be erected in the tract.

The map of the new subdivision, known as tract number 11336, was conditionally approved by the City Council of Redondo Beach on December 15, 1947. The bonds required by a city ordinance, i. e., one for $110,000 guaranteeing completion of the improvement, and the other for $55,000 securing against the filing of mechanics' liens, were posted on February 5, 1948. Final approval of the subdivision map was declared as of that date and the map was duly recorded.

Although these bonds were approved by the city attorney as to form, and by the mayor as to sufficiency, some objection was later raised to them, with the result that appellant Moorhead substituted another set of bonds for the same amounts on April 15, 1948. The original bonds were returned to Mr. Moorhead. The substituted bonds show approval by the city attorney as to form, and the mayor as to sufficiency on April 15, and 17, 1948, respectively.

Apparently, the bonds were worthless. An investigator for the State Department of Insurance testified at the trial that there was no record that the company which purportedly executed them was ever ad-

mitted to do business in the state of California.

After the preliminary grading and leveling was done late in 1947, no streets, sidewalks, curbs or sewers were ever installed, and no houses were built.

In the meantime, appellants employed Mr. J. W. Davis as their sales agent and put on a sales campaign. The tract was signed for sale, and a majority of the prosecuting witnesses testified that they noticed the posters as they drove by. They then talked with Mr. Davis at the tract office where a map of the property hung on the wall.

The record herein discloses that after a prospective buyer looked at the property he chose a particular lot which was noted on the wall map. He examined blue prints and drawings and selected the type of house he wanted built on the lot. He then signed a so-called "Request for Reservation" indicating the house and lot of his choice and made a deposit, the amount of which depended upon whether he was a veteran or non-veteran. In such request the buyer agreed to execute a contract for delivery to him of the lot he had chosen improved with the house of his choice for a total price ranging from $7950 to $8950, together with payment of the balance of the down payment.

The second contract was denominated a "Building Contract" and provided that the Contractor would obtain the necessary building loans to complete the purchase of the lot and the construction of the house, such loans to be amortized building loans, F. H. A. or G. I. insured loans. It also provided for refund of deposits if buyer's credit was not approved; that thirty days would be required to complete and record the building loan and that the time for completion and delivery of the proposed residence should be approximately 90 working days from date of recording the loan.

Count two upon which appellant Moorhead was found guilty is based on a transaction with Mr. W. M. Goleman, a sheet metal contractor, who testified at the trial. He made an agreement in January of 1948 with appellant Moorhead in behalf of Safeway Homes, Ltd., to furnish sheet metal for 141 proposed dwellings in tract number 11336. In order to insure preferred service and have the required material available for the work, Safeway Homes advanced to Mr. Goleman the sum of $1,000.-00, which was to be returned in the event the "project does not proceed." A portion of this money was used to purchase such material. Sometime in February of 1948, the agreement was cancelled by mutual consent, and by endorsement across the face thereof, appellant Moorhead acknowledged receipt of the $1,000.00 theretofore advanced. On February 14, 1948, Mr. Goleman refunded $550.00 in cash of the $1,-000.00 advanced by delivering the same to Mr. John Davis, the salesmanager. Later Mr. Moorhead advised Mr. Goleman that he had received the $550.00.

It was further testified that the account books of Safeway Homes showed issuance of a check in favor of Mr. Goleman on January 30, 1948 for $1,000, but no recorded record of the refund was found.

The following resume is typical of the testimony given at the trial by the various prosecuting witnesses named in counts three to fourteen, and sixteen to twenty-one:

Mr. Roy H. Morris testified that he was employed by T. W. A. airlines and saw an ad in the paper about Safeway Homes; that this tract was near his work, so on March 21, 1948, he and his wife drove over, stopped at the tract office and talked to appellant Moorhead. They selected a lot and picked out a house plan; signed a "Request for Reservation" and made a deposit of $100.00.

Mr. Moorhead told them that they "would have to pay $100.00 down; it was a highly restricted area; and that it would be approximately two weeks before he would know whether or not I would be accepted"; that the $100.00 would be refunded if the application for the G. I. loan was not approved; and that "the house would be completed within not over 90 days after I paid the hundred dollars." At this time, the witness and his wife drove around the tract and noticed that

graders had gone through and marked out the streets, but "that was all."

Shortly thereafter, the witness was notified by Mr. Davis that his G. I. loan had been approved and on March 28, 1948, he and his wife signed the "Building Contract". The total price of the house and lot was recited therein as $7950.00. They then paid the balance of the down payment, to-wit: $400.00. The remainder of the purchase price was to be paid under the G. I. or F. H. A. or a combination thereof, at $49.00 and some odd cents per month.

No improvements were ever placed on the property, the witness never received a deed to the lot and no house was ever built.

After some months of waiting, the witness requested a refund of his down payment of $500.00 from appellant Moorhead, who told him that "he was having quite a hard time, that he had mortgaged his car to refund some money to one of the purchasers, and that if he could have a little more time, why, he was sure that everything would come out all right. * * * I tried to get him to commit himself as to how long it would be before I would receive a refund, and he said, 'Well, maybe a week, two weeks, or three weeks,' and I said, 'Well, can you give me any more definite date?' and he would not." However, appellant Moorhead gave the witness "a form to request my refund", which was signed and returned to appellant on December 8, 1948. No refund was ever made.

A majority of the prosecuting witnesses dealt with Mr. Davis, the salesmanager; some of them talked to appellant Moorhead and a few saw appellant Downey at the company's tract office

Mr. Davis testified that he worked for Safeway Homes from November of 1947 until October 1948; and first discussed employment with appellants in November of 1947; that appellant Moorhead was president of the corporation, and appellant Downey was in charge of sales promotion; that they offered the witness "a commission on the basis of about $100 a house, per sale"; that the lots would be sold on a reservation basis, i. e., to build a house on a certain lot in the tract. He received instructions from both appellants and was paid about $4800 during the time he was employed, part of which he paid to two salesmen who were working under his supervision. In January of 1948, appellants told him that a loan company had consented to make a loan, and they instructed him to tell prospective buyers that "as soon as the F. H. A. could complete their processing of the application and then mortgages would be filed and recorded and the work would start very shortly thereafter." Also, "If the individual found it impossible to wait any further or any longer for their houses to be built, that they could sign a request for cancellation and I would take that into the office. * * * That they could have their refund." He received about twenty requests for such refunds. The witness further stated that the work of grading and preparing the tract for streets and the grading and leveling of lots went on for about thirty days and terminated in December of 1947; that no streets, sidewalks, curbs or sewers were ever constructed and no houses were ever built.

With respect to count two, Mr. Davis testified that Mr. Goleman gave him $550 in cash which he handed to appellant Moorhead at the tract office.

On cross-examination, Mr. Davis testified that the Federal Housing Authority did not give its final commitment on the tract until June, 1948. By that time the loan company which had previously consented to a loan had withdrawn its commitment. Negotiations continued with other loan companies, but no loan was ever completed. The witness took deposits from prospective purchasers until October of 1948.

Mr. Thomas B. Doherty, an accountant in the District Attorney's office, testified that he examined the books of Safeway Homes, Ltd., and from the items therein he made the following recapitulation: Total amount received from depositors was $62,708.00; refunds were made in the amount of $9783.00; expenses were $33,320.16; leaving a balance of $19,604.84, which was unaccounted for. He further testified that he found no record of any bond premium

being paid; that he found that a check was issued to Mr. Goleman on Jan. 30, 1948 for $1,000, but he found no record of a refund of any part of such $1,000.

Appellant Moorhead took the stand and testified in detail as to the difficulties encountered in financing the tract in question; that F. H. A. gave its commitment around June 10, 1948, but Syndicate Mortgage did not follow through because their financing period of ninety days expired before the F. H. A. commitment came through; that he then went to Occidental Savings & Loan Association; recontacted Syndicate Mortgage and contacted several other loan associations. During this period considerable dissatisfaction was registered by the buyers, and, because of the indefinite attitude among the lending institutions, it was attempted to finance the project through private sources. This failed also, because Mr. Flodine started to foreclose the trust deed in November, 1948.

On cross-examination, Mr. Moorhead testified that he approved most of the disbursements made by the corporation; that he and appellant Downey were president and vice-president, respectively, of the corporation, and that they had a drawing and expense account during the year 1948 which was around $5,000.00 each.

Appellants argue that "there is no substantial evidence to support the implied finding of guilt"; that "every bit of the testimony indicates an honest intent to carry on" in the face of "unforeseen disaster"; hence "an essential element to conviction is entirely missing, regardless of whether these appellants were convicted upon the theory of false pretense or the theory of embezzlement."

[1] "Defendant's contentions of insufficiency of the evidence to support the counts of the information are answered if a theory of theft which will meet the test of reasonable doubt may be drawn from the evidence.

[2, 3] "Penal Code, § 484, now amalgamates the crimes of larceny, embezzlement, false pretenses, and kindred crimes under the cognomen of theft. People v. Myers, 206 Cal. 480, 275 P. 219; People v. Cannon, 77 Cal.App.2d 678, 176 P.2d 409. Like charity, California's definition covers a multitude of sins. No longer need the legal profession puzzle over fine distinctions between embezzlement, larceny, and other elements of stealing. The crime is complete if a man takes property not his own, with intent to take it.

[4] "This section of the Penal Code makes it a crime for any person 'by any false or fraudulent representation or pretense' to 'defraud any other person', and to 'fraudulently appropriate property which has been entrusted to him.'" People v. Hiden, Cal.App., 228 P.2d 95, 97.

[5] As to count two, the evidence that appellant Moorhead received the $550 from Mr. Goleman and made no account of its receipt on the books of the corporation, was amply sufficient to support the jury's verdict on that count.

The evidence on the remaining counts discloses that appellants unsuccessfully attempted to finance their project. And they kept promising the prosecuting witnesses that their houses would be built relatively soon or they could have a refund of their down payments, some of which were paid. Nonetheless, as the trial court appropriately observed, when passing on the motions for new trial:

"I have no doubt that this was a reckless enterprise, if in the first instance there was not a planned, predisposed idea of taking money of other people without giving value received.

"It wasn't very long until the situation developing as it did, the defendants well knew that they were taking money for which they could not possibly give value in return. * * * Of course, there are plenty of building projects around this area which have resulted in great successes to those who promoted them and resulted in their making a lot of money. Here this project might have developed into something successful, but the fact is that, being in extreme difficulties and being unable to carry out their promises, the defendants did not so inform those who paid the money,

but kept on taking money of other people when they should well have known that their chances of furnishing anything in return for that money were very remote."

The evidence in this case establishes theft in the form of embezzlement, i. e., "the fraudulent appropriation of property by a person to whom it has been entrusted." Sec. 503, Penal Code.

Appellants contend that the admission in evidence of the substituted set of indemnity bonds constituted prejudicial error, because such evidence was incompetent to prove an intent on their part to defraud the prospective purchasers.

As hereinbefore noted, before approval of the subdivision map by the city council it was necessary that the indemnity bonds be on file. By reason of this fact, the bonds played an important part in appellant's project. In overruling appellants' objection to their introduction in evidence, the court gave as his reason for so doing: "It shows the manner of operation. It may go to the motive, it may go to the intent; it may go to the state of mind; it may shed light on whether the transaction was simply an innocent business transaction which eventuated unfortunately, or whether through a scheme this was a fraudulent factor."

[6] It is well established that evidence of other acts of a similar nature may be admitted in criminal cases, to prove a material fact or where they tend to show motive, scheme, plan or system. See People v. Henderson, 79 Cal.App.2d 94, 119, 179 P.2d 406, and authorities there cited.

[7] The admission of this evidence was not of such a prejudicial character as to warrant a reversal of the judgments.

Appellants next contend that the court erred in giving two instructions: one suggesting a condition not warranted by the evidence, and the other defining a crime other than that with which appellants were charged.

[8] The first instruction was: "If you find from the evidence that the moneys deposited with the Safeway Homes, Ltd. were to be used for a particular purpose, and you further find that said moneys were to be refunded if certain conditions were not met, that is, the obtaining of Veterans' or F. H. A. loans, and that such loans were not obtained, then said deposits constituted trust funds and were refundable to the persons so making such deposits and such deposits could not be diverted or used for other purposes without the consent of such persons so making the deposits * * *."

The language complained of was an abstract statement of fact and not objectionable. See People v. Flannelly, 128 Cal. 83, 60 P. 670; 8 Cal.Jur. 298.

[9] The second instruction reads: "It is unlawful for any person to offer to sell, to contract to sell, or to sell any subdivision or any part thereof until a final map or record of survey map thereof, in full compliance with the provisions of state law and any local ordinance, has been duly recorded or filed in the Office of the Recorder of the county in which any portion of the subdivision is located."

While it is true that appellants were not charged with any violation of the Real Estate Act, this instruction is worded in the language of section 11538, Business and Professions Code, which is applicable to subdividers generally including appellants.

This case was fully and fairly tried. The evidence supports the judgments of conviction, hence the denial of the motions for new trial was not erroneous.

The appeals from the verdicts of the jury are dismissed. The judgments of conviction and the orders denying the motions for new trial are affirmed.

WHITE, P. J., and DORAN, J., concur.

ANDERSON et al. v. SOUZA et al.

Civ. 7913.

Sac. 6136.

District Court of Appeal
Third District, California.

June 1, 1951.

Hearing Granted July 26, 1951.*

Action by Arvid G. Anderson and others against John J. Souza, doing business as the Tourlock Airpark to recover damages by reason of the alleged creation and maintenance of a nuisance through the operation of an airport, and for injunctive relief forbidding the defendants to operate the airport as such. The Superior Court, Stanislaus County, H. L. Chamberlain, J., enjoined and restrained the defendants from operating the airport on the premises described in the complaint and rendered judgment accordingly and defendants appealed. The District Court of Appeal, Van Dyke, J., held that evidence sustained finding that operation of airport and the conditions complained of constituted a nuisance but that instead of enjoining operation of airport entirely decree should be framed which would eliminate nuisance shown to exist.

Judgment reversed and cause remanded.

1. Landlord and tenant ⇐167(1)

A landlord is not responsible to other parties for the misconduct or injurious acts of his tenant to whom his real estate has been leased for a lawful and proper purpose when there is no nuisance or illegal structure on it at time of leasing.

2. Nuisance ⇐33

In action to enjoin operation of an airport on ground that its operation constituted a nuisance, evidence that owner of land constructed field, obtained county permit, flew his own plane from and to field and retained portions of field facilities, and that lessee's rights were to operate flying school, sell gas and repair planes, sustained finding that both owner and lessee operated flying field. Gen.Laws, Act 151a, §§ 2(b, d), 17.

3. Nuisance ⇐33, 49(5)

In action to recover damages by reason of alleged creation and maintenance of a nuisance through operation of an airport and to restrain operation of airport as such, testimony of owner of airport land that he owned and operated a plane and lessee's testimony that he owned and operated four airplanes, plus one which he operated for another owner sustained finding that many airplanes operating from airport were owned and operated by defendant landowner and lessee of airport. Gen. Laws, Act 151a, §§ 2(b, d), 17.

4. Nuisance ⇐49(5)

In action to recover damages by reason of alleged creation and maintenance of a nuisance through the operation of an airport and for injunctive relief forbidding the defendants to operate the airport as such, evidence that property of certain plaintiffs was so situated with relation to normal take-off area as to render their homes inhabitable only under most trying and occasionally terrifying conditions and inference that homes so located, which were there before airport began to operate, would be much less desirable as places of habitation than residences not so affected and that there would be material depreciation in value sustained finding that realty of six of plaintiffs deteriorated in value by reason of conditions which trial court found to exist. Gen.Laws, Act 151a, §§ 2(b, d), 17.

5. Nuisance ⇐33, 34, 49(5), 55

In action by plaintiffs, more than 50 in number, to recover damages by reason of alleged creation and maintenance of a nuisance through operation of an airport, and for injunctive relief forbidding defendants to operate airport as such, testimony showing existence of a nuisance with respect to all plaintiffs supported finding that all of plaintiffs had been irreparably injured by conduct of defendant and that only three couples had suffered damages measurable in money, and such findings were not in conflict. Gen.Laws, Act 151a, §§ 2(b, d), 17.

6. Injunction ⇐14

The term "irreparable injury" authorizing the interposition of a court of equity by way of injunction means that specie of damages, whether great or small, that

* Subsequent opinion 243 P.2d 497.

ought not to be submitted to on the one hand or inflicted on the other.

See publication Words and Phrases, for other judicial constructions and definitions of "Irreparable Injury".

7. Nuisance ⇐36, 56

Where both owner of land on which airport was located and his lessee operated airport, decreeing judgment for damages and granting injunctive relief against both owner and lessee forbidding maintenance of a nuisance through operation of airport was not error. Gen.Laws, Act 151a, §§ 2(b, d), 17.

8. Witnesses ⇐255(2)

Under statute providing that a witness is allowed to refresh his memory by anything written by himself or under his direction at time when fact occurred or immediately thereafter or while still fresh in his memory, if he knows same to be correctly stated in writing and that he may also testify from a writing, though he retain no recollection as to the facts, but that such evidence must be received with caution, before either type of witness will be permitted to testify it must be made to appear that entries were written by witness himself or under his direction, that they were written at time facts occurred or at time when facts were fresh in witness' memory and that witness knew at time entries were made that they were correctly stated facts. Code Civ.Proc. § 2047.

9. Witnesses ⇐258

In action to recover damages by reason of alleged creation and maintenance of a nuisance through operation of an airport, and for injunctive relief forbidding defendants to operate airport as such, permitting witness to testify as to notations made by him over period of years as to planes flying low over his home or near to it and over his property after he testified that he made copies of notations himself was not error, although witness was not asked directly either on direct or cross-examination whether he copied notations correctly. Code Civ.Proc. § 2047; Gen.Laws, Act 151a, §§ 2(b, d), 17.

10. Witnesses ⇐258

Where proper foundation has been laid the fact that writing does not refresh recollection of witness does not prevent him from testifying from writing and if his recollection is not refreshed there is no other way to testify from the writing save to read it verbatim. Code Civ.Proc. § 2047. Gen.Laws, Act 151a, §§ 2(b, d), 17.

11. Nuisance ⇐37

Where plaintiffs, more than 50 in number, brought action to recover damages by reason of alleged creation and maintenance of a nuisance through operation of an airport by defendants and for injunctive relief and although only six plaintiffs appeared and testified, testimony was received in behalf of them all and conditions they described were to some extent common to all plaintiffs, fact that witnesses were themselves plaintiffs did not limit benefit of their testimony to themselves alone and refusal to grant defendant's motion for a nonsuit as to those plaintiffs who did not testify was not error. Gen.Laws, Act 151a, §§ 2(b, d), 17.

12. Nuisance ⇐33, 49(5)

In action to recover damages by reason of alleged creation and maintenance of a nuisance through operation of an airport, and for injunctive relief forbidding defendants to operate airport as such, evidence sustained finding of trial court that operation of field and flying of planes as usually and normally occurring constituted a private nuisance and that in view of increasing use of field nuisance would continue and be aggravated. Gen.Laws, Act 151a, §§ 2(b, d), 17.

13. Nuisance ⇐3(1)

An airport is not a nuisance per se, but it may become a nuisance either because of unsuitable location or improper operation or both. Gen.Laws, Act 151a, §§ 2(b, d), 17.

14. Nuisance ⇐19

Although statute providing that flight in aircraft over lands and waters of state is lawful, unless at altitudes below those prescribed by federal authority, or unless so conducted as to be imminently dangerous

to persons or property lawfully on land or water beneath, went into effect after action to enjoin operation of defendant's airport as a nuisance was begun, injunctive processes of trial court were prospective in operation and statute was applicable to that feature of the case. Gen.Laws, Act 151a, §§ 2(b, d), 17.

15. Nuisance ⇦6

The licensing of an airport by State Aeronautics Commission does not confer right to so operate airport as to constitute a private nuisance to surrounding property owners. Gen.Laws, Act 151a, § 2(d).

16. Nuisance ⇦6
Property ⇦7

Fact that federal government has declared that United States of America possesses and exercises complete and exclusive national sovereignty in air space above United States and that state legislature has declared that sovereignty in space above lands and waters of state is declared to rest in state, except where granted to and assumed by United States pursuant to a constitutional grant from people of state did not divest owners of surface of soil of their lawful rights incident to ownership or determine rights of surface owners as to nuisance created by operation of airport. Gen.Laws, Act 151a, §§ 2(b), 17; Air Commerce Act of 1926, § 6(a), 49 U.S.C.A. § 176(a).

17. Nuisance ⇦19

Regulatory provisions of State Aeronautics Commission Act and federal laws regulating flying and airports do not supplant ancient common law and long-established statute law declaring that nuisances may be abated at suit of those injured thereby. Gen.Laws, Act 151a, §§ 2(d), 17; Air Commerce Act of 1926, § 6(a), 49 U.S.C.A. § 176(a).

18. Nuisance ⇦37

Injunctive process ought never to go beyond necessities of case and where a legitimate business is being conducted and in conduct thereof a nuisance has been created and is being maintained, relief granted should be directed and confined to elimination of nuisance, unless under peculiar circumstances of case the business, lawful in itself, cannot be conducted without creating a nuisance and violating the rights of contiguous property owners.

19. Eminent domain ⇦2(1)
Nuisance ⇦5

The owners and operators of a private airport, notwithstanding they are engaged in a legitimate business, encouragement and furtherance of which is a publicly declared policy of the legislature, must nevertheless conduct it with due regard for rights of others, and if, because of location, operation of such a business will result in depriving others of their property rights, it cannot be permitted, for to do so would, in practical effect, condemn property of others in violation of constitutional guarantees. Gen.Laws, Act 151a, § 2(a).

20. Nuisance ⇦37

In action to recover damages by reason of alleged creation and maintenance of nuisance by operation of an airport, and for injunctive relief forbidding defendants to operate airport as such, evidence did not justify complete abatement of operation of airport and decree should have been limited so as to eliminate nuisance that was shown to exist by complaining home owners. Gen. Laws, Act 151a, §§ 2(b, d), 17.

H. E. Gleason, Donald B. Fowler, Turlock, for appellants.

Brown, Brown & Bacon, Modesto, for respondents.

VAN DYKE, Justice.

Plaintiffs below, more than fifty in number, brought this action against defendants to recover damages by reason of the alleged creation and maintenance of a nuisance through the operation of an airport, and for injunctive relief forbidding the defendants to operate the airport as such. The court, adopting in the main the allegations of the complaint, made the following findings of fact: That since April 19, 1946, plaintiffs were the owners of and resided on real property located close to the airport; that during that period of time the defendants operated the airport, defendants Souza and wife being the owners of

the real property on which the airport is located; that in the course of the operation of the airport numerous aircraft of various types taxi, take off, circle, buzz, cruise about, maneuver, glide, climb, bank, turn, stunt and engage in acrobatics, and land on, from, and to said airport; that this aerial activity is continuous and frequent throughout the daylight hours and that the aircraft are operating with the consent, encouragement and solicitation of the defendants; that many of the airplanes so operated belong to defendants and are operated by them; that the airplanes fly over the homes of the plaintiffs at heights varying from 25 to 800 feet and in passing over or near said homes create such a tremendous noise that the same interferes with the lawful use, enjoyment and occupancy of the dwellings to the great disturbance and nervous upset of the plaintiffs; that because of said noises plaintiffs and members of their families are unable to sleep when planes from the airport are operating, to their great physical detriment and mental anguish; that normal conversation is interrupted; that plaintiffs have great difficulties listening to radio programs and in general the enjoyment of their homes is materially decreased; that plaintiffs, knowing that numerous airplane accidents have occurred throughout the country and that several have occurred at the airport, suffer great fear and apprehension when the airplanes pass over their homes at low altitudes; that defendant Earlandson operates a flying school at the airport, and the student pilots using airplanes belonging to Earlandson fly at low altitudes over plaintiffs' homes, but that only six plaintiffs were affected by the conduct of the student pilots and that, as to the six, such conduct placed their lives and property in great jeopardy and caused them to fear greatly for their property, their lives and the lives of their loved ones; that the real property of the same six plaintiffs by reason of said conditions has depreciated in value, but that this was not true as to the other plaintiffs; that plaintiffs have often requested and demanded of defendants that they cease operating the airport and the airplanes in the manner found, but that defendants have continued to operate them in said manner continuously from April, 1946, to the time of trial; that more airplanes are operating from the field each month and that still more airplanes will operate from the field in the future; that defendants by their acts have caused irreparable injury to plaintiffs and that irreparable injury will be done to them in the future if the defendants continue with their acts as found; that none of the plaintiffs have been damaged except the same six and that they have been damaged as follows, B. E. Anderson and wife jointly in the sum of $500, Arvid G. Anderson and wife jointly in the same sum, and Jack Harlan and wife jointly in the same sum; that plaintiffs have no plain, speedy or adequate remedy at law. As conclusions of law from the facts found judgment was ordered: 1. Enjoining and restraining the defendants from operating the airport on the premises described in the complaint; 2. For damages in the sum of $500 to each of the three couples named above. Judgment was entered accordingly. Motion for new trial was made and denied. From the judgment the defendants have taken this appeal.

[1, 2] We shall discuss the contentions of appellants seriatim as they advance them in their briefs. Appellants first attack the finding of the court that appellants Souza and wife, along with appellant Earlandson, operate the airport. Herein it is claimed on behalf of Souza that it is Earlandson who operates the airport and that Souza, while he owns the property where the airport is located, has leased the airport to Earlandson, and that, therefore, under such cases as Gould v. Stafford, 91 Cal. 146, 27 P. 543; Wiersma v. City of Long Beach, 41 Cal.App.2d 8, 106 P.2d 45; Mundt v. Nowlin, 44 Cal.App.2d 414, 112 P.2d 782; and Meloy v. City of Santa Monica, 124 Cal.App. 622, 12 P.2d 1072, the nuisance complained of is created and maintained by Earlandson alone. These cases lay down the well-known rule that a landlord is not responsible to other parties for the misconduct or injurious acts of his tenant to whom his estate has been

leased for a lawful and proper purpose when there is no nuisance or illegal structure upon it at the time of the leasing. We think, however, that in view of the evidence here this rule and the cases declaring it are not controlling, for it was shown that Souza owned the land, constructed the field, obtained the county permit, flew his own plane from and to the field and retained portions of the field's facilities, that is, the hangars and tie-down space for which he collected rent. Earlandson's rights were to operate his flying school, sell gas and repair planes. Earlandson, therefore, was not in sole charge of the field and it is a fair inference from the evidence that Souza at least joined with Earlandson in permitting public use of the field, and, in short, so participated in the operation of the field that the court's findings that he and Earlandson operated the field are substantially supported by the evidence.

[3] There is next attacked the finding that "many airplanes" operating from the airport were owned and operated by appellants Souza and Earlandson as being contrary to the evidence. We think this finding is sufficiently supported by Souza's testimony that he owned and operated a plane and by Earlandson's testimony that he owned and operated four airplanes, plus one which he operated for another owner. Whether such numbers constitute many or few is a comparative matter, but Earlandson's planes were shown to have been greatly used in the conduct of his air school and in view of the fact of dual control and operation of the port by the two men we find nothing erroneous in the challenged finding.

[4] Next, appellant challenges the court's finding that the real property of six of the plaintiffs has deteriorated in value by reason of the conditions which the court found to exist. While no witness testified to the exact amount of depreciation in value, measured in dollars and cents, this general finding that depreciation in value has occurred is amply supported by the evidence that the property of these couples was so situated with relation to the normal take-off area as to render their homes inhabitable only under most trying and occasionally terrifying conditions. It is a fair inference that homes so located, which were there, as were these, before the airport began to operate, would be much less desirable as places of habitation than residences not so affected and that there would be a material depreciation in value.

[5] Appellants next contend that, whereas the court found that only the three couples had suffered damages measurable in money, it also found that all of the respondents had been irreparably injured by the conduct of appellants and that there is a conflict between these findings. We think, however, that the findings are not necessarily inconsistent. The general allegations as to injury suffered which have been found to be true by the court are supported by the testimony showing the existence of a nuisance with respect to all respondents and these findings do not conflict with findings that only the three couples are entitled to an award for damages in the way of money.

[6] The term "irreparable injury" authorizing the interposition of a court of equity by way of injunction means that specie of damages, whether great or small, that ought not to be submitted to on the one hand or inflicted on the other. Edelman Bros., Inc. v. Baikoff, 277 Ill.App. 432. See, also, Greenfield v. Board of City Planning Commissioners, 6 Cal.App.2d 515, 518, 45 P.2d 219; Espenscheid v. Bauer, 235 Ill. 172, 85 N.E. 230, 232.

[7] Appellants contend that the court erred in decreeing any judgment either for damages or by way of injunctive relief against defendant Souza. This is but another aspect of the contention previously discussed, which was based upon the theory that Souza, having leased the airport, did not operate the same, and we think separate treatment is unnecessary. What we have said heretofore disposes of this contention.

[8] Appellants contend that the court erred in allowing one of the appellants to testify from and read verbatim into the record a memorandum he had prepared

without requiring, as they contend, a proper foundation therefor to be laid. It appears that the length of time covered by the testimony taken was quite considerable, in fact, several years in extent. The witness had from time to time over a considerable period of time and on observing airplanes flying low over his home or near to it and over his property made notations in whatever way was open to him at the time, consisting of a description of the plane, its number and such like matters. He made these notations on scratch paper he may have had with him at the time. Sometimes he entered them upon fence posts and even at times inscribed them on the surface of the ground. He then collected these memoranda and, as he testified, copied the same into more permanent form and either from these latter writings or from other writings copied from them in turn, he was permitted to testify over objections. Section 2047 of the Code of Civil Procedure covers the matter. It provides that a witness is allowed to refresh his memory by anything written by himself or under his direction at the time when the fact occurred or immediately thereafter or while still fresh in his memory, if he knows the same to be correctly stated in the writing. He may also testify from a writing, though he retain no recollection as to the facts, but such evidence must be received with caution. As said in Marron v. Great Northern Ry. Co., 46 Mont. 593, 129 P. 1055, 1057, referring to a similar provision in the codes of that State: "This section comprehends two classes of witnesses. The first class includes the witness whose memory can be refreshed by reference to the memoranda. The second class includes the witness who does not retain any recollection of the particular facts recorded in the memoranda, even after he examines the entries which he made himself. The witness of the first class may refresh his memory, and, having done so, may then testify independently of the memoranda. The witness of the second class may testify directly from the memoranda. But before either one will be heard at all these preliminary facts must be made to appear: (a) The entries must have been written by the witness himself, or under his direction; (b) They must have been written at the time the facts occurred, or at a time when the facts were fresh in the witness' memory; and (c) The witness must have known at the time the entries were made that they correctly stated the facts."

[9, 10] An examination of the record discloses that the witness here did make the notations himself and he testified that he made copies of these notations. He was not asked directly either on direct or cross-examination whether he copied them correctly, but when a witness testifies under oath that he made a copy it is going far afield to say that such testimony is not equivalent to saying that he copied the memoranda correctly since it would not be a copy unless it was correct. While it is better, of course, to properly and fully qualify the witness who is to testify from or with the aid of memoranda, nevertheless we do not think that what happened here would justify reversal if, indeed, error at all was committed. As to his reading the memoranda into the record, that is permitted when the code says: "So, also, a witness may testify from such a writing, though he retain no recollection of the particular facts." Where proper foundation has been laid the fact that the writing does not refresh the recollection of the witness does not prevent him from testifying from the writing and if his recollection is not refreshed there would be no other way to testify "from the writing" save to read from it verbatim.

[11] Appellants contend that the court erred in not granting their motion for a nonsuit as to plaintiffs who did not testify in the action. As we have said, there were some fifty odd plaintiffs. Only six of them appeared in court and testified. But the testimony was received in behalf of all. They were the plaintiffs' witnesses and the fact that these witnesses were themselves plaintiffs did not limit the benefit of their testimony to themselves alone. The conditions they were describing were to some extent common to all the plaintiffs since it described conditions such as low

flying, stunting, indulging in acrobatics and the like which would affect those residents in the immediate vicinity of the airport and there was testimony that placed the other plaintiffs within that radius.

[12] The final contention made by the appellants is that the court erred in restraining defendants from operating an airport on the premises described in the complaint. This contention presents a difficult problem and to its discussion a fuller statement of facts than has heretofore been made is desirable. The defendant Souza owned 42 acres of land within one mile of the limits of Turlock. In 1946 he discussed with federal authorities the suitability of this land as an airport site. Encouraged by what he was told, he proceeded to lay out a landing strip and by locating a strip diagonally was able to achieve an airstrip 2,000 feet in length, just 200 feet beyond the minimum permitted by the United States Civil Aeronautics Administration. He constructed a strip 300 feet wide, oiling and smoothing the surface of the ground. Along the southerly line of his property and at the southerly end of the strip was a public road. The property bounding his property on the north was owned by the Andersons, their son and his wife, and the Harlans. A great deal of testimony concerning the location of the homes of these respondents and the location thereof with regard to the airport was given, along with the use of a map. This map appears to have been introduced in evidence, but it and other exhibits which would have made the task of this Court easier in reviewing the record have not been supplied. It seems they have been lost. One of the Anderson couples does not reside near the airport, but owns an interest in the property of the other Anderson couple. The Anderson home is about 500 feet from the northern boundary of the strip and about 250 feet from the center line of the strip as extended. The Harlan house is about 500 feet from the northern end of the strip and about 300 feet distant from the same center line. North of the Anderson and Harlan properties and 660 feet from the north line of the airfield there is another public road. The public roads mentioned parallel the north and south boundaries of the airfield. Some of the plaintiffs reside northerly of this northernmost road. Bounding a part of the Souza property on the west there is another public road across which lie the residences and property of some of the other respondents. Others bound the field on the east. On the southerly road defendants had signs posted directed to vehicular traffic on the road reading as follows: One sign read, "Stop, Aircraft Crossing." There were two of these Stop signs, apparently placed to warn vehicular traffic going in either direction upon the road. Between them was a sign reading, "No Parking Between Signs—Look Out for Low-Flying Aircraft." A sign directed to aircraft in this same vicinity read, "All Aircraft Keep 20 to 30 Feet Above the Road." There is considerable evidence that these warnings were appropriate and that aircraft, in fact, flew over this road onto the airstrip at elevations even below the 20 to 30 feet which the sign requested. The airstrip runs approximately north and south; the generally-prevailing wind is from the north and hence most craft take off in that direction and on the other hand, and for the same reason, generally land from the south. As a part of his construction of the airport Souza invested altogether in land and buildings some $80,000. The value of the homes and residences of the respondents was not the subject of testimony. Although no considerable complaint seems to have been made while the airport was being constructed, the opposition and complaints began very shortly after the field was put in operation. The homes of the respondents were there before the airport was constructed. A flight pattern was laid out, after consultation with the federal authorities, which may be briefly described as follows: A plane taking off into a north wind would rise from the strip and fly over the property beyond its limits until it reached an elevation of approximately 500 feet, at which time it would turn to the west at a right angle, then turn at a right angle south, again turn at a right angle east and then make a landing on the airstrip

from the south. The pattern was approximately rectangular. A similar pattern would be followed when a south wind was blowing and the planes took off toward the south, this pattern being the reverse of the one just described. Planes desiring to leave the pattern would make the first right angle turn and then proceed away from the pattern as desired. Incoming planes would fly into the pattern and follow it to a landing. There apparently was no restriction as to the size or type of aircraft permitted to use the field and although the airfield was privately owned, nevertheless it was available to the flying public. At frequent intervals planes belonging to business enterprises would arrive and depart from the field in pursuit of their private concerns. Souza testified that there were approximately eighteen to twenty planes hangared or tied down at the field as a fair average. The testimony as to the frequency of flight ran all the way from 150 flights per day down to 40 or 50. Most of this flying was during the daytime, beginning around six o'clock in the morning and continuing into the evening, but there were apparently no time limitations and planes would arrive and depart during the night, make-shift landing lights being provided. It appears that a light plane taking off to the north would become airborne well before reaching the end of the runway. A heavier plane would make a longer run and would sometimes pass between the Harlan and Anderson homes with little altitude. Supportive of the court's findings that a nuisance existed, in addition to what we have already referred to, we select the following testimony which, although contradicted to some extent by witnesses for appellants, yet must here be taken to be true. Mrs. Neva Harlan testified that 45 or 50 planes used the field daily, many of them flying low over her home; that she was unable to rest during the day because of the disturbance; that the noise was so loud she could not understand normal conversation or hear the radio or use the telephone when planes went over; that night flying awakened her; that the planes kept the family awake and so upset they could not get back to sleep after being awakened; that the children were awakened early in the morning; that when friends visited the noise drowned out conversation. Arvid Anderson, who resided away from the airfield, but owned an interest in his son's property bordering the field on the north, was accustomed to work about the 10-acre farm, of which it consisted. He testified that as he worked the planes sometimes made him so jumpy he had to leave; that he had to be on the constant look-out because they came in so low that it was really dangerous; that once while running a tractor a plane came in so low that he rolled off the tractor because he was sure it was going to strike him; that once a plane zoomed over him so low that he put his pitchfork up and felt sure the fork would hit the plane; that he had noticed planes crossing from the airfield over his property at heights of 10, 15 or 20 feet; that some of the lighter planes went higher, but he had seen the larger planes skim the top of the 6-foot fence posts along his southern boundary; that while he had wanted to put a home for himself on the place he could not do it and could not use the place for poultry or turkeys because of the low flying; he was afraid to live on the place. Irene Anderson, who lived in the Anderson home, testified that she had made a count of the planes flying over on certain dates; that on May 15, 1948, just before the case was tried, 110 came over, on May 16th, 105, on Saturday, May 22d, 101, on Sunday, May 23rd, 140; that during week days there would be 50 a day; that flights generally began at six o'clock and continued until dark; that the planes greatly affected her enjoyment of her home and family life, made her nervous, gave her digestive upsets, scared the children. She said "We are just helpless, we don't have a home, we are without anything, nothing to fight for; we are just helpless where we are; it has just been Hell"; that she could not enjoy radio programs because of the continual noise; that she couldn't use the telephone, nor enjoy the visit of guests or relatives. She said "when they come there to see us it is Zoom! Zoom! Zoom! just like that, all the time"; that she was awakened early in the morning and when

awakened at night could not get to sleep again; that she had no rest and had no peace at all; that the children were scared many times until they were hysterical and would run into the house screaming and crying; that her whole home was upset; that when the airport started operating she was well. She said "The noise from the airplanes, when I hear them from the beginning, when they start coming off the runway and into the field, they start the motors up, I hear them, they come closer and closer to the house and I see them and my stomach goes—I don't know, it just goes upside down sometimes, and sometimes I vomit. My stomach feels like the insides are just turned upside down—my health is —what are we going to do?" There was considerable testimony along the same general lines. This record supports the conclusion of the trial court that the operation of the field and the flying of the planes as usually and normally occurring constituted a private nuisance and that in view of the increasing use of the field this nuisance would continue and be aggravated. Both Souza and Earlandson testified that they had continually done all that they could to prevent improper flying and it is a fair inference that they either cannot or will not abate the nuisance themselves. This is significant in view of the fact that the action had been filed on August 7, 1947, and the case was tried beginning May 18, 1948.

[13-15] An airport is not a nuisance per se, but that it may become a nuisance either because of unsuitable location or improper operation or both has been clearly decided. Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817, 99 A.L.R. § ; 2 Corpus Jur. Sec., Aerial Navigation, § 29, p. 909. Our Legislature in 1947 passed a State Aeronautics Commission Act. It therein declared that, "flight in aircraft over the lands and waters of this State is lawful, unless at altitudes below those prescribed by federal authority, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath." State Aeronautics Comm. Act, Sec. 2 (d), Ch. 1379, Stats.1947, Deering's Gen.Laws, Act 151a. While this act had not gone into effect when the action before us was begun it went into effect approximately one month thereafter and since the injunctive processes of the court are prospective in operation it was applicable to this feature of the case. The licensing and regulation of airports, subject to federal control, is committed by the act to the State Aeronautics Commission. Nevertheless the licensing of the airport by the commission does not confer the right to so operate the port as to constitute a private nuisance to surrounding property owners.

"* * * A license granted by a state aeronautics commission for the operation of an airport does not confer upon the proprietor thereof the right to operate it in such a manner as to constitute it a private nuisance." 2 C.J.S., Aerial Navigation, § 29, p. 909.

While apparently no formal license had up to the time of trial been granted to this airport, nevertheless since it was operative prior to June 30, 1947, it comes under the so-called "grandfather clause" of the State Aeronautics Commission Act, Section 17, which provides that "Airport site approvals shall be granted and airport permits shall be issued for any improved airports in use or ready for use on June 30, 1947." We shall treat the airport as a licensed or permitted airport.

[16] Further, as to the effect of regulations concerning flying operations, it has been held that such regulations do not determine the rights of the surface owners as to nuisance. Swetland v. Curtiss Airports Corp., 6 Cir., 55 F.2d 201, 203, 83 A.L.R. 319, a ruling which is in line with the general principle above stated that permits and licenses are not to be considered as granting leave to maintain a private nuisance. It is not controlling that the federal government has declared that the United States of America possesses and exercises complete and exclusive national sovereignty in the air space above the United States, Title 49 U.S.C.A. § 176 (a) and that our Legislature has said "It is further declared that sovereignty in the space above the lands and waters of this State

is declared to rest in the State, except where granted to and assumed by the United States pursuant to a constitutional grant from the people of the State", State Aeronautics Comm. Act, Sec. 2 (b), for it must be said that these declarations were not intended to and do not divest owners of the surface of the soil of their lawful rights incident to ownership.

"There is no definite yardstick that may be used in determining how low an airplane may fly over the property of others in landing or taking off; however, flying at low altitudes incident to landing and taking off may constitute trespass, as it may cause more than mere apprehension of injury. And, extensive low flying, causing unreasonable annoyance to occupants of land below, is a substantial interference with enjoyment of the property." Brandes v. Mitterling, 67 Ariz. 349, 196 P. 2d 464, 467.

[17] The regulatory provisions of the State Aeronautics Commission Act and the federal laws referred to do not supplant the ancient common law and long-established statute law declaring that nuisances may be abated at the suit of those injured thereby. Restatement of the Law of Torts, Section 194, provides:

"An entry above the surface of the earth, in the air space in the possession of another, by a person who is traveling in an aircraft, is privileged if the flight is conducted

"(a) for the purpose of travel through the air space or for any other legitimate purpose,

"(b) in a reasonable manner,

"(c) at such a height as not to interfere unreasonably with the possessor's enjoyment of the surface of the earth and the air space above it, and

"(d) in conformity with such regulations of the State and federal aeronautical authorities as are in force in the particular State."

But: "Under the rule stated in this Section, only those flights are privileged which are conducted at such a height as not unreasonably to interfere with the possessory interest in the land. Thus, a flight, although otherwise conducted in a reasonable manner, for a legitimate purpose, and in conformity with all applicable local regulations, if conducted at such a low height as to cause reasonable fear or substantial annoyance to occupants of the land or to frighten cattle or other animals thereon in such a way as to cause them harm, or to endanger the surface of the land, or persons, trees, structures or other things thereon, or to interfere with the possessor's legitimate use of the air space, is not within the privilege." Comment on Clause (c) of Sec. 194.

As illustrative of the general trend of judicial decisions upon the subject hereof see the following: Thrasher v. City of Atlanta, supra (judgment reversed with directions to issue injunction against continued spreading of dust in excessive or unreasonable quantities over adjoining residential property; Burnham v. Beverly Airways, Inc., 311 Mass. 628, 42 N.E.2d 575 (decree affirmed, upholding injunction against flying below height of 500 feet over residence 2800 feet from city-controlled, but privately-operated, airport); Mohican & Reena, Inc. v. Tobiasz, 1938 U.S.Av.Rep. 1 (injunction granted at suit of owner of summer camp for children against flying below 1000 feet within 500 feet of camp); Vanderslice v. Shawn, 26 Del.Ch. 225, 27 A.2d 87 (residents entitled to an injunction against owners of private airport from permitting flights at less than 100 feet of adjacent dwellings); Alhambra Airport case, 13 J. of Air L. & Comm. 138 (injunction at suit of taxpayers and board of education prohibiting further use of private airport for pilot training and limiting future use to emergency landings and actual business needs of two aircraft manufacturing plants located at airport); Dlugos v. United Air Lines, 1944 U.S.Av.Rep. (Ct.Comm.Pl. Pa.Lehigh Co., 1944) (airline enjoined from operating planes at altitude below 100 feet over plaintiff's fields adjacent to municipal airport, on days when plaintiff engaged in farming such fields, not to exceed ten days during following year, provided five hours' written notice given airline at its office); Swetland v. Curtiss

Airports Corp., supra (airport completely abated by circuit court, notwithstanding refusal of trial court to do so.)

[18] A further contention is made that the trial court still was not authorized to enjoin the further operation of the airport and necessarily must have limited its injunctive order to prevention of the nuisance existing; that this could be done without forbidding all operation of the airport. Injunctive process ought never to go beyond the necessities of the case and where a legitimate business is being conducted and in the conduct thereof a nuisance has been created and is being maintained, the relief granted should be directed and confined to the elimination of the nuisance, unless under the peculiar circumstances of the case the business, lawful in itself, cannot be conducted without creating a nuisance and violating the rights of contiguous property owners. In Vowinckel v. N. Clark & Sons, 216 Cal. 156, 162, 13 P.2d 733, 736, in a case involving a decree ordering defendant to cease operating a number of pottery kilns, the court said: "In the present case the court appears to have given due consideration to the situation of the defendant. This is apparent from the fact that it refused to abate entirely the defendant's operations and granted the relief sought to the extent necessary to preserve the rights of both parties. In other words the court in the exercise of its equity powers, has compared consequences and has considered the injuries resulting to each party, on the one hand if the injunction be wholly denied, and on the other if it be granted. The court, from the evidence presented, gave heed to the rule that in a proper case it will not enjoin the conduct of the defendant's entire business, where such business is not a nuisance per se, if a less measure of restriction will afford to the plaintiff the relief to which he may be entitled. McMenomy v. Baud, 87 Cal. 134, 26 P. 795; Tuebner v. California St. R. R. Co., 66 Cal. 171, 4 P. 1162; Williams v. Blue Bird Laundry [supra], 85 Cal.App. 388, 259 P. 484; McIntosh v. Brimmer [supra], 68 Cal.App. 770, 230 P. 203."

In this case it is apparent from the memorandum opinion written by the able trial judge, on motion for new trial, that it was his conclusion nothing short of complete abatement would preserve the rights of respondents and he attributed this principally to the shortness of the runway. The learned trial judge said: "The third contention, that the injunction was too broad, is a more difficult question. Ordinarily it is true that a lawful act should not be enjoined; that all that should be enjoined is the commission of the act in such a way as to constitute a nuisance; in other words, that only the nuisance should be enjoined. Under that interpretation, defendants ask to be allowed to continue operations provided they commit no nuisance. But in the Court's opinion, that is impossible. The continued operation of that field in its present condition, according to the evidence, must inevitably result in continuance of the nuisance. The field is entirely too small to avoid the nuisance; and the runway is too close to the homes of some of the plaintiffs."

[19] Pertinent to the problem now being discussed is the nature of the airfield involved. It is a private airfield which cannot exercise the power of condemnation and the establishment of which requires no finding by any public agency of public convenience and necessity. The owners and operators of such an airport, notwithstanding they are engaged in a legitimate business, the encouragement and furtherance of which is a publicly-declared policy of our Legislature, State Aeronautics Commission Act, Sec. 2(a), must nevertheless conduct it with due regard for the rights of others, and if because of location the operation of such a business will result in depriving others of their property rights, it cannot be permitted, for to do so would, in practical effect, condemn the property of others in violation of constitutional guarantees. Hulbert v. Cal. Portland Cement Co., 161 Cal. 239, 118 P. 928, 38 L.R.A.,N.S., 436.

The distinction between a public and private use as regards the use of injunctive process is pointed out in New York

City v. Pine, 185 U.S. 93, 22 S.Ct. 592, 46 L.Ed. 820, wherein the Supreme Court of the United States recognized the principle that, where the defendant in an injunction suit has the ultimate right, that is to say, where it is entitled to continue with its work by eminent domain proceedings, a permanent injunction will be denied, but a temporary injunction may be granted to compel the defendant to make compensation. The State Aeronautics Commission Act contemplates the furtherance of aviation, with its manifold benefits to the public, by operation of both public and private fields, but with respect to the public fields it provides for their establishment by counties, cities and other municipal agencies, requires the finding of public convenience and necessity and contemplates the use of the power of condemnation. No such power is given or could be given to those putting their property to private use, even though incidentally the general purposes of the act are thereby subserved. We conclude there is nothing to distinguish a private airport from any other private business with regard to enjoining operations which create a nuisance.

However, we are still confronted with the final question of whether or not the record here and the findings of the trial court itself support the issuance of the decree completely forbidding the continued use of the property involved as an airfield.

[20] The allegations in the complaint which have been heretofore stated indicate clearly that it is the way in which the flying has been done that constitutes the nuisance complained of. Considering these allegations, the following things must be said: That buzzing, stunting and engaging in acrobatics can be prohibited without difficulty. The allegations that planes taxi, take off, circle, cruise about, maneuver, glide, climb, bank and turn are descriptions of ordinary and necessary actions in flying a plane, not objectionable unless conducted in such close proximity to plaintiffs' homes as to constitute a nuisance. It is the way they are being done and not the doing of them in and of itself which is the cause for complaint. It is the doing of these things at such low altitudes and in such close proximity to plaintiffs' homes and property that is the gravamen of the cause. Limits could be placed upon the doing of these acts which would eliminate the nuisance. Plaintiffs also plead that "the only available remedy to Plaintiffs, * * * is a permanent injunction restraining the Defendants permanently from operating the said airport as an airport", but this is said to be necessary "because of the peculiar acts of the Defendants." While all these allegations were found to be true by the trial court we think that neither the pleadings nor the findings justify the complete abatement of the enterprise; and that the testimony does not support the extreme decree granted. No witness testified planes could not fly to and from the field and still fly at such elevations as would eliminate the nuisance factor which now exists. Contiguous property owners must to a reasonable degree yield their desired privacy to the general welfare which is contributed to by the operation of legitimate businesses. Were it not so, railroads could not operate near residences, and factories could not be established without the necessity of purchasing prohibitively large areas of property. That reasonable inconvenience must be suffered by owners whose holdings are contiguous to commercial enterprises is too well decided to require citation of authorities. The evidence shows that the length of the runway here, while approximating the lowest limit fixed by federal authority, yet does exceed that limit. We are aware that airplanes necessarily ascend and descend on rising and descending planes and that where a runway is too short to permit them to ascend or descend over contiguous property without invading the lawful right of the surface owner to the air above his holdings their flight would constitute an unlawful act. Nevertheless there is no testimony here that the runway is so short that no planes could lawfully operate from the field. That such was the situation in the opinion of the learned trial judge appears from that part of his written opinion

which we have quoted, but the evidence does not sustain that position. We think, therefore, that upon this record here, considering the evidence, the pleadings and the findings, the decree rendered went beyond permissible limits. It may be that the imposition of appropriate limitations will, by reason of the shortness of the runway, and the prevailing flying conditions, make it impossible for the airfield to be operated in a normal and usual manner, but that has not been shown; and until it is the injunction forbidding all operations from the field cannot be sustained. It may be difficult, but we think it is not impossible for the trial court either upon the evidence now in the record, or to be taken, to frame a decree which will eliminate the nuisance that has been shown to exist. For instance, flight over the homes of plaintiffs at elevations below those set by federal authority could be forbidden, flight by flyers unable to comply with such a regulation by reason of inexperience could be forbidden; flight except during daylight hours could be forbidden if necessary. True, complete abatement of the enterprise is undoubtedly the result desired by plaintiffs, but we think that, on the record here, that is beyond their right.

The judgment is reversed and the cause is remanded to the trial court for further proceedings in harmony with this opinion.

ADAMS, P. J., and DEIRUP, Justice pro tem., concur.

104 Cal.App.2d 832

BENVENUTO v. SMITH.

Civ. 4226.

District Court of Appeal, Fourth District, California.

June 19, 1951.

Action was brought by Biase Benvenuto against Yvonne Smith for restitution of certain property in proportion to the amount paid by plaintiff, with damages, or for an accounting, on the theory that defendant breached a confidential relationship and reaped a secret profit by purchasing parcel of land for $10,000 and deeding the northerly half of same to plaintiff for $6,500. The Superior Court, San Diego County, Cyrus M. Monroe, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Barnard, J., held that the evidence supported the findings in favor of defendant.

Judgment affirmed.

Joint adventures ⇐5(2)

In action for restitution of property in proportion to amount paid by plaintiff, with damages, or for an accounting, on theory that oral agreement between parties was for purchase of property together but that defendant reaped secret profit by purchasing whole parcel for $10,000 and deeding northerly half to plaintiff for $6,500, evidence supported findings that parties had not agreed to purchase property together, that no confidential relationship existed between them, that defendant purchased the entire property, and that plaintiff purchased from defendant the northerly half for $6,500.

William S. Warden, Solana Beach, for appellant.

Price, Procopio, Cory & Schwartz, San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action for restitution of certain property in proportion to the amount paid by the plaintiff, with damages, or for an accounting.

In July, 1947, the plaintiff, who lived in New York, visited the defendant for a week at her home in San Diego County. During that visit the parties talked of the possibility of buying a part or all of a parcel of land adjoining the defendant's home. This parcel was 200 feet wide and 300 feet deep. In a telephone conversation between the parties in September, 1947, the plaintiff agreed to buy the north half of this parcel for $6500, saying that he would have to sell his home in New York before he could make the payment. Immediately thereafter,

the defendant bought the parcel for $10,000, taking title in her own name and paying the full purchase price.

The plaintiff had difficulty in selling his house, and secured a loan on it. In December, 1947, he sent $4500 to the defendant to be applied on the property he had agreed to buy. He later sold his house and in April, 1948, sent the remaining $2000 to the defendant, together with an amount claimed by her to cover certain expenses in connection with the transaction and in caring for the north half of the parcel in question. Thereupon, the defendant deeded the north half of the parcel to the plaintiff and furnished him a certificate of title. The plaintiff took possession of the north half of the parcel about May 1, 1948.

About a year later, the plaintiff discovered that the defendant had bought the parcel for $10,000, and brought this action. He alleged that on September 17, 1947, he and the defendant, through a long distance telephone call, entered into an agreement to purchase this parcel together; that the defendant represented to him that the purchase price required was $13,000, that she would pay $6500 for the southerly half of the parcel and he was to pay $6500 for the northerly half; that the defendant offered to act as his agent in purchasing the northerly half of the parcel; that the defendant acted in a fiduciary capacity as agent and trustee for him in the purchase of the property; that after the purchase of the parcel the defendant represented to him that she had paid $13,000 for the property, had contributed $6500 towards the purchase price, and had advanced a like sum in his behalf; that these representations were false; and that the northerly 30 feet of the southerly 100 feet of said parcel was purchased by the defendant with money furnished by the plaintiff. The prayer was for a decree requiring the defendant to convey this 30 feet to the plaintiff and to account for the rents and profits received therefrom, or in the alternative for a judgment for one-half of the secret profit made, together with damages.

The court found in all respects in favor of the defendant. In particular, it found that the parties had not on September 17, 1947, or at any other time, entered into an agreement to purchase this property together; that no confidential relationship ever existed between them; and that the defendant had not acted in a fiduciary capacity or as an agent, or as a trustee for the plaintiff in the purchase of this property. It was further found that the defendant purchased the whole of said property with her own funds and for her own use and benefit; that by an oral agreement the plaintiff agreed to purchase from the defendant the northerly half of the parcel for $6500; that in April, 1948, the defendant conveyed that half to the plaintiff in consideration of the payment to her of $6500, together with certain expenses, in accordance with their oral agreement; and that it is not true that the defendant represented to the plaintiff that she had contributed $6500 toward the purchase of the land. The motion for a new trial was denied and a judgment was entered, from which the plaintiff has appealed.

The appellant contends that there was a fiduciary relationship between the parties; that in purchasing this property the respondent acted in a fiduciary capacity as his agent; that by concealing the true purchase price of the property the respondent reaped a secret profit in violation of the fiduciary relationship; and that, as a matter of law, she became an involuntary trustee pro tanto of 65%, or 130 front feet, of the property purchased. It is further contended that there is no substantial evidence to support the contrary findings made by the court.

The entire controversy rests on what was said by the parties in their conversation in July, 1947, and in their telephone conversation in September, 1947. The testimony of the parties is flatly contradictory in both respects. The testimony of the respondent, if believed, amply supports the findings and judgment, and it was accepted by the trial court. While portions of the testimony of the respondent, relied on by the appellant, would naturally tend to raise a doubt as to the nature of this transaction, the court accepted the explanations given

by the respondent, and it cannot be held that they amount to anything more than an additional conflict in the evidence.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

104 Cal.App.2d 632

NOLE v. SIXTY-FIVE O FOUR, Inc.

Civ. 17926.

District Court of Appeal, Second District, Division 1, California.

June 8, 1951.

Rehearing Denied June 25, 1951.

Hearing Denied Aug. 2, 1951.

Blanche Nole brought action against Sixty-Five O Four, Inc., a corporation, owner of furnished apartment rented by plaintiff's husband on weekly basis, for injuries sustained when leg of armchair collapsed. The Superior Court of Los Angeles County, Arthur Crum, J., rendered judgment adverse to plaintiff predicated on verdict of jury, and plaintiff appealed. The District Court of Appeal, Hanson, Justice pro tem., held that evidence on issue of whether owner had actual or constructive knowledge of defective condition of chair was insufficient to take case to jury, but that error was not prejudicial.

Affirmed.

1. Negligence ⇐121(1)

In action by wife against owner of furnished apartment rented by husband on weekly basis for injuries sustained when leg of armchair collapsed, even if wife was invitee and not tenant, wife had burden of proving either that owner had actual knowledge of defect, or that owner had constructive knowledge of defective condition of chair involving unreasonable risk to invitee by showing that defective condition had existed for such period of time that a reasonable man exercising ordinary care would have discovered it.

2. Negligence ⇐136(16)

In action by wife against owner of furnished apartment rented by husband on weekly basis for injuries sustained when leg of armchair collapsed, evidence on issue of whether owner had actual or constructive knowledge of defect was insufficient to take case to jury.

3. Appeal and error ⇐1068(3)

In action by wife against owner of furnished apartment rented by husband on weekly basis for injuries sustained when leg of armchair collapsed, where evidence was insufficient to take case to jury, fact that instructions based upon theory that parties were landlord and tenant, and not invitor and invitee, were erroneous was immaterial, since verdict should have been directed.

4. Appeal and error ⇐1068(3)

In action by wife against owner of furnished apartment rented by husband on weekly basis for injuries sustained when leg of armchair collapsed, submission of case on insufficient evidence was not prejudicial error where jury returned verdict adverse to wife, and judgment entered on verdict would be affirmed.

T. B. Knight, Los Angeles, for appellant.

Moss, Lyon & Dunn, Los Angeles, Henry F. Walker, Los Angeles, of counsel, for respondent.

HANSON, Justice pro tem.

This is an appeal by plaintiff, a married woman, from an adverse judgment predicated on the verdict of the jury in an action to recover damages for personal injuries received when a chair, upon which plaintiff was seating herself, collapsed in an apartment owned by defendant and occupied by appellant, her husband and children. The first question we are necessarily called upon to decide is whether the facts proved by plaintiff-appellant disclosed a legal liability upon which a verdict if it had been rendered in her favor could stand. If such a verdict would have been permitted to stand then the second question is whether the court erred in instructing the jury on the theory that the status of the parties was that of landlord

and tenant, instead of invitor and invitee, and in refusing to give certain instructions requested by plaintiff-appellant based on the latter theory. The jury returned a verdict as has been stated for defendant-respondent.

The evidence, viewed most favorably to appellant, is readily stated. About two weeks prior to November 22, 1948, the date of the accident, appellant, her husband, and their three minor children went to the registration desk of the Wilcox Hotel and there the husband engaged for the family a furnished apartment consisting of a living room with an in-a-door bed, a bedroom and bath, and a kitchen upon a weekly basis and rate. The weekly rate included chambermaid and janitor service. After a stay of about two weeks and on the morning of November 22, 1948, the appellant weighing 126 pounds had occasion to move an upholstered occasional armchair from a corner in the living room to a desk. When she sat down upon it the left front chair leg gave way precipitating her to the carpeted floor causing her to sustain certain alleged injuries resulting in the suit in question. Testimony in behalf of the plaintiff was to the effect that after the accident the chair was examined and it was disclosed that the left leg thereof had "a break all of the way through the top, a split."

Appellant testified that in her two-week stay in the hotel she had paid little or no attention to the chair and that a casual inspection of the leg of the chair would not have disclosed its condition. There was no evidence to indicate that the split in the chair was not of recent origin; no evidence that the split was patent rather than latent; in fact, the evidence was that it was not patent and would not have been visible upon a casual inspection; no evidence that the defendant could by any reasonable inspection have discovered the defect. There was evidence that the defendant had no actual knowledge of the defect.

[1–3] The court denied defendant's motion for a nonsuit and at the close of the evidence likewise denied defendant's motion for a directed verdict. The court thereupon submitted the case to the jury upon instructions based upon the theory that the relationship of the parties was that of landlord and tenant, and not invitor and invitee as contended for by plaintiff-appellant. Viewing the case on the assumption contended for by appellant that the relation between appellant and the hotel was that of invitee and invitor, the burden of proof, nevertheless, was upon appellant to prove (1) either that the defendant had actual knowledge of the defect or, if not, that (2) the defendant had constructive knowledge that the chair was in a defective condition involving an unreasonable risk to the invitee. Owen v. Beauchamp, 66 Cal.App.2d 750, 152 P.2d 756; Matherne v. Los Feliz Theatre, 53 Cal.App.2d 660, 128 P.2d 59; Crawford v. Pacific States Savings & Loan Co., 22 Cal.App.2d 448, 71 P.2d 333. In order to hold the defendant hotel on the basis of constructive knowledge it was necessary for plaintiff to prove that the defective condition in the chair had existed for such a period of time that a reasonable man exercising ordinary care would have discovered it. Cases, supra. The record is barren of any such proof. Accordingly, as the plaintiff failed to prove either actual or constructive knowledge on the part of the hotel of the defective condition of the chair, the trial court should have granted respondent's motion for a directed verdict. As such a verdict was not directed it is immaterial that the instructions given and denied were erroneous. Estate of Hess, 183 Cal. 589, 598, 192 P. 35.

[4] The error not being prejudicial the judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

104 Cal.App.2d 634

PEOPLE v. CLARK.

Cr. 2260.

District Court of Appeal, Third District, California.

June 8, 1951.

Charles Clark was convicted in the Superior Court, Solano County, Harlow V. Greenwood, J., of violation of Penal Code committed upon a girl age seven years and defendant appealed. The District Court of Appeal, Adams, P. J., held that the variance as to the date of offense was immaterial.

Judgment affirmed.

1. Jury ⇐133

Statements by district attorney to prospective jurors, at request of court, as to nature of charge were within court's reasonable discretion. Pen.Code, §§ 1044, 1078.

2. Criminal law ⇐730(7)

Where district attorney in opening statement and closing argument referred to statements of victim not brought in evidence, but victim testified as to offense, such was not sufficient misconduct to justify reversal or new trial, especially in view of court's admonition.

3. Criminal law ⇐404(4)

In prosecution for crime against girl seven years of age, the child's stained clothing and that of defendant were admissible in evidence. Pen.Code, § 288.

4. Indictment and Information ⇐176

Variance as to date of offense is immaterial unless time is of essence of the offense. Pen.Code, § 955.

5. Indictment and Information ⇐176

Where it clearly appears that but single offense is charged to have been committed prior to filing of information, and within statutory period of limitation, variance as to time of offense is immaterial. Pen.Code, § 955.

6. Criminal law ⇐1170½(1)

In prosecution for crime against seven year old girl, where district attorney cross-examined defendant's character witness as to knowledge of drunken driving and disturbing the peace, though cross-examination should have been limited to misconduct of defendant relating to traits involved in charge and inconsistent with reputation attributed to defendant, error was not sufficient to justify reversal. Pen.Code, § 288.

Robert K. Winters, Benicia, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy, for respondent.

ADAMS, Presiding Justice.

Clark was charged by information with a violation of section 288 of the Penal Code committed upon a girl aged seven years "on or about" July 15, 1950. He was convicted by a jury. His appeal is from the judgment that followed, and an order denying a new trial.

Grounds relied upon by appellant are that the court erred in permitting the district attorney to make what appellant refers to as three opening statements; that the district attorney was guilty of prejudicial misconduct in his statements to the jury; that the court admitted irrelevant evidence, which was of an inflammatory nature; that the evidence was insufficient to sustain the conviction; and that the court erred in ruling on objections to the cross-examination of defendant's character witness.

The evidence establishes that defendant, who was a dining car waiter, rented a room in the home of the parents of the child, whom he had known for several years. He occupied one of two bedrooms, while the girl Kathryn and her parents occupied the other when they were all at home. The mother was employed in Placerville and came home on week-ends. The father was also employed, as a red cap, and left home at 5:00 a. m. each day, returning at 1:00 or 2:00 o'clock in the afternoon. For a time the child, Kathryn, was with her aunt in San Mateo, but from July 9th to 15th was left in the home of her parents, as defendant had a lay-over that week and asked that

he be permitted to keep the child at her home. On July 15th, as the father was not returning home, he telephoned to one of his wife's sisters, Mrs. Jordan, who lived near, to take care of the child that night. This she agreed to do, and, upon giving the child a bath that evening, found a "terrible looking yellow substance" on her panties. She immediately made an appointment with a doctor to whom she took Kathryn the following morning. He found that the child had a yellowish-brown discharge, concluded that she was infected with gonorrhea, and treated her with penicillin which brought about a cessation of the discharge. He testified that his estimate of the time of exposure of the child to gonorrhea was three or four days, and possibly as little as two days. A physical examination of Clark on July 19th established that he, too, had gonorrhea. At the trial Kathryn testified that on the mornings that she was left alone in the house with Clark he got into bed with her, pulled down her pajamas and "bothered" her; that he touched her private parts with his, and with his mouth, which made her feel "funny"; and that he told her not to tell. An examination of several pairs of the child's pajamas and panties revealed stains similar to those found on the panties worn by her on July 15th. Similar stains were found on underwear in defendant's closet.

The first alleged reversible error relied upon by appellant is that the district attorney was permitted to make three opening statements. This is based upon a statement made by the prosecuting attorney to the prospective jurors before they were called into the jury box, a second statement made to additional jurors summoned when the first panel was exhausted before a complete jury had been secured, and a third statement after the jury was completed. The record shows that the first statement was made to the prospective jurors at the request of the court, so that they might know what the case was about before they were questioned by the court as to their fitness to serve. He stated the charge and added remarks as to what he believed the evidence would show. After an objection by defendant's counsel that the statement of the district attorney was exceeding a mere statement of the charge, the court instructed the jurors that the statement of counsel was not evidence, and the district attorney proceeded. On the voir dire examination by the court several of the jurors called stated that they had fixed opinions—some stating that it was because of the nature of the charge—and they were excused.

When the special venire was called the court asked the district attorney to make a statement, which he did, reciting only the substance of the charge. The jurors were examined exhaustively by counsel for both prosecution and defense, and defendant did not entirely exhaust his challenges.

[1] The third statement of the district attorney did not differ materially from that previously made. No objection was interposed to anything there stated. We have read the record carefully and find nothing prejudicial made in the foregoing statements, nor anything material that was not thereafter shown by the evidence. The making of the statements was at the court's direction, and the course of the conduct of a trial is a matter within the discretion of the court. Pen.Code, §§ 1044, 1078. We find no abuse of that discretion. And, finally, defendant's counsel expressed himself as satisfied with the jury, and in his statement to them said: "I am satisfied that every single one of you is a fair and impartial juror and will give your best judgment to this case." See People v. Griffin, 98 Cal. App.2d 1, 49, 219 P.2d 519.

[2] Appellant's next asserted error is based upon an assertion by the district attorney in his opening statement that the child's aunt was told by Kathryn that defendant had crawled into bed with her, or that he had asked her, on other occasions, to come into bed with him; and that in his argument, after the evidence was in, the district attorney had made reference to statements made by the child to the aunt which, he said, could not be brought out in the evidence as they were not made in defendant's presence. We cannot consider that such conduct on the part of the prosecuting officer justifies

reversal. The child testified that defendant got in bed with her more than once—every day that he was at home alone with her, including the day he went to work (the 15th); that he took down her pajama pants, "bothered" her, put his private parts on hers, etc. Whether or not she told this to her aunt could have no direct bearing, as it was not an element of the offense charged. If this was misconduct it does not justify reversal of the judgment, nor a new trial. See People v. Arnold, 199 Cal. 471, 486, 250 P. 168; People v. Berryman, 6 Cal.2d 331, 336, 57 P.2d 136; People v. Alexander, 41 Cal.App.2d 275, 282, 106 P.2d 450, 916. It may be said, also, that the court instructed the jury that they should distinguish carefully between the facts testified to by the witnesses and any statements made by the attorneys during the trial or in their arguments as to what facts had or had not been proved; that such statements were not evidence in the case. See People v. Isby, 30 Cal.2d 879, 896, 186 P.2d 405.

[3] Appellant next argues that there was reversible error in permitting the introduction in evidence of the child's stained clothing and that of defendant; that the sight of same tended to inflame the jury. That the articles were admissible seems to be clear from numerous decisions. (See People v. Robinson, 87 Cal.App.2d 772, 774, 197 P.2d 776; People v. Davis, 106 Cal. App. 179, 190, 289 P. 194; People v. Isby, supra, 30 Cal.2d at page 892, 186 P.2d 405; People v. Adamson, 27 Cal.2d 478, 486, 165 P.2d 3.

[4, 5] Appellant's next contention is that the evidence is insufficient to sustain the conviction. In support thereof he argues that no specific date of the commission of the alleged offense was proven, and that he was thus deprived of a chance to prove an alibi. The information charged the commission of the offense "on or about" July 15th. We discussed at length this subject of variance in People v. Moranda, 87 Cal.App.2d 703, 704, 197 P.2d 394, 395, where we held on ample authority that: "It is well established that such a variance is immaterial unless time is of the essence of the offense; and that where it clearly appears, as it does in this case, that but a single offense is charged to have been committed anterior to the filing of the information, and within the period designated by the applicable statute of limitations, the variance is of no significance. Section 955 of the Penal Code of California provides that the precise time at which an offense was committed need not be stated in an information, but it may be alleged to have been committed at any time before the filing thereof, except where the time is a material ingredient." In the later case of People v. Murray, 91 Cal.App.2d 253, 257, 204 P.2d 624, the same principle was reiterated, with citations. And in People v. Williams, 27 Cal.2d 220, 226, 163 P.2d 692, 695, the court said: "Under the generally accepted rule in criminal law a variance is not regarded as material unless it is of such a substantive character as to mislead the accused in preparing his defense, or is likely to place him in second jeopardy for the same offense." Also see People v. Amy, 100 Cal.App.2d 126, 223 P.2d 69.

[6] Finally, appellant argues that the district attorney improperly cross-examined his character witness, who had testified that defendant's reputation for morality was good—though she admitted she had never heard anyone discuss his moral character. On cross-examination she was asked if defendant had not been convicted of drunken driving. Objection was sustained. The prosecutor then asked whether she knew that he had been arrested for disturbing the peace. She answered that she did not, and then said that even if she were told that defendant had been convicted of drunken driving or disturbing the peace it would not change her opinion of his good character. There is nothing indicating that the district attorney acted in bad faith in this line of questioning and we conclude that though the cross-examination should have been limited to misconduct on the part of defendant relating to the traits involved in the charge and inconsistent with the reputation attributed to him by the witness, the error was not

sufficiently important to justify a reversal. See People v. Beltran, 94 Cal.App.2d 197, 210, 210 P.2d 238.

The judgment and the order denying a new trial are affirmed.

VAN DYKE and PEEK, JJ., concur.

104 Cal.App.2d 599

WECK et al. v. LOS ANGELES COUNTY FLOOD CONTROL DIST. et al. and eight other cases.

Civ. 16962–16970.

District Court of Appeal, Second District, Division 1, California.

June 5, 1951.

As Modified June 6, 1951.

Rehearing Denied June 25, 1951.

Hearing Denied Aug. 2, 1951.

Nine separate actions by Robert Weck, and others, W. R. Kratka, and others, Domenico Tonso, and others, George M. James, and others, Clotildis Kerns, and others, Bruce H. Kratka, Richard B. Reinert, Jean Church Jahns, and Carl Richard H. Mueller, against the Los Angeles County Flood Control District, the Southern Pacific Company, a corporation, and the Southern Pacific Railroad Company, a corporation, and others to recover damages that resulted as a consequence of the flooding of lands by storm or flood waters which broke out of a drainage ditch. The Superior Court of Los Angeles County, Paul Vallee and Harold B. Landreth, JJ., entered judgment for plaintiff and the two railroad defendants appealed. The District Court of Appeal, Hanson, J., held that refusal on the part of the trial court to accept facts tending to show a want of legal liability on the part of the railroads for the flooding was prejudicial error.

Judgment reversed with instruction.

1. Appeal and error ⇐1096(3)

The law of the case comprehends only such facts and legal points as are presented to and decided upon a reversal.

2. Waters and water courses ⇐78

Waters flowing in a stream in a natural watercourse through or adjoining a person's lands cannot be diverted by upper landowners to the damage of lower riparian landowners.

3. Waters and water courses ⇐38

A "water course" is a stream of water of such well-defined existence as to make its flow valuable to the owners of land along its course.

See publication Words and Phrases, for other judicial constructions and definitions of "Water Course".

4. Waters and water courses ⇐115

Storm or flood waters are not surface waters although before flowing in the channel of a ditch they may have been of that character.

5. Waters and water courses ⇐119(2)

If at the time of the diversion of storm and flood water the artificial channel is adequate to care for all reasonably anticipated storm or flood waters under the then existing conditions of the landscape, there should be no continuing liability for the diversion.

6. Waters and water courses ⇐179(6)

In action against railroads to recover damages that resulted as a consequence of the flooding of land by storm or flood waters which broke out of a drainage ditch adjacent to railroads' right of way, in absence of evidence that railroads and an adjoining landowner acted in concert in blocking off the natural drainage of ditch through the railroads' right of way, the trial court committed prejudicial error in restricting evidence that adjoining landowner blocked off the natural drainage, to the limited purpose of showing that there was no wash on the adjoining landowner's property.

7. Negligence ⇐15

In order that two or more persons may be joint tort-feasors, it is essential that it be shown that the parties acted in concert to achieve a result or that the actor was authorized by the other to act in his behalf.

8. Waters and water courses ⇐119(4)

Where owners of an adjoining ranch blocked course of natural drain through

railroads' right of way, and this, without any action of railroads, was the proximate cause of diversion of water and consequent overflowing, the railroads were not liable for the floodings.

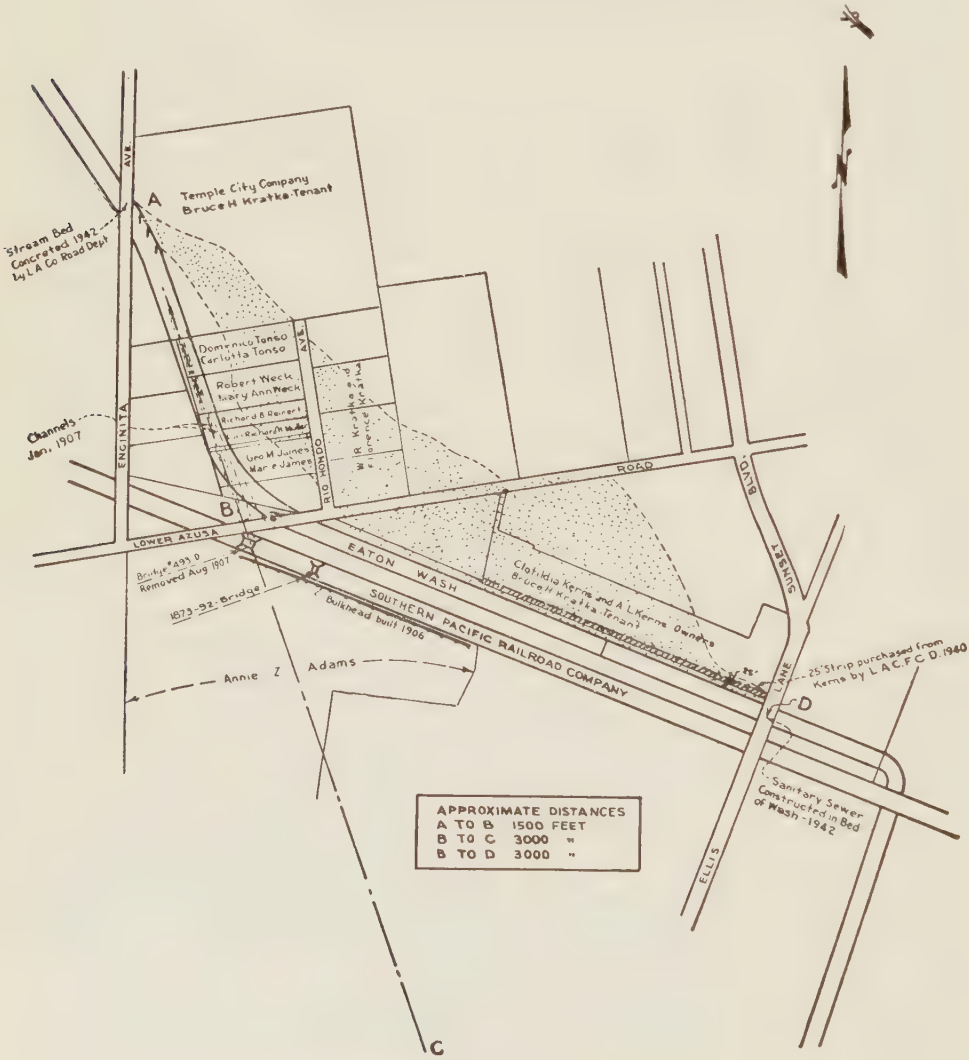
C. W. Cornell, Randolph Karr, Los Angeles, for appellants.

Stewart, Shaw & Murphey, By Wm. L. Murphey, Los Angeles, for respondents.

HANSON, Justice pro tem.

This is the second appeal, in nine separate actions (consolidated for trial) commenced by the respective respondents, to recover damages that resulted to them on March 3 and 4, 1943, as a consequence of the flooding of their lands by storm or floodwaters which broke out of a drainage ditch known as Eaton's Canyon Wash.

The respondents, as plaintiffs below, named as defendants the Southern Pacific Railroad Company (hereinafter called "Railroad Company"), the Southern Pacific Company (hereinafter called "the Company"), the Los Angeles County Flood Control District (hereinafter referred to as the "District") and certain of its employees and officers. It is enough at this point to say that liability against all of these defendants was based on negligence.



The map which we set forth herein (based on exhibits in the case) will help to point out some of the salient facts. The lands of respondents lie in a triangular area east of Encinita Avenue and north of the Southern Pacific Railroad tracks. The drainage ditch known as Eaton's Canyon Wash for a period of time prior to 1906 ran from A to B to C passing under the right of way of the Southern Pacific through a trestle which was constructed over the wash in such a manner as not to interfere with storm or other waters passing down the channel of the wash or drainage ditch. By 1906 or 1907 the channel became blocked at the locality of the trestle and thereupon waters therein flowed easterly along the north side of the railroad right of way from the bend thereof at "B" to "D" on the map and not at all from "B" to "C." At the time of the storm in question, the storm waters originating in the Sierra Madre Mountains flowed southeasterly, in the drainage ditch known as Eaton's Wash toward Encinita Avenue but broke out of the banks of the Wash at point "A" and flooded the area depicted by dots on the map.

We proceed to state additional facts which are germane to a decision of the case. When in 1873 the predecessor railroad of the Southern Pacific Company constructed its railroad line running from Los Angeles easterly it ran roughly parallel to the Sierra Madre mountains which lay to the north of the railroad. In that day, it seems, the surface and storm waters originating in those mountains were largely absorbed by the ranch lands north of the railroad in the locality of what is now known as Savanna, California. However, it appears that, even at that time, excess storm waters coming out of a canyon in the mountains known today as Eaton's Canyon naturally flowed down a course known today as Eaton's Wash to a point westerly of Savanna but east of a highway known as Lower Azusa road at the point where the road diagonally crossed the railroad tracks. Initially, the excess storm waters reached the railroad right of way 531 feet east of the point where the railroad and highway intersected. Accordingly, the railroad constructed a culvert through its roadbed at the point where the waters flowed so as to permit them to flow southeastwards following the low point of the land's topography. Later on, the storm waters shifted their course somewhat westerly so as to reach the right of way only 35 feet east of the point where the road and railway intersected. To meet this new situation the railroad constructed a trestle in its roadbed to permit the water to flow unimpeded in this new natural channel. This channel coming from the north and running slightly southeasterly is depicted on the map as having followed the line A, B, C. At times during torrential rainfalls the channel made by nature was insufficient in depth and width to wholly confine the flood waters therein and hence in part flowed easterly along the northerly side of the railroad. To the south of the railroad the natural channel ran through the approximate center of the Adams ranch and then onwards into the Rio Hondo River.

There is evidence that in 1906 the owners of the Adams ranch erected on their own land, but immediately adjacent and parallel to the railroad right of way on the north, a tight board fence directly across the natural drainage ditch and that this fence extended easterly and westerly of the ditch a total distance of about 1200 feet, in other words, the whole length of the Adams property. There is likewise evidence that this construction acted as a dam to storm or flood waters and as a consequence that the drainage ditch became filled up with boulders and sand not only on the south side of the right of way, but underneath the trestle, and on and across the north side of the right of way. Moreover, there is evidence that as a result of this damming-up process the storm waters coming down from the north were deflected (at point B on the map) and flowed easterly along the north side of the railroad right of way. There was no evidence that water could get through what had been the trestle opening after it had filled up with boulders and sand. After that condition had arisen the railroad pulled up its trestle and dumped dirt in the

holes which had been occupied by its timbers.

The railroad did not at any time remove the boulders and sand which clogged the natural ditch at the point where it crossed its right of way. It did, however, shore up its northerly right of way on either side of, but not across, the natural drainage ditch. However, after the natural drainage ditch was fully blocked, in the manner stated, the railroad shored up the natural channel of the ditch where it had crossed its right of way. Additionally, thereafter the railroad widened and extended the new ditch which ran along on the north side of its right of way. Furthermore, at various times the railroad removed boulders and sand from the new ditch (B to D), as well as from the old portion of the ditch as far north as point A is depicted on the map. This was done to permit the storm waters to flow more freely and as a protection to the roadbed.

Six of the plaintiffs, i. e., James, Mueller, Reinert, Weck, Tonso, and W. R. Kratka, acquired title to their lands from one Platt under deeds, in which was inserted the phrase, "Subject to an unrecorded agreement * * * between Platt and Southern Pacific Railway Company." All of these named plaintiffs acquired their lands which are here involved, subsequent to the time the old channel B to C was blocked up.

The agreement recited that the railroad company was to do certain excavating in the new ditch and, in part, on Platt's land; that such work would be for the benefit of Platt's land and the roadbed of the railroad as a protection against storm waters; that Platt should have the right at any time to clean out the new ditch, whether it ran on the right of way or on his own land. As the only portion of Platt's land which was excavated was that acquired by Mr. James and Mr. Mueller the contract was admitted in evidence only in their cases against the railroads.

Beginning with the year 1915, and prior to 1940, the Los Angeles County Flood Control had acquired title to the right of way of the old flood channel (A to B) and of the new continuation thereof (B to D). In addition the Flood Control had acquired from the plaintiff Kerns a strip of land 25 feet in width running the full distance of his property east and west, i. e., 1674.11 feet. This strip of land immediately adjoined the new channel on its northerly side. Upon this strip for its full length the Flood Control built a dike fifteen feet in height. Likewise the Flood Control acquired a permit to spread dirt and boulders upon a strip of land immediately adjacent to the south of the new channel which extended all the way from B to D.

Prior to 1906 the original natural ditch from A to B was only about 30 feet in width and about 4 feet in depth north of the railroad and of smaller dimensions south of the railroad. Prior to that year the railroad had excavated a small ditch along its northerly right of way, beginning at the original natural ditch (B), which ran easterly to D. After 1907 the railroad gradually widened and deepened this ditch evidently to meet the silting up process going on in the old ditch and the new, as well. By 1936 the railroad had widened and deepened the new ditch considerably. One witness for the plaintiffs stated it was widened to three times its original width. In the meantime it had several times cleaned it out. About 1936 the District undertook to clean out the ditch and to build up the banks along the course of the old and new ditch lying to the north of the railroad. For a period of some 3 or 4 years prior to the March, 1943, flood the District had done little or nothing in the way of cleaning out the ditch.

At the first trial the trial judge at the conclusion of all the evidence directed a verdict in favor of all the defendants. On the appeal therefrom another division of this court affirmed the judgment entered upon the ruling except as to the two named defendant railroads. Weck v. Los Angeles County Flood Control Dist., 80 Cal.App.2d 182, 181 P.2d 935.

Upon that appeal the railroads rested their case for an affirmance on three major grounds. *First*, that there was no evidence that Eaton's Canyon Wash was a watercourse from B to C or for that matter from A to C. *Second*, that there was

no evidence that the railroad companies diverted the flow of the waters of the Wash. *Third,* that there was no evidence of any act by the railroads which proximately caused the waters to leave the channel at A, which it is conceded directly caused the damages. The court ruled that there was substantial conflicting evidence on all of these points and, hence, that the jury should have been permitted to rule on the conflict.

While the railroads on the first appeal contended that the channel B to D should be classed as though it was a part of the natural watercourse or natural drainage ditch (A to B) they did not stress the point nor did they argue, that by reason of lapse of time and the use that was made of the new channel (B to D), they had ceased to be liable for any original diversion or obstruction to the natural channel at B, if such there was on their part. Moreover, in their discussion of the further point that no act of commission or omission on their part was a proximate cause of the injury to plaintiffs, the railroads did not advert at all to the fact that plaintiffs, in their complaints, had alleged that they would not have sustained any injury had it not been for the presence of the dike on the northerly side of the new channel. We pause briefly to state that the evidence on the first appeal disclosed, and the court conceded, that this dike was constructed and maintained by the District alone on an easement owned by it. We do not now stop to discuss what effect these matters of fact should or would have had on the court had they been brought to its attention.

The case upon the second trial below was heard on the original complaint notwithstanding (1) it charged all the defendants (the District as well as the railroads) with a joint liability and (2) averred that had it not been for the construction by all of the defendants of the 15-foot dike none of the plaintiffs would have sustained any damage. The latter averment was not merely an allegation by the plaintiffs that *the* proximate cause of the injuries sustained by them was the construction of the dike, but it was also a binding judicial admission against the plaintiffs. Yet the evidence is undisputed that it was the Los Angeles Flood Control District which purchased the 25-foot strip of land that ran a distance of 1674.11 feet immediately adjacent to the north of the new ditch and erected the dike thereon and that the railroads had no part in it. If then the dike was *the proximate cause* and it alone was constructed and maintained by the District it is clear that the railroads were not proximately liable, as by the pleading they were absolved from liability, unless in fact they had joined in the construction and maintenance of the dike, which as stated is not the fact.

Upon the instant appeals before us the railroads assign as major errors (1) the failure of the trial court to direct a verdict; (2) the refusal of the court to permit the jury to consider, on the question of defendants' liability, the evidence introduced tending to show that the owners of the Adams Ranch caused the diversion of the channel away from its natural course; (3) errors in the instructions; and (4) that appellants James, Mueller, Tonso, Weck, Reinert and W. R. Kratka, as successors in interest of Platt were bound by his ratification of the diversion as evidenced by the so-called Platt contract with the railroads.

We are confronted at the outset, as just indicated, with the problem whether the trial judge ruled erroneously when he refused to direct a verdict for the railroads. This particular problem is beset with difficulties for us, as it undoubtedly was for the trial judge. Initially, we feel called upon to consider whether "the law of the case" as made upon the first appeal, binding alike upon the trial judge as it is upon us, required the submission of the case to the jury. In our view, it did not for reasons presently to be stated.

[1] The rule in this state is that the law of the case comprehends only such facts and legal points as are presented to and decided upon a reversal. Moore v. Trott, 162 Cal. 268, 122 P. 462; Steelduct Co. v. Henger-Seltzer Co., 26 Cal.2d 634, 160 P.2d 804. For instance, if in an ac-

tion upon a promissory note the defendant pleads payment and the evidence on that question is conflicting, a court on appeal would necessarily rule it was a jury question, where the trial court had directed a verdict for the defendant. If, however, on the second trial the defendant had amended his answer, setting up that the action was barred by the statute of limitations and sustained it by uncontradicted proof the trial court would be under a duty to direct a verdict. This for the simple reason that the appellate court had directed a jury trial on one issue alone, to-wit, the issue before it. The question then whether there had or had not been a diversion on the part of the railroads was ruled on the first appeal to be a jury question. But the basic question now before us whether such a diversion, if shown, created a continuing legal liability in view of the facts now before us, was not ruled upon. As the motion below and the appeal likewise have raised that point we proceed to a discussion of it.

If we assume, for the moment, that the railroads in 1907 blocked the natural drainage ditch from B to C and so caused the waters to flow from B to D and then on easterly, we are met with the question whether liability may still stem from the original act of diversion. In 1907 the natural channel from A to B was only about 30 feet in width from bank to bank with a maximum depth of about 4 feet. That the railroad thereafter excavated from time to time, the channel from B to D is the record in this case. It not only removed sand and boulders from it, but before 1936 had widened it quite considerably. If the old natural channel (A, B, to C) was sufficient to carry all storm waters within its banks we fail to see that the diverter was under a duty to construct an artificial ditch which would carry more than the same amount of water without overflowing its banks. We find it hard to believe that one who constructs an artificial ditch is under an obligation to build it so large and so secure that it will carry all the water, that may artificially be diverted into it for all time. On the contrary we think that when an artificial ditch has been in operation for as long as 36 years, as is the case here, it must be held that the original act of diversion is no longer a basis of liability and must be classed as if it has just faded away. We think this is particularly true, where as here, the railroads could not reinstall the trestle, or clean out the old ditch and thereby permit the waters to be cast onto the land which is known in the record as the Adams Ranch and where it is plain that the jurisdiction and control over the old and new ditch is exclusively with the District.

While it has been said, particularly in cases decided decades ago, that liability for diversion never ceases, we think it cannot be said to be the rule today. Cf. Barkley v. Wilcox, 86 N.Y. 140; 3 Farnham, Waters and Water Rights, sec. 889d, p. 2606. Moreover, these early cases dealt for the most part with the diversion of streams valuable for their waters. As there is a vital distinction between diverting waters from a watercourse and guarding against storm or flood waters, we turn to expand a bit further on the subject.

[2, 3] Since very early times it has been a well-established principle of law that waters flowing in a stream in a natural watercourse through or adjoining a person's lands could not be diverted by upper landowners to the damage of lower riparian landowners. The reason back of this rule is self-evident. The pivotal question in every such case has been whether or not there is in fact a watercourse. Hence, the courts were early compelled to define what was meant by the term "watercourse" and quite naturally held that "a water course is a stream of water of such well-defined existence as to make its flow valuable to the owners of land along its course." 3 Farnham, Waters and Water Rights, sec. 878, p. 2556, note 1. See also Vol. 2, sec. 459, p. 1562; see also Hellman Commercial Trust & Savings Bk. v. Southern Pac. Co., 190 Cal. 626, 214 P. 46.

A natural stream of water, generally speaking, is something of value to lands adjacent to its course. But such a stream when augmented with storm or flood wa-

ters is quite the reverse, unless there is a need for such excess waters. Hence, the courts quite naturally held that adjacent landowners along the watercourse were entitled to erect barricades on their lands to prevent storm or flood waters in such a natural watercourse from inundating or otherwise damaging them. This was in no sense a diversion of the waters, but rather an endeavor to confine the waters to their channels.

From what has been said it is apparent that to speak of Eaton's Canyon Wash as a watercourse is a misnomer, but quite too often the courts have done so because in large measure the rules applicable are the same. But in truth the "Wash" in this case was merely a natural drainage ditch; i. e., the natural course taken by storm and flood waters which flowed only more or less periodically. Such waters, being entirely annual and intermittent, possessed no value to lands adjacent to the course they tended to follow, as for instance, a natural ditch created by their more or less periodic flows.

[4, 5] Storm or flood waters are not surface waters although before flowing in the channel of a ditch they may have been of that character. "The chief characteristic of surface water is its inability to maintain its identity and existence as a water body". 3 Farnham, Waters and Water Rights, sec. 878, p. 2557, note 7, citing Gray v. McWilliams, 98 Cal. 157, 32 P. 976, 21 L.R.A. 593. "The weight of authority, as well as of reason, is that flood water is not, and cannot be treated as, mere surface water". 3 Farnham, Waters and Water Rights, sec. 879, p. 2558. "Flood water * * * must be treated as in a class by itself, and it cannot be treated either as a water course or as surface water". Sec. 879, p. 2559, note 8. Upon these premises how should storm or flood waters, not flowing as a part of a natural constant stream of water and without value to property owners along the drainage ditch, be treated? In an endeavor to solve the problem the early decisions in this country accepted the doctrine of "no diversion of waters from a natural watercourse" as being a sufficient and all embracing guide. But those decisions were rendered at a time when the country was largely unsettled or agricultural and not urbanized, as was the case in California in its early days. But we have come upon a new era with new problems which cannot be settled by the laws of nature with respect to the flow of storm and flood waters, where man today is able to block those laws. Storm and flood waters which a century ago could readily have been absorbed by the great open spaces where they normally flowed are now blocked with huge cities and so must seek—in effect—artificial channels as they flow according to the laws of gravity. We should not hold back the normal development and improvements of lands by saying to those who divert natural drainage ditches into artificial ones that liability for diversion never ceases. If at the time of the diversion the artificial channel is adequate to care for all reasonably anticipated storm or flood waters under the then existing conditions of the landscape it should be deemed adequate. There should be no obligation to construct the artificial channel so large and so efficient that it will care for excess storm and flood waters which may flow into it caused by subsequent artificial conditions such as the building of cities and highways which prevent absorption by the lands of such waters and so artificially increase their flow.

We are not without support for these views in the decisions of this state. In San Gabriel V. C. Club v. Los Angeles, 182 Cal. 392, 188 P. 554, 556, 9 A.L.R. 1200, the waters of Eaton Canyon were diverted in part, as here, from their natural course by the construction of a storm drain. As a result the waters formed a channel which passed through the grounds of the plaintiff Club where they had never passed before. Later on the defendant improved the channel. In speaking of the channel the court said: "In any event it has now existed for such a length of time as the channel for the natural drainage of the watershed tributary to it that the manner of its creation is not material, and it has all the attributes of a water channel wholly natural in origin." So in Chowchilla

Farms, Inc. v. Martin, 219 Cal. 1, 25 P.2d 435, 441, it was held that where waters had been diverted through an artificial canal for a number of years, it would be regarded as though it was a natural course. In the course of its opinion the court quoted from 1 Wiel on Water Rights, sec. 60, in part as follows: "'There is further an established principle that by lapse of time an artificial watercourse may come to be regarded as equivalent to a natural one. These cases do not depend exactly upon prescription, for, as above shown, prescription, properly speaking, cannot run in favor of lower parties upon a flow as against parties higher up. They rest rather upon what some of the cases call ordinary dedication to a class of public which, in the course of time, has established itself upon the basis of the artificial condition. Where the creator of the artificial condition intended it to be *permanent,* and a community of landowners * * * has been allowed to adjust itself to the presence and existence of the * * * artificial condition, acting upon the supposition of its continuance, and this has proceeded for a long time beyond the prescriptive period, the new condition will be regarded as though it were a natural one, its artificial origin being then disregarded by the law as it has been by the community."

Quite regardless of what has so far been said we are of the opinion that the case, in any event, must be reversed upon the ground that the trial court committed reversible error (1) in its refusal to admit for all purposes evidence as to the barricade constructed by the owners of the Adams Ranch; (2) in the instructions given to the jury; and (3) in not holding as a matter of law that appellants James, Mueller, Tonso, Weck, Reinert and W. R. Kratka could not recover in view of the Platt contract and the ratification thereby of the diversion.

As has already been indicated, the trial court admitted evidence which disclosed the erection of the barricade upon the Adams land by the occupant thereof and evidence tending to prove that this act alone caused the channel to silt up and that it was the original proximate cause which turned the waters so that they flowed from B to D. The trial judge, however, permitted this evidence not to prove the inherent facts, but for the limited purpose of showing that on March 3 and 4, 1943, "there was no wash south of the railroad tracks."

The statement just quoted was made by the court to the jury at the time of its admission, with this further statement: "* * * the evidence is not admitted for the purpose of indicating at all, ladies and gentlemen, that because somebody else did something the Southern Pacific or the Southern Pacific Railroad Company is excused from anything they did or failed to do. It is admitted solely in connection with the claim of the defendant that there was no wash south of the railroad tracks. *You are to understand that the reception of this evidence, if established, does not in any wise relieve the Southern Pacific Company or the Southern Pacific Railroad Company for anything they did or failed to do.* Now, I am not indicating at all to you that they did or failed to do anything, that is up to you to decide, but the fact that somebody else did something or did not do something has no bearing *on their liability,* the liability of the defendants in this case, or either of them * *." (Italics supplied.)

[6, 7] The trial court, as appears from the transcript, proceeded upon the theory that the railroads and the owners of Adams Ranch were joint tortfeasors, even if the latter initially blocked the natural channel (B to C) and hence that the railroads could not shift their liability by a showing of the true fact. The ruling would have been correct if the parties were shown to have been joint tortfeasors, but that necessary premise was lacking and consequently the ruling was not only erroneous, but highly prejudicial. In order that two or more persons (including corporations as persons) may be said to be joint tortfeasors it is essential that it be shown that the parties acted in concert to achieve a result or that the actor was authorized by the other to act in his behalf. Here the action of the owners of the Adams Ranch was not shown to have been participated in or authorized by the railroads. The

fact, if it be a fact, that the owners of the Adams Ranch blocked the natural drainage course and prior, or subsequent thereto the railroads did likewise, if they did, would not in and of itself show that the parties were acting in concert and as a consequence could be held to be joint tortfeasors. As the proper premise was wanting the conclusion was erroneous. Cf. Thome v. Honcut Dredging Co., 43 Cal.App.2d 737, 111 P.2d 368; California Orange Co. v. Riverside Portland Cement Co., 50 Cal. App. 522, 195 P. 694; Wm. Tackaberry Co. v. Sioux City Serv. Co., 154 Iowa 358, 132 N.W. 945, 134 N.W. 1064, 40 L.R.A., N.S., 102; 56 Am.Jur. 522, 523. Accordingly, the railroads were entitled to introduce evidence to show that the owners of the Adams Ranch blocked the course of the natural drain and that this, without any action on their part, was the proximate cause of the diversion of the channel from B to C to the new channel B to D. The railroads were under no duty to eliminate the blockade so long as it was not caused by its trestle or any other act on its part. The railroads could accept the results of the blockade without taking any affirmative action to eliminate it. Railroads, like any other private owner of lands, are under no duty to go into a natural drainage channel or ditch and remove therefrom debris, sand and boulders which interfere with the free flow of waters so long as they have not erected or placed therein any obstruction to such flow. This is elemental law. If, as the railroads contended, the owners of the Adams Ranch, by means of the barricade, caused the natural channel to silt up on the north side of the right of way, underneath the trestle and on the south side of the right of way and thus caused the diversion, they were entitled to show those facts, if they could. If, as is contended, the railroads removed the timbers of the trestle and filled in the spaces occupied by such timbers such action gave rise to no legal liability, if the action of the owners of the Adams Ranch initially was alone sufficient to divert the channel so that it followed the course B to D rather than B to C. The railroads on such an hypothesis of facts may not be said to have adopted the acts of the actors in the scene. They merely accepted an existing condition and made use of it, for their own purposes, without expanding upon it. Accordingly, the refusal on the part of the trial court to accept the facts as tending to show a want of legal liability on the part of the railroads was prejudicial error. If the jury had been permitted to consider the facts on the basis of legal liability it might well have concluded that the owners of the Adams Ranch rather than the railroads created the diversion.

In view of what has been said it is unnecessary to discuss the error in refusing to give certain requested instructions and additional errors assigned by appellants.

[8] As we are firmly of the view that the court should have directed a verdict for the defendant railroads, the case is reversed with instructions to enter up a judgment for the defendants notwithstanding the verdict. The appeals from the minute order and order denying motion for new trial are dismissed.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied; SHENK and CARTER, JJ., dissenting.

104 Cal.App.2d 614

PEEBLER et al. v. DANZIGER et al.

Civ. 13051.

District Court of Appeal, Second District, Division 3, California.

June 6, 1951.

Hearing Denied July 26, 1951.

Action by Byron Peebler and another against J. M. Danziger and others to recover damages for malicious prosecution of various actions and proceedings. Judgment was for plaintiff in the Superior Court of Los Angeles County, Otto J. Emme, J., against four defendants for $10,722.98 and Edith W. Danziger, H. C. Fickeisen and A. F. Hutchinson appealed from the judgment and attempted to appeal from an order deny-

ing their motion for a new trial. The District Court of Appeal, Shinn, P. J., held that the evidence supported the judgment against defendant, Fickeisen and against Mrs. Danziger but was insufficient to support the judgment against defendant Hutchinson.

Judgment affirmed in part and reversed in part. Attempted appeal from an order denying defendants' motion for a new trial dismissed.

1. Malicious prosecution ⇐64(2)

Evidence supported findings of want of probable cause and malice in litigation which defendant instituted and in which he participated against the plaintiffs to prevent their enjoyment of their rights of ownership of cemetery property.

2. Malicious prosecution ⇐64(1)

Evidence supported judgment of damages against wife of a defendant for malicious prosecution of litigation against the plaintiffs involving their rights of ownership of cemetery property, where evidence authorized inference that wife was conversant with and approved what her husband and another were doing in the litigation and it established that she could not have been unaware of her husband's motive and lack of merit in the litigation he instituted.

3. Malicious prosecution ⇐64(1)

Evidence was insufficient to support judgment for damages in malicious prosecution against an employee of a defendant in allegedly interfering with the enjoyment of plaintiffs of their cemetery property, where whatever employee did on behalf of the defendant, was done an an employee with no advantage to himself, and he sued no one and was not shown to have had any motive to sue or to cause others to bring suit.

4. Appeal and error ⇐194(2)

Claim that denials in answer of defendant made on information and belief were insufficient could not be considered where they were not raised at trial since they were therefore waived.

5. Malicious prosecution ⇐49

In action for malicious prosecution in instituting and maintaining litigation depriving plaintiffs of their enjoyment of cemetery property, complaint sufficiently alleged want of probable cause for the litigation instituted by defendants.

A. Brigham Rose, Los Angeles, for appellants.

Roland Maxwell, Paul H. Marston, Pasadena, for respondents.

SHINN, Presiding Justice.

The present action was instituted by Byron Peebler and Ethel M. Peebler on October 29, 1947, against J. M. Danziger, Edith W. Danziger, his wife, H. C. Fickeisen, A. F. Hutchinson, and Olive Lawn Cemetery, a corporation, to recover damages for the malicious prosecution of one criminal action and certain civil actions and proceedings. The individual defendants answered and the corporation defaulted. In a trial to the court the judgment was in favor of plaintiffs against the four defendants for the sum of $10,722.98 and costs. Edith W. Danziger, H. C. Fickeisen and A. F. Hutchinson appeal from the judgment and attempt to appeal from an order denying their motion for a new trial.

Appellants state their ground of appeal as follows: "The plaintiffs and respondents in all respects failed to establish any of the essential elements requisite to support a cause of action for malicious prosecution." They argue that there was no evidence of malice or lack of probable cause, or that the actions alleged to have been prosecuted with malice were terminated in favor of the plaintiffs, and they claim that the complaint did not allege that the several actions and proceedings were prosecuted without probable cause. The evidence of plaintiffs consisted principally of the court files in several actions: (1) An action (No. 485,682) brought against the plaintiffs May 26, 1943, by B. C. Olds, through J. M. Danziger his attorney, for the recovery of damages; (2) an action (No. 498,915) brought by H. C. Fickeisen on January 16, 1945, against plaintiffs herein, to quiet title to real property; (3) an action (No.500,524) brought by Fickeisen, as trustee in bankruptcy of Graceland, a corporation, filed March 22, 1945, for an accounting and re-

covery of money; (4) an action (No. 508,642) filed December 19, 1945, by Edith W. Danziger against plaintiffs herein for a declaration that certain roads over the property of plaintiffs herein were public roads and to establish title to an office building located on said land, in which H. C. Fickeisen, as trustee in bankruptcy of Graceland, a corporation, filed a complaint in intervention in support of the claims of Mrs. Danziger. In this action the Peeblers filed a cross complaint, naming as cross defendants Edith W. Danziger, H. C. Fickeisen, individually and as trustee, A. F. Hutchinson and certain others who answered the cross complaint; (5) certain proceedings in the matter of bankruptcy of Graceland, a corporation, commenced May 26, 1943, by Fickeisen as trustee, and (6) a criminal prosecution of Byron Peebler in December, 1945, charging malicious damage to real property, on complaint of J. M. Danziger. Altogether, 11 files of actions in the superior court of Los Angeles County were placed in evidence by plaintiffs by reference. These files, other than those in the six actions and proceedings specifically mentioned, which form the basis for the present action, serve no purpose other than to illustrate the history of the controversies and the litigation between the parties, the association of defendants herein in such litigation, and the determinations that had been made with respect to the conflicting claims asserted by the parties.

The argument of appellants with respect to the claim of insufficiency of the evidence to justify the findings herein consists of little more than the assertion that the evidence of plaintiffs failed to show any concerted plan of the defendants to institute or prosecute litigation against the respondents through malicious motives and without probable cause. It is claimed there was no direct evidence of a conspiracy among the defendants or of malice upon the part of the appellants. The circumstantial evidence is dealt with lightly, as if it were of no consequence.

The controversies which have given rise to extended litigation between the various parties are the outgrowth of the ownership by plaintiffs of a five-acre cemetery known as Olive Lawn Memorial Park, and the ownership by Edith W. Danziger of some adjoining property also operated as a cemetery, and sometimes known as Olive Lawn Cemetery. The historical background prior to June, 1943, is set forth in the opinion of the court in Peebler v. Olds, 71 Cal.App.2d 382, 162 P.2d 953, to which we refer as complementary of our opinion in the instant case.

On June 16, 1943, the Peeblers (in action No. 457,361) sued B. C. Olds, H. A. Andrews, J. M. Danziger, and Olive Lawn Cemetery, a corporation, accusing them of a conspiracy to institute and prosecute unfounded litigation instituted in bad faith to deprive the Peeblers of their property rights and to harass and annoy them by means of such litigation and otherwise. They prevailed, except as to H. A. Andrews, and were awarded damages for malicious prosecution in the sum of $977 and costs. The findings of malice and want of probable cause and the judgment were upheld in 71 Cal.App.2d 382, 162 P.2d 953, except as to Edith W. Danziger. As to Mrs. Danziger, the court said, 71 Cal. App.2d at page 388, 162 P.2d at page 956: "However, although her boldness and promptness in taking up the campaign of harassing respondents after the injunction had defeated the unlawful acts of Messrs. Danziger and Olds are suspicious circumstances when taken in connection with the fact that her husband was the chief actor in the events that harassed respondents, yet no substantial evidence of her actual participation in the conspiracy prior to or at the time of instituting the actions has been designated and we find none. Therefore, the award of damages against her must be reversed." The actions referred to by the court were filed on or prior to September 11, 1942, and the effect of the judgment of the District Court of Appeal was that it had not been shown that at that time Mrs. Danziger had joined with the other defendants in their litigation. Action No. 485,682, of Olds against the Peeblers had been filed May 26, 1943, to recover damages in connection with the acquisition by the Peeblers of their cemetery property

in which Olds had formerly had a partnership interest. This action was terminated in May, 1946, by judgment in favor of the Peeblers. We have already mentioned the actions and proceedings which were instituted later.

J. M. Danziger has not appealed. It is not contended that his motives have changed for the better since the court found in action No. 457,361 that the litigation prior to that time had been inspired by him with malicious motives. This was an important fact for the trial court to consider in inquiring into the culpability of his associates.

In 1926 Graceland owned the five-acre cemetery property now owned and operated by the Peeblers. It was conveyed in that year by Graceland to Wake Development Co., and by the latter to B. C. Olds, J. M. Danziger signing both deeds as president of the corporations. Olds conveyed to a partnership of himself and the Peeblers, conducted under the name of Olive Lawn Memorial Park, and the Peeblers eventually acquired all interest of the partnership. Graceland was put into bankruptcy by Danziger in 1943 and the five-acre cemetery property was listed as its sole asset. From that time on the Danzigers were disputing the title of the Peeblers, their right to possession, were interfering with the Peeblers' possession and making numerous other claims. J. M. Danziger was usually acting as attorney for the various claimants.

Fickeisen is the son-in-law of Mr. and Mrs. Danziger and apparently has had no personal interest in the litigation. As trustee in bankruptcy of Graceland he obtained an order authorizing him to institute an action on behalf of the bankrupt to quiet title to the cemetery property of the Peeblers. In his action No. 498,915, he alleged the bankrupt to be the owner of the property. On September 30, 1948, prior to the judgment in the present action it was determined by a judgment in No. 498,915 that the Peeblers owned the property and that neither Danziger, Mrs. Danziger, Graceland, nor Fickeisen as trustee, had any interest therein.

In case No. 500,524, which Fickeisen filed March 22, 1945, against the Peeblers for an accounting and the sum of $105,000, a demurrer to the second amended complaint was sustained without leave to amend and judgment was entered for the Peeblers. Danziger was Fickeisen's attorney in this action.

On March 31, 1944, in case No. 486,114, which had been instituted by the Peeblers against the Danzigers, Olds, H. A. Andrews and Olive Lawn Cemetery, for an injunction and damages, judgment was entered restraining the defendants from going onto the Peebler property and allowing Olive Lawn Cemetery to remove an office building on the Peebler property within 30 days after the entry of said judgment, and providing that Edith W. Danziger and the corporation were permanently enjoined from using the building if they failed to remove it. That judgment became final in December, 1945. In that month Peebler forcibly entered the office building and Danziger caused his arrest on a criminal complaint. This action was dismissed. Although the office building was not removed, Edith Danziger filed suit December 19, 1945 (No. 503,642), asserting ownership of the office building and, as above mentioned, claiming a public road existed leading to her property over the property of the Peeblers. Judgment in that action in favor of the Peeblers was affirmed in 88 Cal.App.2d 307, 198 P.2d 719.

In case No. 474,799, which the Peeblers had instituted in March, 1942, Danziger, Olds and H. A. Andrews were enjoined from going upon the Peebler property. Both Danziger and Olds were found guilty of contempt in entering upon the property.

[1] The evidence and reasonable inferences support the findings of want of probable cause and malice in the litigation which Fickeisen instituted and in which he participated. The bankruptcy proceeding in which he acted as trustee was fraudulent, and he asserted title to the Peebler property on behalf of Graceland, although the corporation had divested itself of title in 1926.

Action No. 500,524, in which Fickeisen sought to recover for Graceland $105,000,

was based upon a letter from J. M. Danziger, president of Graceland, to B. C. Olds, dated March 20, 1929. The claim was obviously a stale one which was not asserted in good faith.

In action No. 508,642, which was brought by Mrs. Danziger to establish the public character of roads through the Peebler property, Fickeisen filed a complaint in intervention asserting ownership and right of possession in the Peebler property as trustee of Graceland. The court found that the filing of the complaint in intervention was a part of a plan and design of Fickeisen and Mrs. Danziger to prevent the enjoyment by the Peeblers of their rights of ownership of the cemetery property. The circumstances were such as to justify the trial court in believing that Fickeisen was acting in concert with the Danzigers to harass and annoy the Peeblers. The least that can be said is that Fickeisen was called upon to justify his conduct. He did not appear as a witness at the trial and the circumstances tending to implicate him in the conspiracy were unexplained.

[2] The evidence also supports the findings against Mrs. Danziger. When she filed her action No. 508,642, it had already been determined that the Peeblers were owners of the property and that the defendants herein had no interest in it, but it had not been determined specifically that the cemetery roads were not public roads. This is the only action which Mrs. Danziger instituted, and if it should be considered by itself it would furnish no evidence of want of probable cause for the claims she made, or malicious motives in asserting them. Nevertheless, she was the owner of the adjoining property and was the one whose rights and claims were in conflict with those of the Peeblers in all the litigation. She has cooperated with her husband in allowing him to represent her, and by assisting his efforts by means of affidavits in support of the unfounded claims he has prosecuted. Mr. Olds was her employee in the management of her cemetery property and the activities in which he engaged. There was ample reason for an inference that she was conversant with and approved of what her husband and Olds were doing when they violated the injunction and expected to profit by their efforts and those of Fickeisen. In view of the previous judgments she could not have been unaware of her husband's motives and the lack of merit in the litigation he instituted. With such knowledge, aiding and abetting his efforts rendered her equally responsible. Mrs. Danziger did not appear at the trial to explain or justify her conduct.

[3, 4] Our views are different with respect to the responsibility of defendant Hutchinson. He was an employee of Mrs. Danziger. He cared for her property, mowed lawns, dug graves and attended to interments. His compensation came from collections made by him for funeral services. Whatever he did was done on behalf of Mrs. Danziger, as an employee, and with no advantage to himself. He sued no one and was not shown to have had any motive to sue or to cause others to bring suit. He was occasionally a witness as to occurrences in the work that he did and his observations of the actions of others. In action No. 508,642, it was found that he, and other owners of burial plots who were named as cross defendants in the Peeblers' cross complaint, had unlawfully interfered with the Peeblers in the use of their property, but no wrongful acts were specified and he was not accused or found guilty of any malicious action. Moreover, the court found that as the owner of a burial plot he would have the right to use the questioned roads on the Peebler property. From all that has been pointed out by respondents, and from what else we have gleaned from the record, it appears that Hutchinson was a workman who minded his own business, endeavored to remain on friendly terms with the Peeblers, and was drawn into the vortex of other people's litigation as a victim of circumstances. We find no evidence that this defendant had anything whatsoever to do with any of the litigation except as a witness, and a fair witness at that. It is claimed by plaintiffs that certain denials in Hutchinson's answer made on information and belief were insufficient. The point does not appear to have been

raised at the trial and was therefore waived. 2 Cal.Jur., sec. 73, p. 246.

[5] We are of the opinion that the complaint sufficiently alleged want of probable cause for the litigation instigated by defendants Danziger and Fickeisen.

The judgment is affirmed as to Edith W. Danziger and H. C. Fickeisen, and reversed as to defendant Hutchinson. The attempted appeal from the order denying defendants' motion for a new trial is dismissed.

PARKER WOOD and VALLEE, JJ., concur.

104 Cal.App.2d 796

Application of SAFEWAY STORES, Inc.

SAFEWAY STORES, Inc. v. VAGIM PACKING CO. et al.

Civ. 14663.

District Court of Appeal, First District, Division 2, California.

June 18, 1951.

Rehearing Denied July 18, 1951.

Hearing Denied Aug. 16, 1951.

Proceeding in the matter of the application of Safeway Stores, Incorporated, for order confirming award based on breach of contract against the Vagim Packing Company, a corporation, and others. The Superior Court, City and County of San Francisco, Thresa Meikle, J., entered judgment for plaintiff and defendants appealed. The District Court of Appeal, Dooling, J., held that the language of the stipulation to arbitrate clearly indicated intention of all parties signing to be bound by the award.

Judgment affirmed.

Arbitration and award ⇦19

Where stipulation to arbitrate was signed by individual partners, partnership and partnership's corporate successor which had same name and acknowledged that both partnership and corporation had each entered into several contracts in dispute and both agreed to submit controversy to arbitration, but signature to submission was without designation as to either partnership or corporation, no question of liability between partnership and corporation was involved and both were bound by award.

Iener W. Nielsen and Meux & Gallagher all of Fresno, for appellants.

George H. Johnston, Warren A. Palmer, and Orrick, Dahlquist, Neff & Herrington all of San Francisco, for respondent.

DOOLING, Justice.

Vagim Packing Co., a corporation, has appealed from a judgment confirming an arbitration award against it.

Safeway Stores, Inc., entered into a number of contracts to purchase raisins from Vagim Packing Co. Prior to April 10, 1946 Vagim Packing Co. was a partnership composed of Edward J. Vagim and James G. Vagim. On April 10, 1946 the corporation of the same name was organized by filing articles of incorporation with the secretary of state. The deposition of Edward J. Vagim, in evidence before the court on the hearing of the petition to confirm the award, contains the following concerning the relationship between the corporation and the partnership:

"Q. Did the Vagim Packing Co., a corporation, take over all the assets of the partnership? A. Well, I think the arrangement was—all of the stock in the corporation is held by the partnership at the present time.

"Q. The partnership is still in existence then? A. Yes. I will stipulate they took practically all of the assets and I think are responsible if any liability exists by reason of this controversy—Vagim Packing Co., a corporation are responsible for it I think.

"Q. But the partnership is still in existence. A. Well, it is not operative. It is just a holding company for the stock; that is all.

"Q. And the stipulation then is that the corporation has assumed all liability with respect to the cause of action set forth in the complaint in this matter, is that right? A. Yes, I think so."

The contracts were repudiated by the seller while 313,600 pounds of raisins (as found by the arbitrators) were still undelivered. Safeway Stores, Inc. commenced an action for this breach joining as defendants the partnership, the corporation and the two individual partners. While this action was pending a written stipulation was signed by all the parties to the action and their attorneys agreeing to submit the dispute to arbitration and for the dismissal of the action with prejudice upon the "completion of the submission to arbitration". The stipulation further provided:

"It is the intent hereof * * * that all of the disputes between the parties are to be determined by such arbitration and not otherwise."

The stipulation was signed by Vagim Packing Co., a corporation, Vagim Packing Co., a partnership, and the two individual partners. It recited in two "whereas" clauses that "on or about March 30, 1946, the *parties* entered into five contracts * * (and) on April 23, 1946, plaintiff and *defendants* entered into a contract * *" and bound "(p)laintiff and defendants, and *each of them* * * * to execute in duplicate the submission agreement covering said proposed arbitration, a full, true and correct copy of which is attached hereto * * *" (emphasis ours).

By this stipulation both the corporation and the partnership acknowledged that each had entered into the several contracts in dispute and both the corporation and the partnership agreed to submit the controversy to arbitration and to execute the submission agreement. The submission agreement was actually signed in the following manner:

"Seller Vagim Packing Co.
Edw. J. Vagim
James G. Vagim"

The award found that "Seller defaulted" and awarded "Buyer" the sum of $30,685.76.

In opposition to the verified petition of Safeway Stores, Inc., asking that the award be confirmed against the several defendants, Vagim Packing Co., a corporation, filed an unverified document entitled "Objections to motion for order confirming award" in which it was alleged 1. "That the award made by the arbitrators was against Vagim Packing Co., a partnership." 2. "That the submission * * * was never executed by Vagim Packing Co., a corporation." 3. "That the form of the award and the parties against whom the award is sought to be confirmed, do not comply with the submission agreement." 4. "That Vagim Packing Co., a corporation, was not a party to the submission."

The above statement of the facts leading up to the submission to arbitration makes it too obvious for dispute that it was intended that the submission to arbitration was to be made by all of the defendants and that no question of liability or non-liability as among the several defendants or between the partnership and the corporation was involved.

Appellant seizes on the single fact that the signature to the submission to arbitration was simply "Vagim Packing Co.", without designation as either partnership or corporation, to argue that the award cannot be enforced against it. Reading the stipulation to submit to arbitration with the submission (which was executed pursuant to the express agreement contained in the stipulation) this court would be countenancing a fraud upon Safeway Stores, Inc. if it agreed with appellant's position. The facts speak so plainly the intention of all parties signatory to the stipulation to be bound by the award that the judgment confirming the award against it is impregnable to any of appellant's refinements of argument.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

104 Cal.App.2d 704

BRADBEER et al. v. ENGLAND et al.

Civ. 18456.

District Court of Appeal, Second District, Division 2, California.

June 12, 1951.

Hearing Denied Aug. 9, 1951.

Petition by George Bradbeer and others against George England, and others as members of and constituting the City Council of the City of Inglewood and Leonard Fox, as city clerk of said city, for a writ of certiorari demanding an annulment of a resolution adopted by the city council granting a zone variance for certain property from family zone to multiple family zone. Samuel Firks as trustee for Hollypark Knolls, Inc., and Hollypark Knolls, Inc., a corporation filed a complaint in intervention. The Superior Court, Los Angeles County, Julius V. Patrosso, J., rendered judgment adopting the findings of the city council and plaintiff appealed. The District Court of Appeals, Moore, C. J., held that the findings of the city council granting the variance requested was sustained by the evidence and that trial court did not abuse its discretion in adopting those findings.

Judgment affirmed.

1. Appeal and error ⇐1010(1)

District Court of Appeals is powerless to reverse judgment when it has substantial evidential support.

2. Administrative law and procedure ⇐755 Municipal corporations ⇐621.53

Where defendants acting as city council had power finally to determine facts submitted in controversy over the granting of a zoning variance, their decision was final in absence of a showing of abuse of discretion.

3. Municipal corporations ⇐621.54

Where findings and evidence showed city council followed standards prescribed by ordinance in determining the zoning variance for 20-acre tract situated near race track should be granted and a tract should be changed from one family zone to multiple family zone, there was no abuse of discretion by trial court in adopting findings of council granting variance.

4. Municipal corporations ⇐621.4

Possibility that procedure before city council for obtaining of resolution granting zoning variance lacks some of the formality observed by judicial tribunals would not deprive council's decision of its effectiveness.

A. J. O'Conner, George J. Hider, Los Angeles, for appellants.

Clyde Woodworth, Inglewood, and Dunlap, Holmes, Ross & Woodson, Pasadena, for respondents.

Spencer & Harris, Inglewood, for interveners.

MOORE, Presiding Justice.

The Hollywood Turf Club, herein referred to as Turf Club, as owner of 124 acres within the City of Inglewood filed with the City's Planning Commission, herein designated Commission, an application for zone variance with respect to a portion of its property from R–1, one family zone, to R–3, multiple family zone, by virtue of provisions of section 14 of ordinance 925 as amended by ordinance 947. Its application was duly denied by the Commission which found the prerequisites of section 14 to be not supported, and that the granting of such variance would be materially detrimental to the public welfare. Turf Club thereupon appealed from the decision of the Commission to the City Council which was composed of respondents who after a public hearing overruled the commission and granted the variance. After a reconsideration of their decision, respondents decided to adopt resolution No. 3150 granting the Turf Club the variance requested. Thereafter, appellants as residents, electors and taxpayers of Inglewood filed their petition in the superior court for a writ of certiorari demanding an annulment of resolution No. 3150. After respondents filed their answer, one Samuel Firks as trustee of Hollypark Knolls, Inc., filed his complaint in intervention declaring that corporation to be interested in the results of the litigation by reason of its contract to purchase several parcels of

land including the subject acres and had contracted to expend large sums of money for such lands and in developing a housing project thereon.

The action was duly tried and decision filed substantially adopting the findings of respondents made while sitting as the City Council of Inglewood. They found that before a variance may be granted it shall be shown:

"1. That there are exceptional or extraordinary circumstances or conditions applicable to the property involved or to the intended use of the property that do not apply generally to the property or class of uses in the same vicinity or zone.

"2. That such variance is necessary for the preservation and enjoyment of a substantial property right of the applicant possessed by other property in the same vicinity and zone.

"3. That the granting of such variance will not be materially detrimental to the public welfare or injurious to the property or improvements in such vicinity and zone in which the property is located; and

"4. That the granting of such variance will not adversely affect the Comprehensive General Plan" as required by subparagraph C, Part II of section 14, ordinance 925 of Inglewood as amended by ordinance 947.

Also, it was found that (1) the Turf Club is owner of 124 acres lying within the City of Inglewood; (2) its application demanded relief pursuant to sub-paragraphs 1, 2, 3 and 4 of paragraph C, Part III of section 14 of ordinance 925, above quoted; (3) it prayed for a variance from R–1, single family zone, to R–3, multiple family zone with respect to a portion of its acres; (4) there are exceptional or extraordinary circumstances or conditions applicable to the property involved or to the intended use of the property that do not apply generally to the property or class of uses in the same vicinity or zone; (5) the subject property is vacant, comprises 20 acres, fronting 1070 feet on Crenshaw boulevard with a depth of 820 feet, and lies at the top of a downward slope overlooking the easterly portion of the race track installations which consist of a quarter-mile practice track, dormitories and barns for 1300 horses; (6) in January, 1950, intervenor Firks as trustee contracted for the purchase of the 20 acres for the purpose of developing same for multiple residential use, and he and his principal, Hollypark Knolls Inc., are now the owners of such lands; (7) they and their predecessors have expended $17,876 for the preparation of plans for the erection of a garden-type-apartment project consisting of 22 multiple residential units on the lands for the use of the Turf Club, for processing preliminary applications for financing the project and for processing applications before the Federal Housing Administration; (8) on May 2, 1950, respondents adopted resolution 3150 granting a variance from R–1 to R–3 for multiple residential use; (9) upon the adoption of such resolution, Firks and his principal became obligated to complete the purchase of the land at a cost of $187,000, which sum they paid to the Turf Club; (10) since the granting of the variance the Hollypark Knolls, Inc., with knowledge of the pendency of this proceeding has expended for services and materials in the construction of the 22 multiple residential units the sum of $76,853.99 and have become indebted for architect's fees, lumber, concrete, plumbing, plastering, painting, hardwood flooring, electrical wiring, appliances and other necessary materials and subcontracts in the sum of about $1,320,000 and have a commitment for a loan of $2,550,000 from a responsible bank to finance the 22 units and the Federal Housing Administration has issued its commitment for the required insurance; (11) prior to ordering the variance respondents granted a fair trial and hearing and their findings are supported by substantial evidence; (12) the granting of the variance will not be materially detrimental to the public welfare or injurious to the property or improvements in that vicinity, nor will it adversely affect the comprehensive general plan of zoning the City of Inglewood.

Sole Issue.

[1] On this appeal only one issue is presented, to wit, is there substantial evi-

dence to support the findings of the trial court. That the proof introduced on behalf of appellants might be equally substantial and more voluminous does not affect the rule that this court is powerless to reverse a judgment where it has substantial evidential support. Appellants' stipulation to the truth of practically all the facts comprising the defense alleged in the answer appears in abbreviated form on the margin hereof.[1] In addition thereto, witnesses testified that the property is ideally suited for this kind of development; the proposed plan to build multiple homes on the subject area will answer the criticism that Hollywood Park should be used for homes; it will not injure property values on Crenshaw boulevard; the property across the said boulevard is now used for institutional and multiple dwelling purposes; it is a beautiful setting for "392 units and a multiple dwelling"; it is zoned for R–1 because it is unsubdivided; there is a refinery, the race track and many other things down there; the project will be pretty close to the oil well and those "firetrap barns"; it will be an improvement to the community; something should be built in the vacant plot; it is unlikely that single family residences will be built there. Mr. Sweeney, an appraiser, testified that "the best use for this land and the best zoning * * * would be for multiple residents [sic] and one of the worst would be the single family residence." Commissioner Lavers testified the property is suitable for multiple leasing, and he and Commissioners Nixon and Sheddan do not believe the tract is desirable R–1 property, while Commissioner Levelle thought that because the subject land is close to the race track, surrounded by boulevards, near the city and high in value, it is suitable for multiple dwellings. In addition, it was pointed out by Mr. Vernon Spencer that Crenshaw boulevard is a major traffic artery and near the land are churches, motels and duplexes. Mr. Dean thinks it would be

1. *Substance of Stipulation.* The subject property is vacant and comprises about 20 acres fronting on Crenshaw Boulevard for 1070 feet with a depth of about 820 feet westerly. It lies overlooking the easterly portion of the Hollywood Park race track installations. The Park includes a grandstand, clubhouse and turf club for the accommodation of 70,000 spectators; parking space for 20,000 automobiles; barns for 1300 race horses; a quarter-mile practice track lying below the slope which extends westerly from the subject property; dormitory for jockeys and unmarried employees. The barns, practice track and exercise facilities are visible from a portion of the subject 20 acres. At the foot of the slope, below those acres, are producing oil wells and four derricks, a gas absorption plant and within 600 feet of the acres is a pumping oil well with derrick removed.

Flat racing for 50 days each year, and harness racing for 35 days in alternate years are customarily conducted. The Park facilities are used for training horses, truck rodeos, various public spectacles and exhibitions, and for animal and flower shows.

The north line of the subject 20 acres is 1710 feet south of Manchester avenue where it intersects Crenshaw, both popular cross-town arterial traffic highways. For 700 feet south of Manchester, (which is 86th street) on both sides of Crenshaw the property is zoned for and is in use for commercial purposes, while Crenshaw on its west side from the southerly boundary of the subject acres south to 90th street is zoned R–3. South of 90th street there is a 90-foot paved roadway from the parking area of the Turf Club and for ingress to and egress from the absorption plant.

On the north and west sides of the subject acres is an L-shaped area of 20 acres reserved for municipal use of the Water and Park Departments of Inglewood. It includes a strip 190 feet wide lying southerly from the said 90-foot roadway. The reserved area and the roadway together extend 280 feet on Crenshaw south of the south line of 90th street and the northerly line of the subject acres, and is therefore over 300 feet south of the nearest single family residence on the west side of Crenshaw.

On the east side of Crenshaw opposite the subject acres is an area zoned R–1–½, also there are two motels, several duplexes and a church.

Residents of the area have complained of dust and dirt from the unimproved property.

It has been the practice of Inglewood to classify unsubdivided property as R–1 pending the establishment of the character of the neighborhood.

impossible to subdivide the 20 acres for single dwellings from an economic standpoint. Mr. Spydell thinks the land is not suitable for single residence homes with the race track during the activity season. The multiple type units are adaptable to that location.

Besides the detailed testimony of such witnesses, photographs of the Turf Club's property and of that east of Crenshaw boulevard as well as of the 20 acres were received in evidence as were also exhibits depicting the exterior appearance of the proposed development.

City Council, Quasi Judicial.

[2] Inasmuch as respondents acting as the city council had the power finally to determine the facts submitted in such a controversy, their decision is final in the absence of a showing of abuse of discretion. Rubin v. Board of Directors, 16 Cal.2d 119, 126, 104 P.2d 1041; Dierssen v. Civil Service Commission, 43 Cal.App. 2d 53, 60, 110 P.2d 513; Otis v. City of Los Angeles, 52 Cal.App.2d 605, 613, 126 P.2d 954; Childs v. City Planning Commission, 79 Cal.App.2d 808, 812, 180 P.2d 433; Lindell Co. v. Board of Permit Appeals, 23 Cal.2d 303, 324, 144 P.2d 4. Section 14 of ordinance 925 authorized such variances by the Planning Commission and "the granting of such a variance when conforming to the provisions of this paragraph [I] is hereby declared to be an administrative function the authority and responsibility for performing which is imposed upon the Planning Commission, and the action thereon by the Planning Commission shall be final and conclusive provided the circumstances prevailing in connection with any such variance conform to one or more" of several conditions specified. However the type of variance from R–1 to R–3 falls in Part II of section 14 wherein the decision of the Commission is "advisory" only to the City Council. Section 16 under "Hearings" requires the Commission to make its recommendations and findings to the City Council by forwarding to the latter a copy of its resolution, and when the Council disapproves the action of the Commission, its decision shall be final.

On appeal to the Council, the instant contest was tried *de novo* with new witnesses as well as the record made before the Commission. Resolution No. 3150 is a comprehensive statement of the Council's trial, findings and decision granting the variance requested by reason of the fact that "there are exceptional and extraordinary circumstances or conditions applicable to said subject property" and that "the variances applied for are necessary for the enjoyment of a substantial property right of the applicant." Pursuant to plaintiffs' motion, the matter was reargued without change in the findings or decision. Thereafter, the matter was transferred to the court below on plaintiffs' petition with the decision already indicated.

No Abuse of Discretion.

[3] There was no abuse of discretion. The City Council proceeded strictly in accordance with ordinance 925 as amended, its findings support the decision and *substantial* evidence supports the findings.

[4] Appellants contend that if the Turf Club did not comply with the requirements prescribed in part II of section 14 of ordinance 925, the trial court abused its discretion. However, the findings and the evidence show that the standards prescribed have been complied with. If perchance the procedure before the council lacked some of the formality observed by judicial tribunals their decision is nonetheless vital and effective. Bartholomae Oil Corporation v. Seager, 35 Cal.App.2d 77, 80, 94 P.2d 614; Cantrell v. Board of Supervisors, 87 Cal.App.2d 471, 479, 197 P.2d 218. There is a total absence of a showing that the court's discretion was abused.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

ATHA v. BOCKIUS et al.
Civ. 14630.

District Court of Appeal, First District, Division 1, California.

June 1, 1951.

Rehearing Denied June 30, 1951.

Hearing Granted July 26, 1951.*

Action by Dorothy E. Atha against E. H. Bockius and others for conversion of an automobile. The Superior Court in and for the City and County of San Francisco, Edward P. Murphy, J., rendered judgment for plaintiff and defendants appealed. The District Court of Appeal, Peters, P. J., held that where automobile registered in both California and Louisiana was mortgaged in Texas under Louisiana registration and thereafter taken to California without mortgagee's knowledge or consent and sold under California registration to a bona fide purchaser without notice of the mortgage, the mortgage, though not recorded in California, was entitled to priority over subsequent purchaser's claim of title, but that purchaser, having become obligated as part of transaction to pay off another mortgage which by virtue of subrogation was entitled to priority over Texas mortgage, became subrogated, upon payment of such mortgage, to rights of mortgagee entitled to priority over Texas mortgage to the extent of the amount unpaid on such other mortgage at time of purchase.

Judgment reversed with instructions.

1. Chattel mortgages ⇐89

The law of the place where chattel mortgage is made governs its validity, in absence of statute requiring all chattel mortgages, whether on property in the state or on property thereafter brought into the state, to be recorded, and hence a foreign mortgage which conforms to law of state in which it was made is valid, even though it does not conform to the law of state to which the property subsequently is brought.

2. Chattel mortgages ⇐89

If automobile subject to a chattel mortgage, properly executed in accordance with law of state in which it was made, is subsequently brought to another state and there sold or mortgaged, in absence of statute requiring all chattel mortgages, whether on property in the state or on property thereafter brought into the state, to be recorded, the prior chattel mortgage will be given priority, even though not recorded in state in which automobile is located, at least where prior mortgagee did not consent to or have knowledge of removal of automobile from his state.

3. Chattel mortgages ⇐2, 89

The rule of comity that the law of place where chattel mortgage is made governs its validity may be changed by statute, but a recording act will not be held applicable to foreign mortgages on personal property subsequently brought into the state, unless the act is clearly applicable and specifically so provides.

4. Chattel mortgages ⇐82

Statutes governing registration of motor vehicles and liens thereon, which were not specifically made applicable to mortgages executed in other states, did not abrogate rule of comity that law of place where contract is made governs its validity. Vehicle Code, §§ 132, 146, 146.1, 146.5, 195, 195.5, 196, 197, 198, 222.

5. Chattel mortgages ⇐89

Where automobile registered in both California and Louisiana was mortgaged in Texas under Louisiana registration and thereafter taken to California without knowledge or consent of mortgagee and sold under California registration to a bona fide purchaser without notice of Texas mortgage, the mortgage, though not recorded in California, was entitled to priority over subsequent purchaser's claim of title, in absence of showing of lack of due diligence of mortgagee in protecting its interests.

6. Chattel mortgages ⇐157(2)

Bona fide purchaser claiming title to automobile as against prior out-of-state mortgage had the burden of showing lack of due diligence of mortgagee in protecting its interests.

7. Chattel mortgages ⇐157(2)

Evidence that prior out-of-state mortgagee might have been negligent in protecting its rights in mortgaged automobile was

* Subsequent opinion 248 P.2d 745.

insufficient to show such lack of due diligence as would bar mortgagee's right to priority over subsequent bona fide purchaser's claim of title.

8. Chattel mortgages ⇐89

Chattel mortgage duly shown on California registration of automobile was entitled to priority over subsequent mortgage obtained in Texas under Louisiana registration which did not disclose California mortgage.

9. Subrogation ⇐23(3)

Where money was loaned to registered owner of automobile under California registration to pay off a prior mortgage and a new mortgage was taken as security, such mortgagee was subrogated to rights of prior mortgagee as against holder of intervening out-of-state mortgage of which subsequent mortgagee had no notice.

10. Subrogation ⇐23(3)

One who advances money to discharge a prior lien on real or personal property and takes a new mortgage as security is entitled to subrogation to the prior lien as against holder of an intervening lien of which he was ignorant.

11. Subrogation ⇐14(3), 23(3)

One who loaned money to registered owner of automobile under California registration to discharge a prior mortgage thereon and took a new mortgage as security became subrogated to rights of prior mortgagee as against holder of intervening Texas mortgage of which he had no notice, and subsequent bona fide purchaser without notice of Texas mortgage, who as part of transaction became obligated to pay the other mortgage, which she ultimately paid, thereupon became subrogated to rights of mortgagee entitled to priority over Texas mortgage to the extent of the amount unpaid on the assumed mortgage at time of purchase.

Healy & Walcom and Leo J. Walcom, all of San Francisco, for appellants.

Park Chamberlain, San Francisco, for respondent.

PETERS, Presiding Justice.

Cecil B. Mark, in 1944, purchased a Ford automobile in Florida, and later secured a California registration for the car. Thereafter, he engaged in a series of transactions, several of which were fraudulent, using the automobile as security. Among other things, he first mortgaged the car in California and then took it to Texas. In that state he mortgaged it to the Government Employees Finance Corporation. Later he returned to California, and, in this state, sold the car to his sister, Dorothy E. Atha, a bona fide purchaser without notice of the prior unrecorded out-of-state mortgage, who, as part of the transaction, paid off the California mortgage. The Texas finance company seized the car for nonpayment of its loan, and later sold it. In this action for conversion brought by the bona fide purchaser against the prior mortgagee and its employees, the trial court held that the subsequent bona fide purchaser prevailed over the prior out-of-state mortgagee. The mortgagee, and its representatives in this state, appeal.

The principal actors in this legal drama are the following: Cecil B. Mark, the crook, who is not a party to this action; Dorothy E. Atha, his sister, who is admittedly the bona fide purchaser of the car, and who is the plaintiff and respondent; the Government Employees Finance Corporation, a Texas company, the holder of a Texas chattel mortgage on the car, and one of the defendants and appellants in this case; E. H. Bockius, local representative of the Texas company, and Hansen and Castro, employees of Bockius, also defendants and appellants.

The case comes to us on an agreed statement of facts. So far as pertinent here, that statement is as follows:

"One, Cecil B. Mark, bought the Ford automobile (which is the subject of this action and of all transactions described herein) in Florida in 1944, paying some cash and giving a purchase money mortgage. After procuring a Louisiana registration therefor, he brought it to California in June of 1945.

"In Los Angeles, on June 18, 1945, he borrowed money from the Vine-Sunset Loan Company, executing a chattel mortgage of the car as security. With the proceeds of the loan, he paid off the purchase money mortgage. California registration was substituted for the Louisiana registration, and pursuant to California law, on the new registration Mark appeared as 'registered owner' (holder of the 'white slip') and the Vine-Sunset Company appeared as 'legal owner' (holder of the 'pink slip').

"On November 10, 1945, Mark executed a new chattel mortgage to the Vine-Sunset Company, refinancing the first loan by that company.

"On January 30, 1946, Mark executed a third chattel mortgage to the Vine-Sunset Company, refinancing the second mortgage.

"On February 14, 1947, Mark executed a chattel mortgage of the car to secure a loan from the Remedial Loan Company in San Francisco, and with the proceeds paid off the outstanding mortgage to the Vine-Sunset Company. Mark, of course, remained the 'registered owner,' while Remedial Loan Company became the 'legal owner' on the new title certificate.

"On August 26, 1947, Mark sold the automobile to plaintiff herein in a rather complicated transaction of which the result was that plaintiff became 'registered owner' of the car (holder of the 'white slip'), while Remedial Loan Company remained the 'legal owner' of the car (holder of the 'pink slip'). Mark received some more money, and both he and plaintiff signed a new note to Remedial Loan Company. In due course, this note was entirely paid by plaintiff, so that at the time of trial, plaintiff was both 'legal' and 'registered' owner, i. e., the holder of both the 'pink' and 'white' slips.

"At all times when the above transactions took place, the record title to the car under California law was perfectly clear and showed no liens other than those stated above.

"In the meantime, however, in September of 1946, Mark had driven the car to Texas. There he procured another Louisiana registration, dated September 28, 1946. (He did not, however, cancel or otherwise notify anyone of his California registration which remained unaffected by this transaction). Then on October 1, 1946, still in Texas, living at a Texas address, and showing only the Louisiana registration, he procured a loan on the car from Government Employees Finance Company and executed a chattel mortgage to that company.

"Mark's purpose in the above transaction was to swindle the Government Employees Finance Company. He made a few payments on the loan, however, but soon returned to California, where he replaced his California license plates. Not long after his return there occurred the transaction in February, 1947, with Remedial Loan Company and subsequently, in August, 1947, the sale to plaintiff described above.

"By April of 1947, the Government Employees Finance Company had traced Mark to California and had notified defendants herein to track him and the car down. Defendants proceeded to do so, and in October of that year, seized the car on behalf of the Government Employees Finance Company, although the car bore California license plates and although plaintiff, who was present at the seizure, exhibited her white registration certificate to defendants, telling them that she was the owner.

"After the seizure, defendants sent the car to Texas, where Government Employees Finance Company sold it. Plaintiff accordingly brought this action.

"It is conceded that Government Employees Finance Company and defendants did not make any effort to record the Texas lien at Sacramento with the Department of Motor Vehicles; and it is further conceded that no efforts were made by Government Employees Finance Company or any of the defendants who were hunting for Mark and the car in California for over six months before the seizure (although they had no actual knowledge of Mark's or the car's presence in California until approximately two weeks before seiz-

ure) to notify the Department of Motor Vehicles at Sacramento of the Texas lien so that transfers might be blocked, or potential transferees at least notified of the lien.

"There is also uncontradicted evidence given by Mr. Francis Auger, Loan Manager at Remedial Loan Company in San Francisco, and who has been in the automobile loan business for twenty-one years, to the effect that Louisiana registrations are looked upon in his business as highly dangerous. Unlike California registrations, they do not require the listing of prior liens, and otherwise are not surrounded with the safeguards required by California, as well as by many other states. Mr. Auger stated that he would not loan money upon a Louisiana registration without an exhaustive investigation. However, the chain of title shows the car first entered California on a Louisiana registration before the first Vine-Sunset mortgage was executed."

On these facts the court concluded that, as between the subsequent bona fide purchaser in California and the prior out-of-state mortgagee, the former was the owner of the car.

[1, 2] The legal question of the priorities between successive mortgagees or purchasers of an automobile, where the transactions occur in different states, has given rise to much litigation. In the absence of a statute requiring all chattel mortgages, whether on property in the state or on property thereafter brought into the state, to be recorded, it is the general rule that the law of the place where the contract is made governs its validity, and that a foreign mortgage will be held to be valid if it conforms to the foreign law even though it does not conform to the law of the state to which the property subsequently is brought. Therefore, if a chattel mortgage is properly executed on an automobile in a foreign state, and later the automobile is brought to another state and there sold or mortgaged, the prior chattel mortgage will be given priority, even though not recorded in the state in which the car is located, at least where the prior mortgagee has not consented to or had knowledge of the removal of the car from his state.

[3] These rules have been recognized in California. In the leading case of Mercantile Acceptance Co. v. Frank, 203 Cal. 483, 265 P. 190, 57 A.L.R. 696, a Minnesota mortgagee was given priority over a subsequent bona fide purchaser in California. The facts were that Frank purchased an automobile in Minnesota, giving a chattel mortgage to Mercantile's assignor. This mortgage was executed and filed in Minnesota in full accordance with the laws of that state. Thereafter, without the knowledge or consent of the mortgagee, Frank drove the car to California where he sold it to a bona fide purchaser without notice of the prior chattel mortgage which, of course, was not recorded in California, nor did it comply with California law as to form. The Supreme Court pointed out that the basic statute on the recordation of chattel mortgages was then section 2959 of the Civil Code, and held that that section applied only to domestic chattel mortgages on personal property within this state at the time of the mortgage, and had no application to a foreign chattel mortgage, even though the mortgaged property was subsequently brought into this state. The court held, therefore, that the lien of the prior Minnesota mortgage took priority over the claims of the subsequent California bona fide purchaser even though the mortgage was not recorded here, nor did it comply, as to form, to California law. The rule of the Mercantile case has been followed. Motor Acceptance Co., Inc. v. Finn, 124 Cal.App. 766, 13 P.2d 761; Deposit Guaranty State Bk. v. Hessel Motor Car Co., 90 Cal.App. 428, 265 P. 954. In the absence of a statute specifically requiring foreign mortgages to be recorded in a state to which mortgaged property is subsequently brought, at least where the prior mortgagee has no knowledge of and does not consent to the removal, the rule of the Mercantile case is in accord with the great weight of American authority. See cases collected and commented upon 14 C.J.S. Chattel Mortgages, § 15, p. 607, 2 Univ. of Chicago L.Rev. 345; 27 Iowa

L.Rev. 528; 40 Harv.L.Rev. 805; 57 A.L.R. 702; Stevenson v. Lima Locomotive Works, 180 Tenn. 137, 172 S.W.2d 812; 148 A.L.R. 375. This rule of comity, of course, may be changed by statute. But before a recording act will be held applicable to foreign mortgages where the property is subsequently removed to another state, the statute must be clearly applicable and specifically so provide. As was stated in Shapard v. Hynes, 8 Cir., 104 F. 449, 453, 52 L.R.A. 675, a case cited with approval in the Mercantile case: "Hence a state may by appropriate legislation decline to observe the rule of comity, and may require all mortgages affecting personal property which is situated therein or brought therein to be there recorded, as a condition precedent to the recognition of their validity in that state. But the statutes of a state which prescribe how mortgages on personal property shall be executed and recorded are generally, if not universally, regarded as speaking with respect to mortgages made within the state upon property there situated, and as having no reference to personalty brought within the state which is at the time incumbered with a valid lien created elsewhere. * * * [Citing authorities.]"

The respondent, while recognizing the rule of the Mercantile case, contends that, by certain amendments to the recordation statutes dealing specifically with automobiles, the rule of comity has been renounced by this state, and that all foreign mortgages on automobiles, where the car is subsequently brought into this state, must be recorded or registered or a bona fide purchaser or mortgagee here will prevail. This was the main theory upon which the case was tried and decided by the trial court. We think this contention is unsound.

The basic section relied upon by respondent in support of her argument on this point is section 195 of the Vehicle Code enacted in 1935 and amended in 1949. Reference is also made to sections 195.5, 196, 197, 198, 146, 146.1, 146.5, 132 and 222 of the Vehicle Code. Respondent argues that these sections make it clear that the Legislature intended to set up a system of registration that would protect bona fide purchasers in this state from all unrecorded prior claimants, whether such prior claim was created inside or outside this state.

[4, 5] The argument of respondent is ably presented at some length, but we think it unsound. The statutes involved are quite lengthy and need not here be quoted. While they contain general language that could easily be interpreted to apply to all mortgages, foreign or domestic, they do not specifically so provide. Such statutes, as already pointed out, will not be interpreted to abrogate the rule of comity, unless they clearly and specifically so provide. See, in addition to authorities already cited, Ragner v. General Motors Acceptance Corporation, 66 Ariz. 157, 185 P. 2d 525. These statutes do not specifically so provide. It follows that the rule of the Mercantile case is still the law of this state. This being so, the judgment of the trial court cannot be sustained on the theory adopted by it.

[6, 7] Respondent also seeks to sustain the judgment on the theory that the rule of the Mercantile case does not protect a negligent foreign mortgagee, and contends that the facts here demonstrate that the Texas company was negligent. Respondent refers to the fact that when Mark borrowed from the Texas company he gave a Texas address, and presented a Louisiana registration dated three days before he applied for the loan. Respondent also refers to the evidence of Francis Auger, loan manager of Remedial, that Louisiana registrations in the automobile finance business are looked upon as dangerous registrations because they do not require prior loans to be listed. The trial court did not expressly find that this constituted negligence on the part of the Texas company, but, even had it done so, such evidence falls far short of that required to bar a lien holder from the legal priority to which it normally would be entitled. The burden was on respondent, and this burden was not sustained by a mere showing that the Texas company *might* have been negligent. There was no showing what the Texas company *did* that is claimed to constitute negligence. While due diligence is re-

quired on the part of the foreign lien holder to entitle it to priority, no lack of due diligence is here shown. Moreover, this theory seems to be an afterthought, and is not the theory upon which the trial court decided the case.

However, even though the rule of the Mercantile case is still the law of California, and, even though the Texas company was not negligent, respondent is not completely without some rights in the automobile here involved. In our opinion, under the admitted facts, respondent was subrogated to the rights of a prior mortgagee, whose rights were prior and superior to those of the Texas company.

In order to explain this subrogation point, which was not presented to or considered by the trial court, the facts should be set forth in chronological order:

1944—Mark purchased the car in Florida and secured a Louisiana registration.

June of 1945—Mark brought the automobile to California, secured a California registration, and borrowed money thereon from the Vine-Sunset Loan Co., giving a chattel mortgage as security, which was properly recorded in California. In November, 1945, and in January, 1946, Mark refinanced this loan with the same company. The California registration showed Mark as registered owner and Vine-Sunset Loan Company as legal owner.

1946—In September of 1946 Mark took the automobile to Texas, secured another Louisiana registration, but did not cancel the California registration. On October 1, 1946, Mark, in Texas, borrowed money on the car from the Government Employees Finance Corporation, giving a chattel mortgage as security.

[8] It is too clear to require any discussion that, at this moment under California law, the rights of the Vine-Sunset Loan Company, being prior in time, were superior to those of the Texas company.

Now, to continue with the chronological history:

1946—Mark returned with the car to California and resumed the California registration which had never been abandoned.

Feb. 14, 1947—Mark secured in California a new loan from Remedial Loan Company with which to pay off, and he did pay off, Vine-Sunset Loan Company. The California registration now showed Mark as registered owner and Remedial as legal owner.

Aug. 26, 1947—Mark sold the automobile to respondent in a transaction whereby respondent became obligated to pay off the Remedial Loan Company lien, which she subsequently did.

October, 1947—Appellants seized the car.

[9, 10] Under this state of facts it is quite apparent, as already pointed out, that in February of 1947 when Mark borrowed from Remedial to pay off the Vine-Sunset loan, the Vine-Sunset loan, being prior to the Texas company's loan, was superior to that of the Texas company. Under fundamental principles of subrogation Remedial stepped into the shoes of Vine-Sunset and became subrogated to its rights. In 70 A.L.R. 1396 there is an annotation entitled: "Subrogation to prior lien of one who advances money to discharge it and takes new mortgage, as against intervening lienor." At page 1398 the general rule, supported by many cases from twenty-five states, including one from California, is stated as follows: "In the majority of the cases within the scope of the annotation, one advancing money to discharge a prior lien on real or personal property, and taking a new mortgage as security, has been held entitled to subrogation to the prior lien, as against the holder of an intervening lien of which he was ignorant."

The California case cited in support of this rule is Simon Newman Co. v. Fink, 206 Cal. 143, 273 P. 565. There the plaintiff loaned money and took a chattel mortgage with the understanding that an outstanding chattel mortgage on the same personalty was to be paid. Unknown to plaintiff there was an outstanding second chattel mortgage on the same personalty. The Supreme Court held that the last lender was subrogated to the rights of the first lender, and had priority over the second chattel mortgage. The court specifically

held that the doctrine of subrogation applies to liens on personal property. See, also, Darrough v. Herbert Kraft Co. Bank, 125 Cal. 272, 57 P. 983.

There are cases, cited in the annotation, that have adopted a contrary rule. One such case is Richards v. Griffith, 92 Cal. 493, 28 P. 484. That case must be deemed to have been overruled by the much later Simon Newman Co. case, supra. The majority rule already quoted appeals to us as the sound and equitable rule to be applied in such cases.

When this rule is applied to the facts of this case, there can be no reasonable doubt but that the rights of Remedial on February 14, 1947, were superior to those of the appellants. Remedial then had all the prior and superior rights of Vine-Sunset.

[11] It is equally clear that, in October of 1947 when respondent purchased the car from Mark, and then, as part of that transaction, became obligated on the note to Remedial, which she ultimately paid off, she became subrogated to the rights of Remedial. Her rights thereupon became superior to those of the Texas company, not because she was a bona fide purchaser, but because she became subrogated to the rights of Remedial. As between the appellants and respondent, the latter was the holder of the senior lien.

The determination that respondent is entitled to be subrogated to the rights of Remedial does not determine that the judgment should be affirmed. Respondent's right is to step into the shoes of Remedial. The judgment is for the full value of the car and its accessories on the date of seizure. The case was not tried on the theory of subrogation, so that there does not appear in the record the precise amount of the Remedial loan to which respondent became subrogated. Respondent and the Texas company are in the position of successive lien holders, with respondent as the senior claimant. But her claim is limited to the amount of the Remedial loan, and does not extend to the full purchase price of the car. As a bona fide purchaser, her rights are junior to those of the Texas company. The cause will have to be reversed to ascertain the precise amount of the Remedial loan on the date respondent purchased the car.

The judgment is reversed with instructions to the trial court to ascertain the amount of the Remedial loan to which, under the rules already set forth, respondent is entitled to be subrogated, and when such amount is ascertained, to enter judgment in favor of respondent in that amount, plus interest. Both sides to bear their own costs on this appeal.

BRAY and FRED B. WOOD, JJ., concur.

104 Cal.App.2d 697

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. REYNOLDS et al.

Civ. 18244.

District Court of Appeal, Second District, Division 2, California.

June 12, 1951.

Action by Security-First National Bank of Los Angeles, a National Banking Association, as trustee of an express trust declared by Harriet L. Rice in her lifetime against Elba W. Reynolds, and others, for instructions and for construction of declaration of trust and of trustee's authority. The Superior Court, Los Angeles County, Paul Nourse, J., adjudged that accumulated income was part of principal to be preserved for remaindermen and defendants Elba W. Reynolds, and others, appealed. The District Court of Appeal, Moore, J., held that acquiescence by trustor in budgeting of payments of income to her by trustee when coupled with previous amendment of declaration which directed that then accumulation income was to be part of corpus manifested intention that income thereafter accumulated prior to her

death was also to become part of trust corpus.

Judgment affirmed.

1. Trusts ⇐58, 272(1)

Where trustor, who had reserved right to receive income during her lifetime, amended trust so that accumulated income became part of principal and subsequently budgeted income and trustee paid to trustor only $500 monthly and kept balance as accumulated income, acquiescence of trustor in such budgeting and amendment to declaration of trust indicated that trustor desired that only monthly allowance be made to her and that she approved of trustee's retention of unused portion of income.

2. Trusts ⇐272(1)

Intent that income from trust fund shall be wholly or partially accumulated to become principal may be inferred not only from language of declaration of trust but also from acts of trustor during continuance of her life estate.

3. Trusts ⇐58, 272(1)

Where trustor who had retained right to receive net income during her lifetime amended declaration so that accumulated income which she was entitled to withdraw became part of trust principal and thereafter acquiesced in budgeting by trustee of payments of income, and declaration provided that upon termination of trust all accrued undistributed income should belong to beneficiary or beneficiaries entitled to next eventual estate, intention manifested was that accumulated income was to be preserved as corpus for remaindermen.

4. Trusts ⇐272(1)

Provision of statute, that when in consequence of valid limitation of future interest, there is a suspension of power of alienation during continuation of which income is undisposed of and no valid direction for accumulation is given, such income belongs to persons presumptively entitled to next eventual interest, applies to income from trust estate which accrued during period power to alienate corpus is suspended by reason of valid limitation of future interest and did not apply to income accumulated while trustor was in being and had right to use it at will. Civ.Code, § 733.

5. Trusts ⇐58, 272(1)

Where amendment to declaration of trust under which trustor had right to receive income for life when considered with conduct of trustor led to conclusion that accumulated income should become part of principal, absence of express stipulation in declaration requiring accumulation of income did not preclude such interpretation.

Erb, French & Picone and Edward D. French, all of Beverly Hills, Brady & Nossaman and Walter L. Nossaman, all of Los Angeles, for appellants.

Raymond A. Nelson, Los Angeles, for John Setley Kleis, Jr., a minor et al., as Guardian Ad Litem, etc., in pro. per., respondent.

MOORE, Presiding Justice.

Plaintiff sued the life tenants and remaindermen of a trust estate because of conflicting demands made with reference to certain income of the estate. It asked (1) for instructions to the trustee and (2) for a construction of the declaration of trust and of the trustee's authority.

The trustor was Harriet L. Rice. She had formerly placed her estate in trust with plaintiff from which she was to receive in her lifetime *"the net income received from the trust estate and available for distribution."* That trust terminated in January, 1931. Under date of February 18, 1931, the present trust was created, the corpus of which was composed of the assets of the former trust and its accumulated income. By the terms of the Declaration of Trust, herein referred to as the declaration, trustor was privileged to withdraw at any time the "accumulated income" of the former trust. But on April 4, 1941, the declaration was so amended that "all accumulated income under paragraph XI of the Declaration in the sum of $25,000" which was income of the previous trust "shall henceforth be and become a part of the principal of the trust estate."

While the trustor might without let or hindrance have, in compliance with her declaration of trust, taken for her own use

all the income from the trust estate [1], she did not do so. On July 29, 1942, without protest from her, the trustee budgeted the income and thereafter paid her only $500 monthly. As a consequence, at the time of her decease the excess of income received and accumulated by the trustee above her withdrawals aggregated $7,083.20 while $1,106.78 had accrued but had not yet been received by the trustee.

Following the demise of Mrs. Rice in February, 1948, her executor brought an action against the trustee to recover the collected excess income ($7,083.20). Relief was denied and as a part of its decision the court made the following finding: "That it was the intention of Harriet L. Rice, the creator of said trust, that all of the net income which she was entitled to receive during her lifetime, but which had not been paid over to her at the time of her death, should be paid over pursuant to said trust agreement as follows: Income accrued and/or undistributed at the termination of any interest or estate hereunder, shall belong and go to the beneficiary or beneficiaries entitled to the next eventual estate in the same proportions as the principal thereof."

Pertinent Provisions of the Declaration of Trust.

The latter sentence of the finding made in the executor's action is quoted from Article IX of the declaration, and it was never modified.

Article III requires the trustee on the trustor's demise to make payments to the persons mentioned in Article II and then to distribute to them certain sums of money; but the trustee was not directed to pay them out of principal or income. However, the declaration as amended in April, 1941, required that the accumulated income which had been made a part of the trust estate become a part of the principal.

Article V provides that after payment has been made to the beneficiaries named in Article III, the net income of the trust estate shall be distributed in installments to designated persons and it makes provision for such distribution to the successors in interest of those named and for the termination of the trust and for the ultimate distribution of the corpus to specified relatives of trustor. Appellants have priority over all other relatives named in the declaration and assert the right to receive all the income including that accrued and undistributed.

Under the declaration (Art. VIII) the trustee was given all powers over the trust estate that might have been exercised by an absolute owner, including the power and discretion to invest accumulated income the same as though it were the corpus of the trust.

Article IX requires that all accrued or undistributed income upon the termination of the trust "shall belong and go to the beneficiary or beneficiaries entitled to the *next eventual estate* in the same proportions as the principal thereof."

The Trustor's Intent.

Appellants contend that (1) at no place in the declaration is there proof of trustor's purpose with respect to the accumulated income; (2) had she intended the accumulations to become principal she would have said so in the declaration; (3) as life tenants they are entitled to the next "eventual estate"; (4) since they do not take any portion of the principal, the "eventual estate" clause must be disregarded and the accumulated income be divided among them on the basis whereby they receive current income. On the other hand, respondent-remaindermen contend that the trustor clearly intended that income already accumulated at the date of the trustor's demise, as well as the income accrued but not collected, constitutes corpus of the trust and as such corpus it should at the termination of the trust be paid to themselves as Article IX clearly indicates. That article directs the disposition of undistributed income and unless it is avoided by other provisions of the declaration such directive must prevail. Not only is there no such contravening clause within the instrument but on reading it in its entirety and in the

1. The trust estate was conservatively worth $200,000.00.

light of transpired events it is reasonably inferred that the trustor intended the income accumulated and accrued at her death to go to the remaindermen when the trust terminates. In the executor's action, *final judgment* determined that the "accumulated income" is not a part of Mrs. Rice's estate, but it is a part of the trust estate and must be distributed to the beneficiaries of the next eventual estate as the declaration provides. That is a final judgment.

[1, 2] There are means of divining the trustor's intention other than her written word. Not only did she deposit under the new declaration the accumulated income from the former trust in the sum of $25,000 but she amended the later instrument in 1942 by her acquiescence in the trustee's budgeting of the total income, advancing to her only $500 monthly and keeping the balance as "accumulated income." Such conduct on her part was tantamount (1) to a declaration that she desired only that a monthly allowance be made to her and (2) to her approbation of the trustee's retention of the unused portion of the net income. In fact, it could mean no less than that she had arranged for the budget in the ordinary course of business. Code Civ.Proc., sec. 1963, subds. 19 and 20. And by the same token and the silence of the record to the contrary, the trustee conducted the trust fairly and regularly and according to the ordinary course of business. Moreover, the earnings of accumulated income were paid trustor as income on principal, i. e., she made no distinction between income from the original corpus and earnings from the cumulated income. Obviously for the purpose of giving an aura of sanctity to her silence, in 1941 she amended the declaration by making the past accumulations a part of the corpus of her trust and continued the practice of accepting only a part of the net earnings thereof, leaving the balance to build up the corpus. Such conduct negates the deduction urged by appellants, to wit, that she would have made provision for the future cumulations had she desired them to be part of the corpus of the trust. Intent that income shall be wholly or partially accumulated to become principal may be inferred not only from the language of the declaration but as well from the acts of the trustor during the continuance of her life estate. See Manning v. Bank of California, 216 Cal. 629, 637, 15 P.2d 746; Estate of Budd, 166 Cal. 286, 292, 135 P. 1131; Estate of Steele, 124 Cal. 533, 541, 57 P. 564.

[3] If the trustor intended for the income amassed in her lifetime to become part of the trust estate, then such intention must continue to prevail notwithstanding her death. Such intention having been inferred from the instrument and the acts of the trustor, it becomes a directive posthumously to deny to life tenants the accumulated income and to preserve it as corpus for the remaindermen. The declaration contains no provision for payment to appellants as life tenants of any sum other than the income accruing after the death of Mrs. Rice. Giving to every clause of the instrument the effect intended by its author as required by the rule in interpreting contracts, Civ.Code, sec. 1641, no other conclusion can be derived. The trustor's intention is manifested by her language in the declaration.

"Next Eventual Estate".

[4] Appellants contend that the phrase "next eventual estate" quoted from Article IX appears in section 733 of the Civil Code and has been applied to determine the destination of income undisposed of under the terms of the trust. They cite many decisions in support of that thesis, to wit, Manice v. Manice, 43 N.Y. 303, 385; Pray v. Hegeman, 92 N.Y. 508; In re Saddington's Will, 260 App.Div. 135, 21 N.Y.S. 2d 80, etc. A close inspection of section 733[2] will show that it has no application. Before it could be invoked, Article IX must be impotent and not susceptible of a

2. Civil Code, sec. 733. "When, in consequence of a valid limitation of a future interest, there is a suspension of the power of alienation or of the ownership during the continuation of which the income is undisposed of, and no valid direction for its accumulation is given, such income belongs to the persons presumptively entitled to the next eventual interest."

practical interpretation. It relates to the income from a trust estate which accrued while the power to alienate the corpus is suspended by reason of "a valid limitation of a future interest". The amassed income of the trust estate here did not accrue by virtue of "a suspension of the power of alienation" in "consequence of a valid limitation of a future interest". It accumulated while the trustor was in being and had the right to use it at will. It cannot therefore be said that Article IX of the declaration would constitute a foundation for an award of the accumulated income to appellants. In the case of Manning v. Bank of California, 216 Cal. 629, 15 P.2d 746, 749, a situation not wholly unlike the facts herein was under consideration. After observing the broad powers of the trustee to manage, invest and reinvest " 'any moneys or surplus or proceeds' of sale," the court commented that at the date of the will, seven years before the testator's death, he had four daughters whose normal life expectancy exceeded 20 years. He knew the income and expenses incident to the estate were uncertain and variable but of the income he clearly intended that each of his girls should receive not more than $300 a month during the life of the trust. "It is equally plain that he desired his entire estate not consumed in paying his daughters the specified income and discharging expenses of the trust administration ultimately to go to said four daughters * * * to the exclusion of other persons to whom he might have made legacies and bequests. The conclusion that the surplus income was to be accumulated and invested during the life of the trust is inescapable from the language used in creating the trust." Likewise, Mrs. Rice by using only $500 per month when she might have used more, and by empowering the trustee to "invest" income as though it had been corpus, could have intended not otherwise than that the accumulations of income should constitute part of the corpus of the trust.

Appellants argue fervently that the "last nine words" of Article IX contemplate an element not present at this juncture in the life of the trust, namely, that "*the principal thereof* had to be going somewhere when the particular *interest or estate* * * terminated." Now the language of Article IX could by a reasonable construction mean nothing else than that the income accrued at the date of trustor's death shall belong and go to the remaindermen who are entitled to the *next eventual estate.* The italicized phrase involves no mystery While the word "eventual" has many meanings, that which appears to be most appropriate to its setting as used in Article IX is that which will result ultimately or which will take place in a particular contingency.[3] The "estate" means the corpus of the trust in the ownership of someone. The "next" estate refers to the status of such corpus when it passes into the ownership of others. The word "eventual" emphasizes such meaning of "next," indicating that the trustor's thought was that the accrued income at the "termination of the trust hereunder shall belong and go to the beneficiaries" of the corpus which becomes in their hands the "eventual estate." Appellants as the life tenants could never by virtue of the declaration become owners of the estate, and the corpus cannot be an estate unless it is in the ownership of someone so that it has a status, a state, a permanent abode.

[5] The trustor's plan and purpose evidently was to build up her estate for her eventual beneficiaries. To that end she designed as the method of accomplishing

3. Illustrations of this use given by the Oxford English Dictionary are as follows:

Lord Lyttleton: William aspired to secure to himself the *eventual* succession to the crown * * * in case that Louis * * * should die before his father.

Burke: Nothing is provided for it, but an *eventual* surplus to be divided * * *.

Green's Short History: He offered to admit England to a share in the *eventual* partition of the Spanish monarchy.

Jefferson: A bill authorizing the president in case of a declaration of war * * * to raise an *eventual* army of thirty regiments.

Buckle: As society advances, the *eventual* cessation of all such attempts is certain.

such purpose to transmit as an addition to the corpus of the trust such accrued profits of the trust as she might not have used in her lifetime.

The absence of an express stipulation in the instrument for the accumulation of income or for its being added to the trust estate does not hinder the interpretation that the declaration intended such behavior. Her purpose that such accumulated income should become principal is so clearly implied by her own acts as well as by the instrument itself that her meaning cannot be mistaken. Not a word indicates an intent that such cumulations may be paid to life tenants after trustor's death. If they are not to receive it, the only destination marked for it is the trust estate so that it may be finally divided among the remaindermen in the "same proportions" as the principal. By pursuing such course appellants will receive income on the "accumulated income" during their terms as beneficiaries and the remaindermen will receive it "eventually" as it was intended by the trustor.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

104 Cal.App.2d 588

PAGAN v. SPENCER et ux.

No. 14708.

District Court of Appeal, First District, Division 1, California.

June 5, 1951.

As Modified on Denial of Rehearing June 27, 1951.

Jose Pagan brought an action against Brady Spencer and Lee Esther Spencer, his wife, to quiet title to real estate and defendants cross-complained to quiet their title thereto. The Superior Court in and for the County of Contra Costa, Harold Jacoby, J., quieted title in defendants and plaintiff appealed. The District Court of Appeal, Bray, J., held that title to the money deposited by defendants with real estate broker who was to hold the money until plaintiff obtained a decree quieting plaintiff's title to the real estate was still in defendants after the real estate broker allegedly absconded with the money, and that title to the real estate was still in plaintiff, and that plaintiff was entitled to have title quieted in plaintiff unless defendants paid amount of such lost money to plaintiff within a reasonable time.

Judgment reversed with instructions.

1. Escrows ⇐8(1)

If property in custody of escrow-holder is either embezzled or lost by escrow-holder, the loss, as between seller and buyer, falls on the one who owns the property at time of its embezzlement or loss, and if escrow-holder embezzles purchase price before time when, under escrow, seller is entitled to it, loss falls on buyer since it is still buyer's money, but if money be embezzled after seller has become entitled to money, loss falls on seller since it is now considered property of seller.

2. Escrows ⇐8(1)

Where defendants orally agreed to purchase lot from plaintiff and defendants paid money to real estate broker selected by plaintiff, and broker was to hold money until plaintiff obtained a decree quieting plaintiff's title to lot, at which time lot was to be conveyed to defendant and title was to pass, and real estate broker allegedly absconded with money, title to money was still in defendants and title to lot was still in plaintiff, and plaintiff was entitled to have title to lot quieted in plaintiff unless defendants paid amount of such lost money to plaintiff within reasonable time, notwithstanding broker was selected by plaintiff.

3. Principal and agent ⇐25(1)

One who knows that another is acting as his agent or permits him to appear as such, to injury of third persons who have dealt with apparent agent in good faith, is estopped to deny agency.

4. Principal and agent ⇐8

Whether an agency has been created is to be determined by relation of parties as they in fact exist under their agreements or acts.

5. Estoppel ⇐72

Where one of two innocent persons must suffer the loss should be borne by him whose acts made loss possible.

6. Escrow ⇐9

The title to money deposited in escrow to be paid to vendor of property does not pass until all conditions of escrow have been fulfilled.

Andrew P. Costelli, Oakland, for appellant.

Henry W. Mahan, Benicia, for respondents.

BRAY, Justice.

Plaintiff sued defendants to quiet title to certain real property. Defendants cross-complained to quiet their title thereto. Judgment went for defendants quieting their title. Plaintiff appeals.

Question Presented.

The absconding escrow holder was the agent of which party in the sale and purchase of the property?

Facts.

The parties stipulated to practically all the facts. Originally plaintiff had purchased a certain lot in Richmond from a tax title buyer. Defendants orally agreed to purchase the lot from plaintiff, who directed defendants to go to the office of a real estate broker named Bowe to have the written contract drawn. Plaintiff knew Bowe. Defendants did not. Bowe had no connection with the sale of the property. He was to draw the contract and to hold the payments as they came in. Bowe drew the contract which was signed by the parties. It provided that plaintiff sold and defendants purchased the lot for $1500, $700 cash, and the balance of $800 with interest to be paid to plaintiff's wife at the rate of $50 per month. "Said payments are to be made to G. M. Bowe for Mrs. Santos S. Pagan" at Bowe's office. Defendants paid plaintiff the $700 on execution of the contract. As the title was only a tax title it was orally agreed that Bowe was to hold the $800 as paid until plaintiff obtained a decree quieting his title to the property. He was then to turn the money over to plaintiff's wife. It was stipulated that defendant Brady Spencer, if called would testify that plaintiff told him that when defendants had made payment in full Bowe would deliver them the deed, and that plaintiff, if called, would deny making that statement. Defendants paid in accordance with the terms of the contract.

After the $800 had been paid by defendants to Bowe, but before the quiet title decree had been obtained, plaintiff, needing some cash for a trip to Mexico, asked Bowe to pay him $300 of the moneys in Bowe's hands. Bowe told him that he could not pay any money until the decree was obtained, but that if defendants would authorize him to pay plaintiff the money, he would do so. Defendants gave such authorization and Bowe paid plaintiff $300. Later, and before the decree was obtained, Bowe absconded with the $500 balance and has not been heard from since. It is agreed that both parties are innocent so far as the loss of the money is concerned. No question of negligence of either party is raised.

Whose Agent Was Bowe?

Plaintiff contends that Bowe was the agent of both parties, and as the contingency upon which plaintiff was to receive the balance had not occurred, namely, the obtaining of the quiet title decree, the title to the $500 was still in defendants and the loss falls on them. The court found that Bowe was the agent of plaintiff and that the title to the balance of the purchase price was in plaintiff at all times and ordered the title of defendants in the real property quieted.

[1] It is well settled in California that "If the property in the custody of the escrow holder is either embezzled or lost by it, then, as between the seller and the buyer, the loss falls on the one who owns the property at the time of its embezzlement or loss. For example, if the escrow holder embezzles the purchase price before the time when, under the terms of the escrow, the seller is entitled to it, the loss falls on the buyer, since it is still his money. On the other hand, if the money

be embezzled after the time when the seller has become entitled to the money, the loss falls on him, since it is now considered his property." Crum v. City of Los Angeles, 110 Cal.App. 508, 514, 294 P. 430, 432.

In Shreeves v. Pearson, 194 Cal. 699, page 707, 230 P. 448, page 451, the court said: "* * * whenever a deed is deposited in escrow by the grantor to be delivered to the grantee upon payment by him to the escrow holder of a sum of money to be by the latter delivered to the grantor upon the production by the latter of a satisfactory certificate of title, the escrow holder is, as to such deed and money, the agent of both parties until such time as the said satisfactory certificate of title is produced, but he thereupon becomes the agent of the purchaser as to such deed, and of the seller as to such money." See also Hildebrand v. Beck, 196 Cal. 141, 236 P. 301, 39 A.L.R. 1076.

[2] We find it impossible to distinguish the facts in this case from those in the Crum case, supra. There the buyer sent a check for the balance of the purchase price to the bank selected by the seller, and with whom the seller had left the deed, with instructions to hold it until further instructions. The bank cashed the check and became insolvent. The court held, in effect, that as the seller under the agreement was not entitled to receive the purchase price until it had furnished the buyer with a certificate of title, the bank, when it cashed the check, was holding the proceeds in its capacity as agent for the buyer. The Crum case likewise answers the contention of defendants here that the fact that plaintiff selected Bowe is controlling. There the court held that regardless of whether there was a true escrow the principles of escrow quoted above applied. Nor can we distinguish our case from the principle of the Shreeves case, supra, where a deed was placed in escrow by the seller to be delivered upon receipt of certain moneys and trust deed, and the moneys were placed there to be paid the seller when a title guarantee could be given the buyer, and other things done. The court there held at page 711 of 194 Cal., at page 453 of 230 P.: "We are compelled to the conclusion that there still remained unperformed a number of substantial requirements of this escrow at the time of Eshleman's defalcation, and hence, that up to and at and after said time he still occupied his original position as the agent of the purchasers in respect to whatever portions of the purchase price of said property either were or were to come into his hands before the completion of said escrow."

The Hildebrand case, supra, is likewise in point. There the escrow holder absconded with the purchase moneys which had been deposited by the buyer with instructions to pay it to the seller when a title guarantee could be obtained for the buyer. The court found that the embezzlement occurred before this condition could be met; the title to the money had not passed, and therefore it was the money of the buyer which was embezzled. As said in First Nat. Bank v. Caldwell, 84 Cal.App. 438, 446, 258 P. 411, 415: "Whenever a deed is deposited in escrow by the grantor to be delivered to the grantee upon payment by him to the escrow holder of a sum of money, to be by the latter delivered to the grantor upon the production by the latter of a satisfactory certificate of title, the escrow holder is, as to the said deed and money, the agent of both parties until such time as the said satisfactory certificate is produced, and he thereupon becomes the agent of the purchaser as to such deed and of the seller as to such money."

The test to be applied in a situation of this kind is: in whom was the title to the money at the time of the embezzlement? This, again, depends in some degree upon the question of whether title to the property had passed to the buyer. Obviously it had not here. The conveyance to the buyer was not to occur until the quiet title decree had been obtained. Plaintiff's wife was not entitled to the money until then. The court found that Bowe held a deed from plaintiff to defendants. Defendant Brady Spencer's testimony would

have been that he was to get the deed from Bowe. It was not deliverable until the agreed condition occurred, namely, a quiet title decree was obtained. While defendants could have waived this requirement, they did not do so. Another test is this: Could plaintiff have required Bowe to pay him or his wife the $500 before a quiet title decree was obtained? Obviously he could not, for the reason that title had not yet been delivered. Thus, at the time of the embezzlement, title to the property was in plaintiff and title to the money in defendants.

[3] Defendants do not quarrel with the rule of law of the above cases. They merely disregard it, and contend that Bowe was plaintiff's agent alone. Thus, they quote section 2317 of the Civil Code on ostensible authority, and cite Walsh v. American Trust Co., 7 Cal.App.2d 654, 47 P.2d 323, a case involving a forged check by an ostensible agent; Safeway Stores, Inc. v. King Lumber Co., 45 Cal.App.2d 17, 113 P.2d 483, a case involving the endorsing and cashing of checks by an agent who had apparent authority to do so; Siskin v. Dembroff, 121 Cal.App. 730, 9 P.2d 908, involving extent of agency; and Gorton v. Doty, 57 Idaho 792, 69 P.2d 136, involving the question of agency in use of an auto; and the rule in 2 Corpus Juris Secundum, Agency, § 29, p. 1063, to the effect that one who knows that another is acting as his agent or permits him to appear as such, to the injury of third persons who have dealt with the apparent agent in good faith, is estopped to deny the agency. Obviously none of these apply to the case at bar.

Nor is Tosi v. Northern Calif. Bldg. & Loan Ass'n, 3 Cal.2d 274, 44 P.2d 333, also cited by defendants, any help. There the question was whether the real estate broker who claimed to be acting for defendant was its agent. The broker received payments periodically from plaintiff and turned some of them over to the defendant, finally absconding with the balance. There was no escrow involved. The court held that although not defendant's agent in the beginning, the course of conduct between him and defendant was such that he became its agent; also that defendant ratified his acts as such agent.

[4–6] "Whether an agency has been created is to be determined by the relation of the parties as they in fact exist under their agreements or acts." Rezos v. Zahm & Nagel Co., 78 Cal.App. 728, 730, 246 P. 564, 565. While not conclusive on the subject, the interpretation placed by Bowe upon his relationship to defendants is interesting. Replying to a letter written him by plaintiff's attorney, Bowe, on June 11, 1946, and before defendants had paid in full, wrote, "I am the Escrow holder *for the purchasers* * * * I have been instructed by them not to release any money to Mr. Pagan until this property shows clear." (Emphasis added.) The fact that payments were to be made to Bowe for Mrs. Pagan does not change the situation any. She would not be entitled to the money until the specified contingency had arisen, namely, the quiet title decree obtained. The mere selection of the escrow holder by plaintiff does not bring the case within the rule of Safeway Stores, Inc. v. King Lumber Co., supra, 45 Cal.App.2d 17, 113 P.2d 483, that where one of two innocent persons must suffer, the loss should be borne by him whose acts made the loss possible. The fact that plaintiff brought defendants to Bowe makes no stronger situation than the one in the Crum case, supra, where the seller was the one who selected the bank as the one to whom the buyers were to make payment. The trial court made no finding as to whether title to the property had passed at the time Bowe absconded, although erroneously it did find that title to the money had passed. Under the circumstances of the case one could not have occurred without the other, and as pointed out before, title to the property could not pass until the quiet title decree was obtained, which was after Bowe absconded. "The title to money deposited in escrow to be paid to the vendor of property does not pass until all conditions of the escrow have been fulfilled." Hastings v. Bank of

America, 79 Cal.App.2d 627, 629, 180 P.2d 358, 359.

The judgment and decree quieting title is reversed with instructions to the trial court to give defendants 30 days after the decision herein becomes final in which to pay plaintiff the sum of $500 without interest, and in addition thereto, if defendants have been in possession of said premises, all taxes levied, assessed and accrued against said premises from the date that defendants took possession up to and including the time that said defendants shall pay plaintiff said sum of $500; and in the event said plaintiff has paid any taxes during said period of time said defendants shall pay to said plaintiff all taxes so paid by him during said period of time, and the same shall be a lien on said property in favor of plaintiff. Upon failure of defendant to pay said sum and said taxes within said period, title thereto shall be quieted in plaintiff.

PETERS, P. J., and FRED B. WOOD, J., concur.

On Petition for Rehearing

PER CURIAM.

In plaintiff's petition for rehearing our attention is called to the claim, not heretofore appearing, that defendants took possession of the property involved in this action in November, 1945, and have remained in possession ever since and have not paid any of the taxes of the County of Contra Costa assessed and levied against the property during said period. Therefore our opinion should be modified as herein set forth.

The petition for rehearing is denied.

In re DABNEY'S ESTATE.

DABNEY et al. v. PHILLEO et al.

Nos. 21768, 21861.

Supreme Court of California, in Bank.

June 19, 1951.

Rehearing Denied July 19, 1951.

Proceeding in the matter of the estate of Louise E. Dabney, deceased, wherein Clifford R. Dabney and Alice M. Dabney applied for writ of supersedeas to stay further proceedings under orders for ratable distribution entered by the Superior Court, Los Angeles County, Roy L. Herndon and Newcomb Condee, JJ. Milton H. Philleo, as executor of the last will of Louise E. Dabney, deceased, and Melvin H. Mann, filed demurrers and answers as respondents to the petitions for supersedeas. The Supreme Court, Schauer, J., held that since executor's bond was only $100,000 and he had already made distribution of $300,000 under orders for ratable distribution despite statutory stay effected by appeals therefrom and order for ratable distribution of $1,000,000 had been made during pendency of statutory stay under prior appeal, parties claiming property inventoried as part of decedent's estate were entitled to writ of supersedeas staying any further distribution under orders theretofore entered pending outcome of appeals from such orders.

Writ of supersedeas issued.

For prior opinion see 225 P.2d 611.

See also, Cal.App., 226 P.2d 380.

1. Executors and administrators ⇐314(12)

Orders for ratable distribution to heirs were appealable. Probate Code, § 1240.

2. Appeal and error ⇐485(2)

The function of a writ of "supersedeas" is to suspend the enforcement of a judgment or order pending appeal therefrom and not to reverse, supersede, or impair the force or pass on the merits of the judgment or order and the correctness of trial court's decision, at least, when it is not apparent on the face of record, is not involved in a supersedeas proceeding. Code Civ.Proc. § 949.

See publication Words and Phrases, for other judicial constructions and definitions of "Supersedeas".

3. Appeal and error ⇐469(2)

The perfecting of an appeal from a decree of distribution by an appellant who is not required to perform the directions of the judgment or order appealed from stays proceedings in the court below upon the judgment appealed from. Code Civ.Proc. § 949.

4. Appeal and error ⇐460(2)

Where the order or judgment appealed from requires no acts to be performed by appellant for the benefit of respondent or in pursuance of the directions of the judgment or order, no bond may be required from appellant in order to effect a stay of proceedings under statute and, since the appeal operates to set up an automatic statutory stay, appellate court will not balance or weigh the arguments with reference to the possible irreparable injury to appellant or respondent as would be necessary if issuance of the writ were solely a matter of discretion. Code Civ.Proc. § 949; Probate Code, §§ 1000, 1001.

5. Appeal and error ⇐477

Even where an appeal effects a statutory stay of proceedings, the writ of supersedeas will issue in a corrective capacity in case of a violation or threatened violation of such stay. Code Civ.Proc. § 949.

6. Judgment ⇐851

A "self-executing judgment" is one that accomplishes by its mere entry the result sought and requires no further exercise of the power of the court to accomplish its purpose.

See publication Words and Phrases, for other judicial constructions and definitions of "Self-Executing Judgment".

7. Appeal and error ⇐485(2)

Where appeal effects an automatic statutory stay of an order or judgment, the writ of supersedeas will issue to stay action by either executors or guardians or by the court pending appeal and the writ may be directed to any or all of them as respondents, though the judgment or order appealed from is self-executing. Code Civ.Proc. § 949.

8. Appeal and error ⇐485(2)

Where executor's bond was only $100,000 and he had already made distribution of $300,000 under orders for ratable distribution despite statutory stay effected

by appeal from such orders and order for ratable distribution of $1,000,000 had been made during pendency of statutory stay under prior appeal, parties claiming property inventoried as part of decedent's estate were entitled to writ of supersedeas directed to both trial court and executor staying any further distribution under such orders pending outcome of appeals therefrom, involving construction of alleged assignment to determine whether appellant was a proper party in interest to object to petitions for ratable distribution. Rules on Appeal, rule 49; Code Civ.Proc. § 949; Probate Code, § 1010.

9. Appeal and error ⇐492

Distribution made by executor under orders for ratable distribution prior to the filing of notice of appeal from such orders was not in violation of any statutory stay effected by such appeals and could not be prevented by any writ of supersedeas subsequently issued. Code Civ.Proc. § 949.

10. Appeal and error ⇐492

Distribution made by executor under order for ratable distribution after the filing of notice of appeal from such order was made in violation of the statutory stay effected by such appeal and at the peril of executor, but a writ of supersedeas subsequently issued could not actually prevent the making of such distribution which had already been made and the operation of such writ should be limited to further distributions. Code Civ.Proc. § 949.

C. Paul Du Bois and John E. Sisson, Los Angeles, for petitioners.

Dolley, Knight, Woods & Hightower, Roy P. Dolley and Franklin L. Knox, Jr., all of Los Angeles, for respondents.

SCHAUER, Justice.

In these applications for a writ of *supersedeas* petitioners, Clifford R. Dabney and Alice M. Dabney, husband and wife, seek to stay further proceedings in the Estate of Louis E. Dabney, Deceased, under orders of ratable distribution entered on August 22 and September 26, 1950, and February 6, 1951, pending determination of petitioners' appeals from such orders.

Petitioners allege, in their first petition for the writ[1], that on February 1, 1950, they commenced an action (numbered 569707) in the superior court in Los Angeles in which they seek declaratory relief, to establish constructive and resulting trusts, to quiet title, and an accounting and further relief, all with respect to certain described properties which are inventoried as assets of the Dabney estate. Petitioners' claims to and in such properties are asserted not as heirs of, but adversely to, the decedent's estate. The properties were or are in the possession of respondent Milton H. Philleo as executor of the estate, subject to administration in the estate proceedings in the superior court in Los Angeles.

Petitioners then allege that the following proceedings occurred in the estate, each and all of them designed to defeat any recovery petitioners may secure in their action 569707:

[1] Petitions for ratable distribution to the heirs of decedent were filed; petitioners filed objections thereto; the objections were overruled; two orders for ratable distribution, of $150,000 each, were entered on August 22, 1950; an order for distribution of $300,000 was entered September 26, 1950. On October 3, 1950, petitioners filed notices of appeal from these three orders[2], and the transcripts on appeal are now on file in this court (L.A. 21768).

Petitioners further allege that on August 25, 1950, the executor made full distribution of the sum of $300,000 under the two orders of August 22, and that he "has informed petitioners that he intends to make distribution of the" $300,000 under the order of September 26, despite the appeals of petitioners. It is also alleged in a second

1. Filed November 14, 1950, and transferred to this court after decision by the District Court of Appeal, Second Appellate District, Division One, 225 P.2d 611, ordering that the writ be denied and that a temporary restraining order which had theretofore been entered by that court be dissolved.

2. Such orders are appealable. (Prob. Code, § 1240.)

petition [3] for the writ that on or about November 3, 1950, a further petition for ratable distribution was filed, petitioners filed objections thereto, the objections were overruled, an order of ratable distribution of $1,000,000 was entered on February 6, 1951, and on the same day petitioners appealed from such order; that the executor has stated his intention to distribute the entire assets of the estate despite petitioners' appeals. This latter appeal is also presently pending in this court (L.A. 21861), a temporary stay has been ordered, and the record has been filed.[4]

Petitioners allege, in addition, that if distribution is made under the orders appealed from the properties and interests which they claim to own and seek to recover, and which are inventoried as assets of the estate, will be irretrievably lost; that distribution will be made to more than one hundred persons, residing in many different states, and that it will be prohibitively expensive and in many cases impossible to recover from such distributees; that the bond of the executor is only $100,000 and his personal assets limited, and that therefore petitioners will be unable to recover from him in excess of his bond.

The executor as well as one of the distributees of the estate have filed demurrers and answers as respondents to the *supersedeas* petitions. In the answers and in oral argument before this court it is stated among other things:

That distribution of the $300,000 ordered August 22, 1950, was made on August 28, 1950, prior to the filing of appeal by petitioners (on October 3, 1950); on December 28, 1950 [5], distribution was made under the order of September 26, 1950; the executor has not stated to petitioners his intent to distribute "the entire assets" of the estate regardless of petitioners' appeals [however, he does not himself deny such intention]; petitioner Clifford R. Dabney has assigned to others his entire interest in the estate and in any recovery in his action 569707 (for declaratory relief, to quiet title, etc.), and consequently is not a proper party in interest to object to petitions for ratable distribution; petitioner Alice M. Dabney filed no creditor's claim against the estate and is not a proper party in interest to object to the petitions for distribution; in action 569707 demurrers to petitioners' complaint have been sustained without leave to amend, judgment that "plaintiffs [petitioners here] take nothing" was entered accordingly (on October 6, 1950), and petitioners have appealed therefrom; in the proceedings on the petitions for ratable distribution, to which petitioners objected and in which their appeals are pending, the trial court "has ruled that inasmuch as Clifford R. Dabney has sold his entire interests in the estate and made effective assignments, therein filed, that he has no standing in that court to object to petitions for ratable distribution merely by reason of the fact that he is asserting an adverse claim for certain of the assets inventoried and a part of the estate"; staying distribution under the orders from which petitioners appealed would result in tax losses to the estate as well as interest income on the amount sought to be distributed.

[2] Respondents contend, first, that petitioners are not persons interested in the estate and therefore have no standing in this court to object to distribution. It is apparent, however, from the portions of respondents' answers quoted hereinabove, from the records on appeal in L.A. 21768 and L.A. 21861, from uncontroverted al-

3. Retained by this court, without transfer to the District Court of Appeal.

4. This record was filed subsequent to filing of the petition for the writ; pursuant to Rule 49, Rules on Appeal, petitioners state the subject matter of this appeal to be whether petitioners are interested parties to the estate proceedings, whether petitioners as adverse claimants to properties also claimed by the estate are entitled to object to distribution of the estate, and whether they are entitled to have the assets claimed by the estate, and adversely by them, retained in the possession of the executor pending final adjudication in action 569707.

5. The date of entry by the District Court of Appeal of its decision ordering that the writ be denied and that the temporary stay order be dissolved.

legations of the *supersedeas* petition in L. A. 21861, and from statements of counsel in oral argument before this court, that this is one of the points directly concerned in the appeals now pending. The correctness of the decision of the trial court (at least when it is not apparent on the face of the record, and it is not so apparent here [6]) is not involved in a *supersedeas* proceeding; it "is not the function of such a writ to reverse, supersede or impair the force of, or pass on the merits of the judgment or order from which the appeal is taken; the validity of such judgment or order is to be reviewed on the appeal therefrom. [Citations.] Its purpose is merely to suspend the enforcement of the judgment pending the appeal." (Smith v. Smith (1941), 18 Cal.2d 462, 465, 116 P.2d 3, and cases there cited.) Determination of the issue of petitioners' interest in the estate must therefore await decision on the appeals.

[3] It is established that under the provisions of section 949 of the Code of Civil Procedure the perfecting of an appeal from a decree of distribution by an appellant who is not required to perform the directions of the judgment or order appealed from "stays proceedings in the court below upon the judgment appealed from." (See In re Estate of Schedel (1886), 69 Cal. 241, 243, 10 P. 334 [distributee appealed; distribution held automatically stayed]; Pennie v. Superior Court (1891), 89 Cal. 31, 34, 26 P. 617 [estate claimants appealed from order directing payment of family allowance; payment thereof held automatically stayed]; Born v. Horstmann (1889), 80 Cal. 452, 453, 22 P. 169, 338, 5 L.R.A. 577 [perfection of appeal by claimants under testamentary trust "operates as a *supersedeas*"]; Firebaugh v. Burbank (1898), 121 Cal. 186, 190, 53 P. 560; Estate of Wellings (1925), 197 Cal. 189, 195–196, 240 P. 21; Jensen v. Hugh Evans & Co. (1939), 13 Cal.2d 401, 405–406, 90 P.2d 72, and cases there cited; see also Estate of Garraud (1868), 36 Cal. 277, 280 [appeal by estate claimants from order of distribution "suspended and stayed its vital force and effect; and, pending such appeal, no action could be taken by the Court below for the enforcement of the order, or upon any subject matter embraced therein"].)

[4] It is further established that where, as here, the order appealed from requires no acts to be performed by appellants for the benefit of respondents "or in pursuance of the directions of the judgment or order appealed from," no bond may be required from appellants in order to effect the stay of proceedings under section 949 of the Code of Civil Procedure. (Williams v. Wells Fargo Bank (1941), 17 Cal.2d 104, 107, 109 P.2d 649; see Jensen v. Hugh Evans & Co. (1939), supra, 13 Cal.2d 401, 406–407, 90 P.2d 72.) Furthermore, since the appeal operates to set up an automatic statutory stay, this court will not "balance or weigh the arguments with reference to the possible irreparable injury to appellants or respondents as would be necessary if the question of the issuance of the writ was solely a matter of our discretion." [7]

6. (a) Both appellants and respondent executor state that they "have been unable to find any case * * * which has ever decided" the point as to whether one claiming property adversely to the estate is a person interested (see Prob. Code § 1010) who is entitled to object to a petition for ratable distribution.

(b) The tenability of the claim (see p. 4) that petitioner Clifford Dabney "not only conveyed all of his interest as an heir in said estate, but also conveyed every other claim and interest * * * of every kind and character to which he would be entitled by distribution or otherwise," and is therefore not "a person interested in any way in said estate," appears to depend upon the construction to be placed on certain instruments executed by Clifford, as to the proper construction of which instruments the claims of petitioners and of respondents are widely divergent and deserving of careful judicial scrutiny.

7. Relative to respondents' plea of tax and income losses to the estate and the distributees if the stay is effected, it is noted from the record that petitioners in their objections to the distribution petitions in the probate court requested that if distribution be ordered bond be required from the distributees as provided by Probate Code, §§ 1000, 1001, but that

(Feinberg v. One Doe Co. (1939), 14 Cal. 2d 24, 29, 92 P.2d 640.)

[5] It is also established law that even where an appeal effects a statutory stay, the writ of *supersedeas* will issue "in a corrective capacity" in case of a violation or threatened violation of such stay. (See In re Estate of Schedel (1886), supra, 69 Cal. 241, 243, 10 P. 334; Daly v. Ruddell (1900), 129 Cal. 300, 301, 61 P. 1080; Foster v. Foster (1936), 5 Cal.2d 669, 672, 55 P. 2d 1175; Fulton v. Webb (1937), 9 Cal.2d 726, 729, 72 P.2d 744; Jensen v. Hugh Evans & Co. (1939), supra, 13 Cal.2d 401, 407, 90 P.2d 72; Feinberg v. One Doe Co. (1939), supra, 14 Cal.2d 24, 28–29, 92 P.2d 640; Williams v. Wells Fargo Bank (1941), supra, 17 Cal.2d 104, 106–107, 109 P.2d 649; Smith v. Smith (1941), supra, 18 Cal.2d 462, 466–467, 116 P.2d 3; Estate of Sam Lee (1945), 26 Cal.2d 295, 296, 158 P.2d 193; Estate of Hultin (1947), 29 Cal. 2d 825, 833, 178 P.2d 756; see also Estate of Stough (1916), 173 Cal. 638, 642, 161 P. 1; Ruggles v. Superior Court (1894), 103 Cal. 125, 128, 37 P. 211; Food & Grocery Bureau v. Garfield (1941), 18 Cal.2d 174, 176–177, 179, 114 P.2d 579.)

[6] Respondents urge, nevertheless, that "Where the judgment or order requires no process to be issued for its enforcement, no *supersedeas* is allowed." Although this general principle is stated and followed in the cases relied upon by respondents (Stewart v. Hurt (1937), 9 Cal. 2d 39, 68 P.2d 726; City of South Gate v. City of Los Angeles (1936), 6 Cal.2d 593, 595, 58 P.2d 1288; Caminetti v. Guaranty Union Life Ins. Co. (1943), 22 Cal.2d 759, 763, 141 P.2d 423), in none of those cases does it appear that the appeal effected an automatic stay of proceedings in the lower court. Connected with this point is respondents' further contention that the orders of distribution were "self-executing," that "no process is required to be issued" for their enforcement, and that therefore *supersedeas* will not lie. Varying situations in which it is stated that the judgment or order appealed from was "self-executing" and that *supersedeas* would not be granted may be found in the cases (see, e. g., Boggs v. North American Bond etc. Co. (1936), 6 Cal.2d 523, 525, 58 P.2d 918 [order dismissing petition for postponement of sale under deed of trust]; In re Graves (1923), 62 Cal.App. 168, 169, 216 P. 386 [judgment suspending petitioner from practice of law for one year]; Hulse v. Davis (1927), 200 Cal. 316, 317, 253 P. 136 [order quashing execution]; People v. City of Westmoreland (1933), 135 Cal. App. 517, 519, 27 P.2d 394 [judgment that petitioner city had never been lawfully incorporated]; In re Imperial Water Co. No. 3 (1926), 199 Cal. 556, 557, 250 P. 394 [order dissolving the water company and directing distribution of its property through its corporate directors acting as trustees]; Caminetti v. Guaranty Union Life Ins. Co. (1943), supra, 22 Cal.2d 759, 763, 141 P.2d 423 [order approving rehabilitation and reinsurance agreement affecting twelve mutual life insurance companies]; Stewart v. Hurt (1937), supra, 9 Cal.2d 39, 42, 68 P.2d 726 [judgment removing a testamentary trustee and appointing a successor]). Again, however, in none of the cited cases does it appear that the appeal effected a statutory stay, although that question was expressly not considered in Re Imperial Water Co. No. 3, supra. In Feinberg v. One Doe Co. (1939), supra, 14 Cal.2d 24, 27–29, 92 P.2d 640, it is held that a superior court order affirming an arbiter's award in a labor dispute and enjoining defendants from employing a particular person was in effect a mandatory injunction automatically stayed by appeal, and that the writ should issue to restrain attempted contempt proceedings in the lower court. In rejecting the contention that the order was "self-executing" and that the writ would therefore not lie, the court stated "The term 'self-executing' is practically self-defining, and obviously denotes a judgment that accomplishes by its mere entry the result sought, and requires no

the court expressly denied such a requirement. Whether a bond may or may not be required in connection with orders for *ratable* distribution as distinguished from orders for *partial* distribution, is not here considered.

further exercise of the power of the court to accomplish its purpose."

[7] Contrary to the arguments of respondents, there is direct authority that the writ will issue to stay action by either executors or guardians or by the court pending appeal, and that it may be directed to any or all of them as respondents. Thus, in Estate of Stough (1916), supra, 173 Cal. 638, 642, 161 P. 1, where appeal was held to effect an automatic stay of an order appointing an executor, but the executor had attempted to take possession of estate property, the writ was issued restraining him "from doing any act as executor * * * during the pendency of the appeal." In Coburn v. Hynes (1911), 161 Cal. 685, 688, 120 P. 26, it is declared that "A guardian * * * is an officer of the court, whose every act must depend for its authority upon the order appointing him"; appeal from such order was held to effect an automatic stay; and the writ issued to restrain the guardian from taking possession of the property of his alleged incompetent pending the appeal. In Guardianship of Walters (1949), 93 Cal.App.2d 208, 215, 208 P.2d 713, the writ was issued "to stay all action by * * * [the] guardian, to take or to retain possession of" property of his alleged incompetent "until the final determination of the appeal from the order appointing a guardian" and from a subsequent order that he take such possession. And in Firebaugh v. Burbank (1898), supra, 121 Cal. 186, 190, 53 P. 560, it is declared that an appeal by the widow from a decree of distribution in an estate "suspended its execution, and until the determination of that appeal the executors were not only precluded from distributing the estate in accordance with its terms, but were required to retain the property in their care and custody." (See also Estate of Sam Lee (1945), supra, 26 Cal.2d 295, 296, 158 P.2d 193, in which it is stated that appeal from an order appointing the public administrator as administrator of decedent's estate "automatically stayed any further act by" such administrator pending outcome of the appeal; however, the writ was denied without prejudice with the statement that "In view of this statutory stay it may not be assumed that further proceedings, pursuant to the orders appealed from, will be attempted.") These cases are clear precedent for issuance of the writ to both the court and the executor in the present case, prohibiting distribution of the estate pending outcome of the appeals.

[8] It is our further view that the writ is not only warranted but required where, as here, the executor has already made distribution of $300,000 under the order of September 26, despite the fact that appeal therefrom effected a statutory stay; and, in addition, counsel for the executor asserted in oral argument before this court "that even though there is a statutory stay, *supersedeas* is not in order here for the reason that the executor could act at his peril if he desired to do so." In this connection, it should be borne in mind that the bond of the executor is only $100,000, and that in distributing under the September 26 order the executor has already acted at his own peril in relation to the claims of petitioners. Moreover, the order of February 6, 1951, for distribution of $1,000,000 was made during pendency of the statutory stay under the prior appeal, although counsel for the executor has informed this court that distribution thereunder will not be made "until this appeal is disposed of."

[9, 10] Respondents further contend that in any event the writ should not apply to distributions made "before the *supersedeas* becomes effective." In Messenkop v. Duffield (1930), 211 Cal. 222, 225, 294 P. 715, relied upon by respondents, a judgment decreeing plaintiff entitled to possession of certain property was completely executed before the *supersedeas* became effective, and the writ of *supersedeas* by which defendant-appellant sought restoration to possession, was denied. In the present case the executor made distribution of the $300,000 under the two orders of August 22, prior to the filing of notices of appeal therefrom on October 3, 1950, and therefore such distribution was not in violation of any statutory stay nor, obviously, can it be prevented by any order now to be made. The distribution under

the order of September 26, 1950, clearly was in violation of the statutory stay and at the peril of the executor. Whether the temporary stay order entered by the District Court of Appeal on November 15, 1950, was effectively dissolved by that court through its decision of December 28, 1950, or was automatically continued in effect by our order granting a hearing and transferring the cause to this court, we need not now determine. In neither event could the writ now to issue actually prevent the doing of that which has already been done, nor does it appear necessary or desirable in this proceeding to consider whether restitution must be made. We deem it proper, therefore, to limit operation of the writ to further distributions.

It is ordered that the writ of *supersedeas* issue to both trial court and executor staying any further distribution under the orders heretofore entered, pending outcome of the pertinent appeals; bond is not required of petitioners as a condition of the writ.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., concur.

37 Cal.2d 391

GREEN v. BROWN et al.

L. A. 21601.

Supreme Court of California, in Bank.

June 15, 1951.

Action for declaration of rights under conveyance of realty by Thomas E. Green against James O. Brown and Zephrene C. Brown. The Superior Court, Los Angeles County, Carl A. Stutsman, J., rendered judgment for defendants, and plaintiff appealed. The Supreme Court, Carter, J., held that the trial court's judgment had been erroneous in declaring that the deed had reserved a life estate for plaintiff in only an undivided one-half interest in the premises.

Reversed.

Prior opinion, 224 P.2d 476.

1. Joint tenancy ⇐3

A gift to two or more persons for their lives is ordinarily construed as creating estate or estates to endure, not so long only as they are all alive, but until death of last survivor, and gift to person for lives of himself and another creates estate in his favor to endure until death of survivor, donee having an estate for his own life upon death of such other person, while if donee is first to die, estate then assumes characteristics of an estate pur autre vie. Civ.Code, §§ 683, 686.

2. Husband and wife ⇐14(3)

A deed by husband and wife to wife's daughter and daughter's husband, in which words of reservation were that life estate was saved to both grantors in all of property and rights of enjoying same during term of "their natural lives" such words were equivalent to phrases "joint tenancy" or "to survivor of them" and were effective to reserve life estate in whole property for husband as surviving grantor. Civ. Code, §§ 683, 686, 1069.

3. Joint tenancy ⇐9

Where deed had reserved joint tenancy life estate to grantors and survivor grantor had continuously occupied premises, grantees did not acquire title to property by adverse possession by reason of fact that they also had been in continuous, actual possession of property and had paid half of the taxes thereon.

4. Life estates ⇐28

In suit brought by survivor grantor for declaration of rights under conveyance of realty, evidence would support trial court's findings that grantors, who had reserved joint tenancy life estate, had nevertheless given grantees right to occupy property with grantors and that surviving grantor had allowed grantees to expend money for improvements on property upon the understanding that surviving grantor would not interfere with grantees' lifetime home in premises, and such findings sus-

tained trial court's conclusion that surviving grantor's life tenancy was subject to grantees' right to occupy property with grantor.

5. Gifts ⇐25

Where grantors, who had reserved joint tenancy life estate, made oral gift to grantees of right to occupy property with grantors, and grantees accepted said gift by remaining in possession of property and making expenditures for improvements thereon, grantors would be estopped to rely upon statute of frauds or to repudiate gift.

6. Specific performance ⇐85

The part performance required by courts as prerequisite to specific performance of promise to make gift of land is not necessarily any part of agreed exchange for promisor's performance that is to be compelled but may be merely action taken by promisee in reliance upon promise, and such promise will become specifically enforceable against promisor as soon as promisee has so far acted in reliance on promise as to make it unjust not to compel execution of gift.

7. Gifts ⇐25

The principle that party, invoking estoppel against owner of property who has remained silent while such party invoking estoppel claimed ownership and changed position, must be ignorant of true state of title, has no application where there is parol gift, for in such case it is assumed that at time gift was made donor had title and donee knew it, but that donee accepted title as gift and treated it as his property.

8. Gifts ⇐25

In order for promisee under oral promise to make gift of land to establish estoppel against promisor by reason of expenditures made by promisee for improvements thereon, such expenditures must provide lasting benefits and add improvements to land tending to enhance its value over and above value of property to promisee.

9. Gifts ⇐25

Where grantors, with reserved joint tenancy life estate in property with market value of $25,000 and reasonable rental value of $100 per month, permitted grantees to share occupancy, and grantees paid $20 a month on indebtedness against property and half of taxes and utilities and in addition expended $2,100 and other additional amounts in improving property, grantees accepted gift of right to occupy property by such expenditures made for improvements thereon, and the detriment suffered by grantees was sufficient to estop surviving grantor from repudiating gift of occupancy.

10. Appeal and error ⇐1073(1)

In action brought by surviving grantor, for declaration of rights under conveyance of realty in which grantors had reserved joint tenancy life estate, where grantees were entitled, under evidence, to share occupancy of property with surviving grantor until termination of life tenancy, trial court's judgment that surviving grantor's interest was subordinate to paramount actual possession of grantees and limited to his personal use was not sufficiently intelligible or certain, in absence of evidence that grantor's right of occupancy was superior to that of plaintiff or that his right of occupancy was limited to his personal use, and therefore such judgment would have to be reversed.

11. Life estates ⇐17

Where surviving grantor with reserved life estate was estopped to repudiate gift to grantees of right to occupy property with grantor, because of reliance by grantees in making expenditures for improvements on property, grantees would not be entitled to have lien imposed on surviving grantor's life estate for amount of such expenditures.

12. Equity ⇐39(1)

Rule that, in equity, court may decide all issues between parties merely defines equity jurisdiction and scope of relief that may be granted, and does not mean that there does not have to be some basis in law or equity for decision of such issues one way or other.

13. Gifts ⇐48

In action brought by surviving grantor with reserved life estate for declara-

tion of rights under conveyance of realty, trial court did not err in admitting declaration of homestead on property by grantees shortly after execution of deed, even though such declaration would not affect title, where declaration was made with consent and at suggestion of one of grantors and had some relevancy as indicating that gift to grantees of right to share occupancy of property with grantors had been intended by grantors and accepted by grantees.

14. Joint tenancy ⇐10

In action brought by survivor of two grantors, who had reserved joint tenancy life estate, for declaration of rights under conveyance, evidence that no proceedings had been had by survivor to establish death of joint tenant was irrelevant. Probate Code, §§ 1170–1175.

15. Joint tenancy ⇐10

In action by surviving grantor with reserved life estate for declaration of rights under conveyance of realty, testimony by one of grantees to effect that she would not have made improvements on property if she had known that surviving grantor had remarried was relevant on subject of reliance by grantees upon surviving grantor's promise that grantees could share occupancy of property without undue interference by surviving grantor.

Jefferson & Jefferson, Bernard S. Jefferson and Martha Malone Jefferson, Los Angeles, for appellant.

Oscar S. Elvrum, Los Angeles, for respondents.

CARTER, Justice.

Plaintiff and his wife, Etta Green, were the owners as joint tenants of real property, with a home thereon in which they were residing. Living with them were defendants, James Brown and his wife, Zephrene, who was the daughter of Etta by a former marriage. The Browns were paying $25 a month to the Greens. In 1941 the Greens conveyed the property to the Browns and the parties continued to occupy the home, the Browns agreeing to pay the Greens $20 a month on an indebtedness against the property and half the taxes and utilities.

The conveyance above mentioned was made by a deed in which the Greens granted to the Browns the title to the property "subject, however, to the Life Estate hereinafter reserved * * *" The reservation clause to which reference is made reads: "Reserving and Excepting, however, a Life Estate in the Grantors above named in all of the above described property, and the right to use, occupy and enjoy the same and to receive the rents, issues and profits therefrom during the term of their natural lives."

In 1943, Etta Green died. Plaintiff continued to live in the house with the Browns. He remarried and difficulties arose between him and the Browns; the instant action followed.

[1, 2] The trial court determined that under the deed the death of Etta terminated her life estate in an undivided half interest in the property and plaintiff had an estate for his life in an undivided half interest in the property. This is predicated on the proposition that the reservation in the deed was of a life estate in an undivided half interest in each of the grantors, making the grantors tenants in common of a life estate in the property; that if the life estate were in joint tenancy then the survivor would have a life estate in the whole property. This construction of the deed is predicated on the rule that a joint tenancy is created by a transfer to two or more persons when expressly declared by the transfer to be such. Civ.Code, §§ 683, 686. In the light of that rule other factors must be considered. The general rule is stated as follows: "A gift to two or more persons for their lives is ordinarily construed as creating an estate or estates to endure, not so long only as they are all alive, but until the death of the last survivor. And a gift to a person for the lives of himself and another clearly creates an estate in his favor to endure until the death of the survivor, the donee having an estate for his own life upon the death of such other person, while if the donee is the first to

die, the estate then assumes the characteristics of an estate pur autre vie." Tiffany, Real Property, § 49. See Flagg v. Badger, 58 Me. 258; Kenney v. Wentworth, 77 Me. 203; Saunders v. Saunders, 373 Ill. 302, 26 N.E.2d 126, 129 A.L.R. 306; Dow v. Doyle, 103 Mass. 489; Douglas v. Parsons, 22 Ohio St. 526; Ogle v. Barker, 116 Ind.App. 250, 63 N.E.2d 432; Glover v. Stillson, 56 Conn. 316, 15 A. 752; Corbin v. Manley, 291 Ky. 289, 164 S.W.2d 394. The words of the reservation are that a life estate is saved to both grantors in all of the property and the right of enjoying the same (all of it) during the term of "their lives." That is, the lives of both of them must have expired before any part of the use of the property is lost to either of them. Those words are equivalent to the phrases "joint tenancy" or "to the survivor of them." This construction is fortified by the statutory provision that reservations are "to be interpreted in favor of the grantor." Civ.Code, § 1069. There is nothing in Heiden v. Howes, 77 Ohio App. 525, 67 N.E.2d 641, or Guyer v. London, 187 Okl. 326, 102 P.2d 875, relied upon by defendants, contrary to the holding of the foregoing authorities.

[3] Defendants contend that they acquired title to the property by adverse possession because they have been in possession and paid half the taxes. Plaintiff has also been occupying the property. There is no finding on any issue of adverse possession. The trial court found: "That it is true that the cross-complainants and defendants, James O. Brown and Zephrene C. Brown, and each of them, have had the continuous actual possession of said Lot one (1), commonly known as 2202 Juliet Street, ever since December 15, 1941, and that they, and each of them, are now in actual possession of said real property." But, no other elements of adverse possession appear. The court found that Etta died and "said Life Estate of Etta C. P. Green in said [property] ipso facto terminated and vested in said remaindermen, James O. Brown and Zephrene C. Brown, as Joint Tenants, on the date of the death of said decedent," which is simply a conclusion of law based upon the court's erroneous interpretation of the deed, rather than a finding of adverse possession. Moreover, it is found that after Etta's death plaintiff had, pursuant to the deed, a life estate in an undivided half interest in the property.

In its judgment the court determined that plaintiff's life estate in a half interest is further limited in that it is "* * * in all respects subordinate to the paramount actual possession of said property theretofore delivered to said James O. Brown and Zephrene C. Brown, as Joint Tenants, and exclusively limited to said Thomas E. Green's sole occupancy and personal use during the period of his natural life, and not otherwise." That limitation is apparently predicated on its conclusions of law that plaintiff "does not come into Court in the above entitled cause with clean hands, and he is equitably estopped from prevailing in this proceeding and he is guilty of laches." That conclusion is presumably based on the findings that a fiduciary relationship existed between Etta and plaintiff and defendants; that at the time of the marriage of Etta and plaintiff, the latter was in "poor financial circumstances" while Etta had a sum of money which was later increased; that defendants, with plaintiff's consent, have been occupying the property with plaintiff and Etta on a "share and share alike basis"; that in 1942, plaintiff and Etta abandoned a homestead they had declared on the property and defendants made a homestead declaration on the property at plaintiff's and Etta's "recommendations and suggestions"; that plaintiff's "aforesaid remaining vested life estate is in all respects exclusively limited to the sole occupancy and personal use of said [plaintiff] during the period of his natural life, and not otherwise. * * *

"That it is true that thereafter the defendants * * * in the utmost good faith, proceeded to improve said premises with the consent of the plaintiff * * * and on the 21st day of May, 1945, the parties involved in this action made, executed and delivered that certain unrecorded Deed of Trust covering said real property

from Thomas E. Green, a widower, and James O. Brown and Zephrene C. Brown, husband and wife, as Trustor, to Los Angeles Trust and Safe Deposit Company, a California corporation, to secure an indebtedness in favor of Security-First National Bank of Los Angeles in the sum of $2,500.00 and other amounts payable under the terms thereof.

"That it is true that thereafter a demand was made by said Bank for an additional sum of $200.00 for Termite Inspection and control of said premises, and said loan was later cancelled.

"* * * that the defendants * * * discussed the contemplated loans with the plaintiff * * * and he recommended that they secure a loan for the improvement of said property from another source so that the defendants * * * could fully enjoy their lifetime home in said premises; * * * that the defendants * * * obtained $1600.00 from an endowment Life Insurance Policy and borrowed $500.00 from the Postal Credit Union of Los Angeles, without using the plaintiff's * * * credit or encumbering said premises; that * * * defendants, * * * relying upon the statements of plaintiff, * * * that they were in possession of their permanent home, thereafter expended, in the utmost good faith, said sum of $2100.00, and other additional amounts, in repairing, remodeling and improving said premises * * *"

Plaintiff asserts that the evidence does not support those findings. From defendants' evidence it appears that they have been living with the Greens, plaintiff and Etta, since the 1920's. When the home, a 9-room house, the property here involved, was acquired in 1927, they continued to live together under a "share and share alike" basis, as the defendants describe it, whereby the living expenses and expenses of the property were shared by both families. Prior to the execution of the deed in 1941, which conveyed the property from the Greens to the Browns, the latter had been paying the Greens $25 per month, and thereafter they paid less, but they also paid the balance of an indebtedness against the property. In 1941, when the deed was made, and thereafter, defendants were assured by Etta and plaintiff that they would have a permanent home on the property and they would "share and share alike." Defendants have paid, as found by the court, half of the city and county taxes on the property ranging from $138 to $152 each year from 1942 to 1948. Shortly after its execution, the Greens abandoned a homestead they had declared on the property, and at their suggestion, defendants declared a homestead on it. After Etta's death in 1943, plaintiff told defendants that things would continue as usual, "share and share alike" and that they had a permanent home on the property. He ate his meals with them and the taxes were borne equally. Early in 1945, they consulted with him with reference to improvements on the property consisting of redecorating and new furniture. He agreed that they should go ahead and do as they wished. Money was borrowed and the improvements were made, consisting of painting the outside of the house, redecorating some of the interior, and purchasing new furniture. The old furniture was sold with plaintiff's consent and he received the proceeds of the sale. The improvements cost about $4,000. At the time the improvements were made plaintiff said he would need only one room in the house. He repeatedly stated after Etta's death that if he remarried, he would not bring his new wife into the house to live. He remarried in April, 1945, but did not reveal his marriage until the following September, after the improvements were made, at which time he stated that he wanted to move his wife into the house. Defendant, Mrs. Brown, testified, over plaintiff's objection on the ground of irrelevancy, that they would not have made the improvements if they knew he was going to remarry.

[4] This evidence seems sufficient to support the findings. Although it may be, to some extent, consistent with the life estate reserved in the deed, and thus not a basis for a restricted occupancy by plaintiff, yet it is also susceptible of the inference, that even during the plaintiff's life, as well as after his death, defendants were

to have the use and occupancy of the property as a home. The long course of conduct and assurances by plaintiff and Etta could lead defendants to believe that they had a permanent home and plaintiff would not interfere with their occupancy of it as shown by the pattern which had long been followed. There is no direct evidence, as stated by plaintiff, that defendants relied upon plaintiff's assurances and conduct in making the improvements and other expenditures, but we believe it may be inferred. It appears from the evidence that most of the assurances were made several years before the improvements were made, but in view of the fiduciary relationship between the parties, the absence of any withdrawal or repudiation of the arrangement, and plaintiff's acquiescence in the improvements, we cannot say that the trial court was unjustified in its conclusion.

Plaintiff asserts that the following elements of an estoppel are not present here: (1) No showing that plaintiff had any reason to believe defendants were making the improvements in reliance on his assurances; (2) Defendants were as fully aware as plaintiff, or should have been, of the true status of the title (a life estate in Etta and plaintiff); (3) There is no showing of a detriment suffered by defendants in that the improvements were beneficial to defendants' remainder interest and were of slight cost in comparison with the market value of the property as well as its rental value, and were temporary in character.

[5, 6] From the evidence presented, a legal theory upon which a judgment may be based is, that the Greens made an oral gift to defendants of a right to occupy the property with plaintiff; and that defendants accepted said gift by remaining in possession of the property and making expenditures for improvements thereon. An estoppel would then arise against plaintiff to rely upon the statute of frauds or repudiate the gift. The rule is stated as follows: "It has been previously explained that the part performance required by the courts as a prerequisite of specific enforcement is not necessarily any part of the agreed exchange for the defendant's performance that is compelled. It may be merely action in reliance on the defendant's promise. That is particularly evident in the case of a promise to make a gift of land; there is no agreed exchange of any kind, otherwise the transaction would not be a gift. These promises become specifically enforceable as soon as the promisee has so far acted in reliance on the promise as to make it very unjust (perhaps again called a 'virtual fraud') not to compel execution of the gift." Corbin on Contracts, § 441. See Peixouto v. Peixouto, 40 Cal.App. 782, 181 P. 830; Howard v. Stephens, 38 Cal.App. 296, 176 P. 65; Kinsell v. Thomas, 18 Cal.App. 683, 124 P. 220; Rest., Conts., § 197; Kennedy v. Scally, 62 Cal.App. 367, 217 P. 96; Burris v. Landers, 114 Cal. 310, 46 P. 162; Manly v. Howlett, 55 Cal. 94; Anson v. Townsend, 73 Cal. 415, 417, 15 P. 49; Husheon v. Kelley, 162 Cal. 656, 124 P. 231; Alpha Stores, Ltd. v. Croft, 60 Cal. App.2d 349, 140 P.2d 688; Bekins v. Smith, 37 Cal.App. 222, 174 P. 96.

Plaintiff urges, however, that there was no showing that he had reason to believe defendants relied upon the Greens' assurances and gift. He cites Biddle Boggs v. Merced Mining Co., 14 Cal. 279 and Lindley v. Blumberg, 7 Cal.App. 140, 93 P. 894. Those cases involved silence on the part of the owner of property, while another claims ownership and changes his position. There is no element of gift in those cases.

[7] Next, plaintiff relies upon similar cases, Mott v. Nardo, 73 Cal.App.2d 159, 166 P.2d 37; Killian v. Conselho Supremo etc., 31 Cal.App.2d 497, 88 P.2d 214, and Raynor v. Drew, 72 Cal. 307, 13 P. 866, for the proposition that in order to rely on that kind of estoppel the one urging it must be ignorant of the true state of the title. Where, however, there is a parol gift, that principle has no application, for it is assumed that at the time the gift was made, the donor had title and the donee knew, yet the latter accepted it as a gift and treated it as his property.

[8, 9] A more serious objection to defendants' position is that they have not

suffered sufficient detriment to establish an estoppel—that the outlay by them was trifling and not lasting, or to phrase it in the language of part performance, there has not been enough. The reasonable rental value of the property was $100 per month, and its market value was $25,000 at the time the witnesses were questioned. The court found that defendants expended $2,100 and "other additional amounts" in improving the property. There is evidence that they expended $4,100. In addition, the court found that they paid half the taxes on the property for the years 1942 to 1948, and the total taxes for some years were as follows: 1946—$152.39; 1947—$138.01; 1948—$142.40. And, also, it is found that they paid an indebtedness against the property amounting to $286.42. The improvements consisted of painting the exterior of the house, redecorating a portion of the interior, laying carpets, replacing furniture and the removal of some inside fixtures. The rule is stated in Burris v. Landers, supra, 114 Cal. 310, 315, 46 P. 162, 163 that: "* * * the expenditures * * * must be in the nature of lasting benefits and improvements to the land, tending to enhance its value over and above the value of the use of the property to the plaintiff. * * * Slight and temporary improvements, or trivial outlays, made to suit the taste or convenience of the occupant, do not raise an equity in favor of the donee. * * * for, if the value of the expenditures made by the occupant does not exceed the benefit to him of the use of the land without charge or rental, then, generally, and in the absence of other circumstances of hardship shown, he not only will not have been injured, but will in fact have been advantaged, by the promises made." See also Jonas v. Leland, 77 Cal. App.2d 770, 176 P.2d 764. We believe that under all the circumstances here presented, including the fiduciary relationship between the parties, the rule has been satisfied.

[10] Plaintiff urges that the judgment restricting his use of the property is erroneous. We hold that the judgment is erroneous in declaring that the deed reserved a life estate for plaintiff in only an undivided half interest in the premises. It further contains the clause heretofore quoted, that plaintiff's interest is "subordinate" to the "paramount actual possession" of defendants and is limited to his personal use. Precisely what is meant by such an adjudication is difficult to ascertain. There is no evidence that defendants' right of occupancy was to be superior to that of plaintiff, or that the latter's right was limited to his personal use, except casual remarks made by plaintiff that he would only need a room or two for himself and that he would not bring a second wife into the house. In that state of the record we do not believe that that portion of the judgment is sufficiently intelligible or certain. As we have seen, the evidence shows that both plaintiff and Etta, and later plaintiff, as well as defendants, were to remain on as usual as occupants of the property. One concrete way of expressing it might be that defendants own an undivided half interest in the property for plaintiff's life and the whole thereafter, and plaintiff owns an undivided half interest for his life, all by reason of a parol gift by plaintiff and Etta of a half of their life estate, but it has not been stated with certainty in the judgment, therefore, it must be reversed.

[11, 12] Plaintiff claims that the court erred in imposing liens in favor of defendants on plaintiff's life estate. The court impressed a lien in favor of defendants for $2,100, for the improvements and for the half of the taxes paid by defendants. It is difficult to find any basis for that adjudication. If the basic theory is a parol gift followed by a detriment in reliance thereon, it would seem the detriment suffered should not be charged against the plaintiff-donor as a debt. Defendants-donees have received the property. Defendants cite no authority to support that part of the judgment, except cases holding that in equity the court may decide all the issues between the parties. That may well be true, but it does not mean that there does not have to be some basis in law or equity to decide such issues one way or the other. It is merely a rule of equity jurisdiction and the scope of the relief that may be granted.

[13] Finally, plaintiff complains of rulings on the admission of evidence. There was admitted the declaration of a homestead on the property by defendants shortly after the execution of the deed. It is true that such declaration, in itself, was not relevant, for it would not affect title, but as it was made with the consent and at the suggestion of Etta, it had some relevancy as indicating that a gift of the right to occupy the property was intended by the Greens and accepted by defendants.

[14] Evidence was admitted that no proceedings had been had by plaintiff to establish Etta's death pursuant to §§ 1170–1175 of the Probate Code. We agree that it was irrelevant.

[15] The testimony by Mrs. Brown that she would not have made the improvements on the property if she had known plaintiff had remarried was admissible. It had some relevancy on the subject of reliance by defendants, that is, that they relied upon the assurances that they could occupy the property without undue interference by plaintiff.

Judgment reversed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

EDMONDS, J., concurs in the judgment.

104 Cal.App.2d 806

GSCHWEND et al. v. STOLL et al.

Civ. 7961.

District Court of Appeal, Third District, California.

June 18, 1951.

Hearing Denied Aug. 16, 1951.

Action by Ellis G. Gschwend and Lorenzo E. Gschwend against H. L. Stoll and Stoll Lumber Company to recover unpaid purchase price of logs. The Superior Court, Mendocino County, Lilburn Gibson, J., gave judgment for plaintiffs and defendants appealed. The District Court of Appeal, Third District, Schottky, J., pro tem., held that trial court's findings that sellers delivered logs in the agreed sum of $7,258.05, and that $5,949.24 had been paid on account, included a finding that the price of the logs had not been reduced from $24 to $21 per thousand feet.

Judgment affirmed.

1. Trial ⇐397(1)

When a trial court does not find upon all material issues it commits error.

2. Trial ⇐395(5)

Finding of trial court should be on ultimate facts, since such a finding includes finding of probative facts necessary to sustain it.

3. Pleading ⇐8(1)

Ultimate facts are required to be pleaded.

4. Trial ⇐395(1)

In order to determine the sufficiency of a finding of fact, it is only necessary to ascertain what statement of that fact is required in a pleading.

5. Trial ⇐397(6)

In sellers' action to recover $7,258.05 for logs, sold at $24 per thousand feet, trial court's finding that sellers sold and delivered logs to buyers for $7,258.05 and that $5,949.24 had been paid on account, included a finding that the price had not been reduced from $24 to $21 per thousand feet.

6. Appeal and error ⇐931(3)

In sellers' action to recover $7,258.05 for logs sold at $24 per thousand feet, where trial court in opinion stated that there was ample evidence that market value of logs was $24 per thousand feet, and rendered judgment for $7,258.05, the opinion could not be relied on to show that issue as to whether price had been reduced to $21 per thousand feet was left undetermined, although there was no specific finding on issue.

7. Appeal and error ⇐717

Opinions of trial judges are not part of the decision and may not be used to impeach findings.

Spurr & Brunner, John Lawrence, Ukiah, for appellants.

Mannon & Brazier, Ukiah, for respondents.

SCHOTTKY, Justice pro tem.

Plaintiffs and respondents brought this action against defendants and appellants to recover the sum of $1308.81. The complaint contained two common counts: (1) "That within two years last past defendants became indebted to plaintiffs in the agreed sum of $7,258.05 for lumber, logs and lumbering materials sold and delivered," and "that only $5,949.24 has been paid"; and (2) "That within two years last past the defendants became indebted to plaintiffs in the sum of $7,258.05 for lumber, logs, and lumbering materials sold and delivered," and "that only $5,949.24 has been paid." Defendants' answer denied the allegations of the complaint, and offered to allow judgment for $396.27 plus $12 costs to be taken against them.

The court in its findings found that all of the allegations of the complaint were true, and found further that "plaintiffs sold to defendants * * * lumber, logs and lumbering materials in the aggregate agreed and reasonable sum of $7,258.05, and said defendants have paid only $5,949.-24 on account thereof." The court concluded that plaintiffs were entitled to judgment against defendants in the sum of $1,308.81, and this appeal is from the judgment entered in accordance with said findings and conclusions.

Appellants do not contend that the evidence is insufficient to support the findings and judgment, but the principal, and in fact the only, contention of appellants is that the court erred in not making a specific finding as to whether or not the price of the logs had been reduced from $24 to $21 per thousand feet. Appellants proposed such a finding but the court simply found that respondents sold and delivered to appellants logs in the "agreed and reasonable sum of $7,258.05," and that so much had been paid on account.

[1–4] It is, of course, the law that a trial court commits error when it does not find upon all material issues, but it is also the law that findings should be on ultimate facts, and it is unnecessary to state the probative or evidentiary facts, for a finding of ultimate facts includes a finding of all of the probative necessary to sustain it. Since ultimate facts are required to be pleaded, it is only necessary in order to determine the sufficiency of a finding of fact to ascertain what statement of that fact is required in a pleading. (24 Cal.Jur., sec. 203, p. 968.) See, also, Nicolds v. Storch, 67 Cal.App.2d 8, 153 P.2d 561; Hitchcock v. Lovelace, 47 Cal.App.2d 818, 830, 119 P.2d 151; Pellegrino v. Los Angeles Transit Lines, 79 Cal.App.2d 40, 42, 179 P.2d 39.

[5] The findings in the instant case were as broad as the pleadings, and when the trial court found that respondents sold and delivered to appellants logs in the agreed and reasonable sum of $7,258.05, and that $5,949.24 had been paid on account, this necessarily included a finding that the price had not been reduced from $24 to $21. In Pacific States S. & L. Co. v. Perez, 51 Cal.App.2d 84, at page 94, 124 P. 2d 184, at page 189, the court said: "In response to the claim that there is no finding on the issues of fraud and confiscation, it is sufficient to call attention to the finding of the lower court that the claims of defendants to the property are without right and that they have no interest in the property. Where an omitted finding must be inferred from a consideration of the findings actually made, an appellate court will recognize the necessary inference and consider the finding in question as having in effect been made. Reiniger v. Hassell, 216 Cal. 209, 211, 13 P.2d 737; Publishers Distributing Service v. Southern Cal. School Book Depository, 14 Cal.App.2d 448, 58 P.2d 401."

Furthermore, in their answer appellants did not plead any modification or change in the original agreement, nor do the pleadings specifically mention any agreement or modification except that the complaint alleges and the answer denies that the sum due for logs was the agreed sum.

[6, 7] Appellants do not contend that the findings assigned by court fail to cover

all of the issues made by the pleadings, but appellants argue that the opinion of the trial court filed eleven days before the findings of fact and conclusions of law were signed may be resorted to to show that the issue of fact as to whether the price had been reduced from 24 to $21 was left undetermined. Appellants state that "in his order for findings the trial judge stated that in his opinion it made no difference whether defendant H. L. Stoll spoke to plaintiff Lorenzo Gschwend the words to which he had testified which were that he 'would have to buy the logs for $21.00 or quit milling.'"

There are two answers to this argument. First: The opinion of the trial judge, read as a whole, shows clearly that the trial court believed that there had been no modification in the agreement or change in the price, for the court stated: "There is ample evidence in the record that the market value of logs during all the period involved was $24.00 per thousand feet; and as above indicated there is no satisfactory evidence in the record that the original agreement to pay $24.00 per thousand was ever modified or changed." Secondly: As stated in 24 Cal.Jur., sec. 174, p. 924, the well-settled general rule is: "Opinions of trial judges, although welcomed by appellate courts as aids to the justices in discovering the processes by which judgments may have been reached, are not binding. Such an opinion is no part of the decision, and may be modified, or nullified by the findings of fact and conclusions of law. The opinion is merged in and controlled by the judgment; * * * and may not be used to impeach the findings."

We are satisfied that the findings covered all of the material issues and ultimate facts, and further that if a specific finding had been made on the evidentiary matter, as requested by appellants, such finding would have been adverse to appellants.

The judgment is affirmed.

PEEK, Acting P. J., and VAN DYKE, J., concur.

CAFFREY v. TILTON.

Civ. 14701.

District Court of Appeal, First District, Division 1, California.

June 15, 1951.

Hearing Granted Aug. 9, 1951.*

Action by Richard Caffrey against B. A. Tilton, individually and doing business under the name and style of Embe Gear Works, for declaratory relief relating to contract under which defendant had purportedly employed plaintiff to procure business on commission basis. The Superior Court for the city and county of San Francisco, Theresa Meikle, J., entered order which denied defendant's motion for change of venue, and defendant appealed. The District Court of Appeal, Peters, J., held that contract to pay commissions which was silent as to place of payment when read with statute making place of payment, in absence of express provision to contrary, place where creditor can be found, was express obligation to pay or perform at place at which plaintiff was working and that venue in county in which plaintiff was working was proper under statute as place of performance expressly provided for by contract.

Order affirmed.

1. Venue ⇐7

Under venue statute providing in part that when defendant has contracted to perform obligation in particular county, county in which obligation is to be performed is, among others, proper county for trial of action founded on obligation and that county in which obligation is incurred shall be deemed to be county in which it is to be performed unless there is special contract in writing to contrary, obligation sued upon must be expressed rather than implied under contract before there can be special contract in writing specifying that place of performance is other than that in county in which obligation is incurred. Code Civ. Proc. § 395.

2. Principal and agent ⇐81(4)

Under statute that in absence of express provision to contrary offer of performance might be made at option of debtor wherever person to whom offer ought to be made can be found, contract which appointed plaintiff defendant's representative in

* Subsequent opinion 240 P.2d 273.

certain area and which stated that defendant would pay plaintiff commissions on business secured in such area but which was silent as to place of payment was express contract, when read with statute, that defendant would pay commissions in area in which plaintiff was working and in which he could be found. Civ.Code, § 1489, subd. 2.

3. Venue ⇐7

Under venue statute providing that when defendant has contracted to perform obligation in particular county, county in which obligation is to be performed, among others, shall be proper county for trial of action founded on such obligation and that county in which such obligation is incurred shall be deemed to be county in which it is to be performed unless there is special contract in writing to contrary action on contract entered into in Los Angeles but which was express contract that commissions for business procured by plaintiff be paid in San Francisco and which was brought to recover commissions, was properly brought in San Francisco since contract manifested express contrary intent. Code Civ.Proc. § 395; Civ.Code, § 1489, subd. 2.

F. T. Leonetti, Glendale, for appellant.

Frank J. Baumgarten, San Francisco, for respondent.

PETERS, Presiding Justice.

Defendant B. A. Tilton, individually and doing business under the name and style of Embe Gear Works, appeals from an order of the San Francisco Superior Court denying his motion for a change of venue to Los Angeles, the county of his residence.

The clerk's transcript discloses the following: Plaintiff, Richard Caffrey, filed, in San Francisco, a "Complaint for Declaratory Relief" against defendant. It is therein alleged that plaintiff is a resident of San Francisco; that defendant's gear manufacturing business has its principal place of business in Los Angeles; that on March 1, 1948, plaintiff and defendant entered into a written agreement whereby defendant employed plaintiff to sell merchandise and to generally represent defendant in northern California; that for these purposes plaintiff was to maintain a place of business in San Francisco; that the written agreement is attached to and incorporated in the complaint as Exhibit "A"; that thereafter plaintiff entered upon performance of the agreement and represented defendant in northern California; that under the terms of the contract plaintiff was to receive a 10 per cent commission on work secured by defendant through the efforts of the plaintiff; that one of the consumers within plaintiff's territory was the Dalmo Victor Company of San Mateo; that plaintiff solicited business from that company and secured for defendant a contract for the sale of merchandise in excess of $50,000; that thereafter defendant in violation of the contract wrote a letter to plaintiff attempting to exclude Dalmo Victor Company from the original contract after plaintiff had already secured the business and become entitled to the commission; that such letter is attached to and incorporated in the complaint as Exhibit "B"; that in this fashion defendant seeks, without justification, to exclude Dalmo Victor Company from plaintiff's territory, and seeks to avoid the payment to plaintiff of the 10 per cent commission which was agreed upon and previously paid up to the date of filing the complaint; that plaintiff has performed all terms of the contract, but defendant seeks to modify or terminate it.

The prayer is for a declaration that plaintiff is entitled to the 10 per cent commission on business solicited and obtained from Dalmo Victor Company now accrued or to accrue in the future; that plaintiff be granted a declaratory judgment ordering that plaintiff have and recover the 10 per cent commission on accrued and future shipments to Dalmo Victor Company; and for a declaration of the rights and duties of the parties under the contract.

Exhibit "A" is a letter on the letterhead of Embe Gear Works addressed to plaintiff in San Francisco and signed by B. A. Tilton. The letter first tells plaintiff to have some cards printed, at the expense of defendant, and then continues:

"We would be pleased to have you represent us, and any work we receive through your solicitation we will pay you 10%.

"The following are some of the companies that we have done work for." Then follows a list of seven companies in the bay area including two in San Francisco and also including "Dalmo Victor Company, San Mateo."

Exhibit "B" is also on the letterhead of the Embe Gear Works, is addressed to plaintiff in San Francisco, is signed by B. A. Tilton, and is dated November 1, 1949. By this letter defendant informed plaintiff "not to enter into negotiations for us with the Dalmo-Victor Co. This is because of the precarious nature of their financial setup." The letter continues that if plaintiff does not want to continue to represent defendant subject to the condition "you are to consider this letter as a revocation of our agreement."

Defendant moved for a change of venue to Los Angeles, supporting the motion with an affidavit and an amended affidavit averring that he is a resident of Los Angeles; that the contract was entered into in Los Angeles, and that the contract was not to be performed by defendant in San Francisco. Plaintiff filed a counter-affidavit admitting that the contract was accepted in Los Angeles, but averring that the performance of the contract by plaintiff was in the San Francisco bay area and that the commissions due from the defendant to plaintiff were payable in San Francisco.

The trial court denied the motion and defendant appeals.

The propriety of the trial court's action must be determined by a proper interpretation of section 395 of the Code of Civil Procedure. That section, so far as is pertinent here, provides: "In all other cases, except as in this section otherwise provided, and subject to the power of the court to transfer actions or proceedings as provided in this title, the county in which the defendants, or some of them, reside at the commencement of the action, is the proper county for the trial of the action. * * * When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary."

Here it is an admitted fact that this is a personal action, that defendant resides in Los Angeles, and that the contract was entered into in Los Angeles, the acceptance having been mailed from there. Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 74 P. 855, 65 L.R.A. 90. Therefore, defendant is entitled to have the action tried in Los Angeles unless the obligation was to be performed in San Francisco and in determining whether it was to be so performed we must conclusively presume that it was to be performed where entered into "unless there is a special contract in writing to the contrary." Thus, the case narrows down to the issue as to whether there was a "special contract in writing" providing for defendant's performance in San Francisco.

This problem is by no means a simple one. One of the leading cases interpreting the "special contract" exception of section 395 is Armstrong v. Smith, 49 Cal.App.2d 528, 122 P.2d 115. In that case plaintiff contracted to construct a dwelling for defendant in Alameda County. The contract was executed in San Francisco, and defendant resided in San Mateo County. The complaint alleged that plaintiff was prevented from performing by reason of the refusal of defendant to allow plaintiff to construct the building. The complaint was filed in Alameda County. Defendant's motion for a change of venue to the county of his residence—San Mateo—was denied. This was reversed on appeal. The court held that the breach being sued upon was of an implied obligation under the contract—i. e., the implied obligation of defendant not to interfere with performance by the plaintiff. The court carefully dis-

tinguished this implied obligation of defendant from the agreement of defendant to pay for the house—an express obligation. It was held that, when the *obligation* sued upon is implied, there can be no special contract in writing as to place of performance within the meaning of section 395. In this connection the court stated, 49 Cal.App. 2d at page 536, 122 P.2d at page 119: "* * * if there is embodied in the agreement giving rise to the action an express stipulation with respect to the obligation in question, the requirements of the statute are met. It is our opinion that before an action may be brought under section 395, supra, in the county where the obligation forming the basis of the suit is performable, the contract must specifically state the place of performance of such obligation. If the contract so states, then the provision as to place of performance is both express and special."

[1] Thus, the "special contract in writing" within the meaning of section 395, means that the obligation sued upon must be express and not implied.

[2, 3] We do not think that the Armstrong case is determinative of the question here presented. The present case is for declaratory relief to have it ascertained whether or not defendant has breached the contract in relation to commissions earned from business secured from Dalmo Victor Company. The complaint, while one for declaratory relief, is founded on a contract obligation. By it plaintiff is trying to collect, judicially, the commissions earned and to be earned on the Damo Victor Company business. In the Armstrong case the *obligation* sued upon was an implied obligation. There the contract did not expressly provide that the defendant would permit plaintiff to perform the contract. This promise was implied. The basis of the cause of action was that defendant had failed to live up to that promise. That obligation being implied, there was no "special contract in writing" within the meaning of section 395. But in our case the *obligation* sued upon is in writing, and express. By the letter of March 1, 1948, which constitutes the contract of the parties, the plaintiff was appointed the representative of defendant and the defendant promised that "any work we receive through your solicitation we will pay you 10%." Then are listed various companies in Alameda, Santa Clara, San Mateo and San Francisco counties with which defendant has heretofore done business, including the Dalmo Victor Company. Thus, there is a written contract appointing plaintiff defendant's representative which lists companies located in the bay area, including San Francisco, and which states that defendant will pay plaintiff commissions on business secured by him. The obligation to pay commissions, the breach of which obligation forms the basis of the complaint, is express. The only thing that is implied is the place of payment. The law supplies that deficiency. Section 1489 of the Civil Code reads as follows:

"In the absence of an express provision to the contrary, an offer of performance may be made, at the option of the debtor: * * *.

"2. Wherever the person to whom the offer ought to be made can be found * * *." This section must be read into the contract. Under it, the place where plaintiff could be found and was performing was in San Francisco. Mary Len Mine v. Ind. Acc. Comm., 64 Cal.App.2d 153, 148 P.2d 106; Castleman v. Scudder, 81 Cal. App.2d 737, 185 P.2d 35; Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 74 P. 855, 65 L.R.A. 90; Hale v. Dolly Varden Lumber Co., —— Cal.App.2d ——, 230 P.2d 841.

Thus, it follows that there is a special express contract that the defendant will pay commissions to plaintiff, and the law requires that, on such a contract, the payments be at the residence of the creditor. Therefore, there was a special as well as an express contract that the defendant would pay the commissions in San Francisco. This being so, San Francisco is a proper county, under section 395 of the Code of Civil Procedure, to hear the action.

The order appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

104 Cal.App.2d 746

CONNOR v. PACIFIC GREYHOUND LINES et al.

Civ. 14677.

District Court of Appeal, First District, Division 1, California.

June 14, 1951.

Action by John E. Connor against Pacific Greyhound Lines (a corporation) and Norman D. White for personal injuries sustained while a passenger in bus owned by defendant corporation and driven by individual defendant which collided at intersection with automobile driven by another party. The Superior Court in and for the City and County of San Francisco, Franklin A. Griffin, J., entered judgment on verdict in favor of defendants, and plaintiff appealed. The District Court of Appeal, Peters, J., held that evidence sustained finding that bus driver who had not observed vehicle which entered intersection against red light at high rate of speed until just prior to collision had exercised high degree of care required of common carriers.

Judgment affirmed.

1. Carriers ⇐318(7)

In action by passenger against bus company and driver of bus for personal injuries arising out of collision at intersection between bus and automobile which had entered intersection at high speed against red light, evidence sustained finding the bus driver had exercised high degree of care required by common carrier.

2. Negligence ⇐68

Person exercising ordinary or high degree of care is not required to assume that others will break law unless he knows or should have known that such might occur.

3. Carriers ⇐321(12)

In action by passenger against bus company and driver of bus for personal injuries arising out of collision of bus with automobile at intersection when automobile had proceeded into intersection at high rate of speed against red light, instruction that driver of vehicle entering intersection on go signal with exercise of due care is not required to maintain lookout for vehicle which might enter intersection in violation of traffic signal and that if bus driver was exercising ordinary care he had right to assume, in absence of circumstances which should have caused him to think differently, that driver of other vehicle possessed normal faculties which he would exercise in ordinary care for his own safety and safety of others, was proper.

4. Trial ⇐296(3)

Where instructions in suit by passenger against bus driver and bus company for personal injuries arising out of collision with automobile at intersection stated duty of care owed by carrier to persons in vehicles using streets without reference to high degree of care owed by carriers to passengers, and other instructions comprehensively stated duty of care owed to passengers, jury could not reasonably have misinterpreted instructions and there was no error.

5. Negligence ⇐68

It is general rule that one exercising care for his own concerns cannot assume that others will do the same if it is reasonably apparent that such other persons are not going to perform their duty.

6. Carriers ⇐321(19)

In suit by passenger against driver of bus and bus company for personal injuries sustained in collision with automobile at intersection in which jury had been fully instructed on doctrine of res ipsa loquitur and had been told that whether or not inference raised by doctrine had been met by defendant was jury question, instruction that if after considering all evidence jury found that accident might have been caused in several different ways and proximate cause could not be determined, then there could be no recovery by plaintiff, did not remove inference of doctrine from jury's consideration and was not error.

7. Carriers ⇐321(19)

In action by passenger against driver of bus and bus company for personal injuries sustained in collision at intersection in which there was no evidence of faulty equipment on bus, and in which jury had been fully instructed on doctrine of res ipsa loquitur instruction that finding of some

act or omission of defendant driver at time of accident which proximately caused injuries of plaintiff was necessary for verdict for plaintiff was not error.

8. Carriers ⇐321(3)

In action by passenger against driver of bus and bus company for personal injuries sustained in collision at intersection in which jury had been fully instructed on doctrine of res ipsa loquitur and in which there was no evidence of any kind showing negligence on part of defendants other than that indicating that driver of bus had been negligent, instruction on highest degree of care which related primarily to duty of driver of bus without reference to other possible acts of negligence of defendants was not error.

9. Carriers ⇐321(12)

In action by passenger against bus driver and bus company for personal injuries sustained when bus collided at intersection with automobile when driver had alternatives of either attempting to stop bus or of accelerating to miss automobile, instruction that duty of carrier to its passengers was not absolute theoretical one calling for certain fixed course of conduct under all circumstances but that if driver of bus was confronted by emergency not caused by his own negligence fact that he chose alternative that involved risk to passenger's safety was not proof of negligence, but that character of emergency, seriousness of alternatives involved, and duty to persons other than passenger must be considered in determining whether there was negligence, was not error.

10. Carriers ⇐280(1)

Duty of carrier to passengers is not so absolute that it requires complete disregard of rights of non-passengers who might be in danger.

11. Appeal and error ⇐928(4)

When record does not show at whose request an instruction was given, it must be presumed that instruction was requested by appellant.

12. Appeal and error ⇐882(12)

Where passenger brought action against bus driver and bus company for personal injuries sustained in accident which occurred at intersection with another automobile and passenger's offered instruction on unavoidable accident was given, that instruction on unavoidable accident offered by bus company and driver should not have been given because there was no evidence justifying instruction on such matter could not be urged by passenger on appeal.

13. Carriers ⇐305(1)

Where passenger was injured when bus in which he was riding collided with automobile which had proceeded into intersection and into path of bus at high rate of speed and against red light, if accident was proximately caused by negligence of driver of automobile, then it was unavoidable accident as far as bus driver and bus company were concerned.

14. Trial ⇐296(3)

In action by passenger against bus driver and bus company for personal injuries in which jury had been fully instructed on degree of care owed by carrier to passengers in other instructions alleged ambiguity on degree of care in instructions on unavoidable accident was not misleading to jury.

15. Trial ⇐260(8)

Refusal of requested instruction in suit by passenger against bus driver and bus company for personal injuries which was proper instruction but which was merely cumulative of instructions already given was not error.

Herbert O. Hepperle, San Francisco, for appellant.

Robert L. Lamb, San Francisco, for respondents.

PETERS, Presiding Justice.

John E. Connor, the plaintiff, was injured when a Pacific Greyhound Lines bus in which he was a passenger, and which was operated by defendant Norman D. White, collided with an automobile being driven by John Kane, at the intersection of Bayshore Highway and San Bruno Avenue in San Mateo County. The jury

brought in a verdict in favor of defendants. From the judgment entered on that verdict plaintiff appeals.

At the scene of the collision, Bayshore runs north and south, and San Bruno runs east and west. There are three traffic lanes running in each direction on Bayshore, divided by an unpaved area in the center. In addition, there are "turn-off" roads on each side of Bayshore. San Bruno is a two-lane highway. There are automatic traffic lights on each corner of the intersection, and also in the unpaved dividing strip of Bayshore. In addition, there are street lights in the area. At the time of the accident the bus was proceeding north on Bayshore, and the Kane car was going west on San Bruno.

Connor, the plaintiff, was a railroad brakeman. On the evening of June 28, 1948, he arrived in San Jose by train, and purchased transportation on a Greyhound bus leaving for San Francisco at about midnight. Connor seated himself on the driver's side on the aisle about three or four rows from the front of the vehicle. Admittedly, the bus left San Jose nearly an hour late.

White, the driver of the bus, testified that he was going about 45 miles per hour just before the collision; that he was then about 50 minutes late; that just before he entered the intersection he pulled over to the fast inside northbound lane; that he was not weaving in and out of traffic; that when he was about 250 to 300 yards from the intersection the traffic lights were green for north and southbound traffic; that when he entered the intersection the lights were still green; that as he approached the intersection there were two automobiles waiting for the lights to change in the center and outside northbound lanes of Bayshore; that these vehicles were just starting to cross with the green lights as he approached; that just as he entered the intersection he saw the Kane car coming from his right; that the Kane car hit the bus just behind the right front wheel; that the impact threw the bus into the left guardrail; that the brakes of the bus were knocked out of commission by the collision; that he tried to get the moving bus off the guardrail, but, just before he got to an overpass beyond the intersection, the steering apparatus went out; that he then had no control over the bus and it proceeded until it crashed into a concrete abutment which is part of the overpass. Connor, and the driver, and others, were injured as a result of the collision.

Connor testified to a quite different version of the accident. He testified that the bus was weaving in and out of traffic and travelling at about 60 miles per hour before entering the intersection; that he was looking out the left window of the bus just as it entered the intersection so that he did not observe the traffic lights at that moment; that just as the bus entered the intersection it took a sudden swerve to the left; that he turned his eyes to the right and saw, through the windshield of the bus, yellow lights to his left just about the level of his eyes; that at that moment he noticed the Kane automobile, and the collision occurred. On cross-examination Connor was confronted with a statement signed by him and given to a representative of Greyhound about two weeks after the accident which contains several damaging admissions. Among other things, the statement declares: "I was awake but have no idea as to our speed, nor do I know in which lane we were travelling. Suddenly our driver swerved to the left and I then saw an auto headed straight at the right side of the bus and the next instant it crashed head-on into the side of the bus * * * as I did not notice the signals, I know nothing about them. I have a faint recollection of seeing a yellow light, but I do not remember where it was, and do not know whether or not it was a traffic light. My truthful opinion is that the driver of the car that struck the bus was to blame for the accident. I consider that the bus driver was a safe, cautious and careful driver, and I would not hesitate to ride with him again." The statement which was not in the handwriting of Connor, was three pages long. Connor admitted that he signed each page, and that he knew that it had been secured by a representative of Greyhound. He denied reading the

statement before he signed it, and denied making the statements that White was a cautious driver, or that the accident was the fault of Kane. He admitted that, as a railroad man, he knew the custom about statements being taken by carriers after an accident.

By stipulation the deposition of Curtis L. McCullough taken in another action growing out of the same accident was read into evidence, he being unavailable at the time of the present trial. McCullough, a sailor, was standing on the northeast corner of the intersection at the time of the accident. He was trying to hitch hike a ride to San Francisco. He stated that he saw the Kane car coming from the east when it was some distance away; that when he first saw the Kane car coming, the traffic lights at the intersection were green for east-west traffic; that they changed to amber when Kane was 50 to 75 feet from the intersection, and changed to red when Kane was about 5 feet from the corner. Although there are some inconsistencies in his story, he was positive that the Kane car entered the intersection when the lights were red for east-west traffic. He stated that the Kane car approached the intersection at about 40 to 45 miles per hour and did not slow down as it entered; that he saw the two cars going north in the outside and middle lanes of Bayshore and saw them start to cross and saw Kane dart in front of them and clear those two cars by about three feet; that he heard the operators of those cars slam on their brakes; that he saw the bus coming on the inside northbound lane of Bayshore, and Kane, after passing in front of the other two cars, crashed into the side of the bus; that the bus was then going about 25 to 30 miles per hour. The bus had the green light when it entered the intersection.

Kane, the driver of the private automobile involved in the collision, testified that he was going about 20 miles per hour when he entered the intersection; that when he entered, the lights were green for east-west traffic and changed to amber while he was in the intersection; that he first saw the bus when he was crossing the middle of the three northbound lanes of Bayshore; that he honked his horn and applied his brakes but could not avoid the collision.

There is no dispute but that the weather was clear, the roadways dry, and that all the vehicles involved had their lights on.

[1] Appellant argues that, considering the high degree of care owed by a carrier to a passenger, the evidence is insufficient to support the judgment. This argument is largely predicated upon the statement of White, the driver of the bus, that, just before the accident, "I just happened to glance to the right and I see [sic] this car just entering the intersection from the east, and it was too late to try to stop." It is urged that, as a matter of law, this indicates a lack of that high degree of care required of a carrier toward its passengers; that White's testimony that he was watching the traffic and looked east and west before entering the intersection and did not see the Kane car does not create a conflict where the other evidence shows either that he did not look, or, if he did, he must have seen. Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513, and Chrissinger v. Southern Pacific Co., 169 Cal. 619, 149 P. 175, are cited in this connection. The Zibbell opinion affirmed a judgment for plaintiff. The Chrissinger case affirmed a judgment of nonsuit. It is quite apparent that in the present case the jury found that the accident happened solely because of the negligence of Kane in entering the intersection against a red light. That implied finding is amply supported. White testified that he looked east on San Bruno while he was approaching the intersection. The evidence shows that the two private vehicles in the outside and middle lanes of Bayshore started across the intersection before the bus did. McCullough's testimony was to the effect that the Kane car entered the intersection at a high rate of speed against the red light. Under these circumstances the question as to whether White exercised the high degree of care required of common carriers was for the jury. Its finding that such care was exercised is amply supported.

Appellant's main attack is upon the action of the trial court in giving or refusing

to give certain instructions. Error is assigned in the giving of the following two instructions:

[2, 3] "The driver of a vehicle who enters an intersection pursuant to a green 'Go' signal and is exercising due care is not required to maintain a lookout for a vehicle which might enter the intersection from another highway in violation of the traffic signal."

"If the bus driver himself was exercising ordinary care as he approached the point where the accident occurred, and so long as there was nothing in the circumstances that caused him, or would have caused a reasonably prudent person in his position to think differently, he had a right to assume that the driver of the automobile that collided with defendants' bus was possessed of normal faculties of sight and hearing, and of ordinary intelligence, and that he was using and would use those faculties in the exercise of ordinary care for his own safety and for the safety of others."

[4, 5] Appellant's argument is that these instructions told the jury that the bus driver had no duty to maintain a lookout for a vehicle that might enter the intersection in violation of law, and, in effect, directed a verdict for defendants if the bus had the right of way. Moreover, so it is urged, these instructions told the jury that ordinary care did not require the bus driver to maintain a lookout for vehicles that might be violating the law. It is the law that one in the exercise of ordinary or a high degree of care is not required to assume that others will break the law unless he knows or should have known that such might occur. There is nothing in Holder v. Key System, 88 Cal.App.2d 925, 200 P.2d 98, cited by appellant, to the contrary. In that case an instruction was offered to the effect that one proceeding with a "Go" signal is not negligent in failing to keep a lookout for vehicles that might enter the intersection in violation of the signal. The court held that it was not error to refuse this instruction, first, because the subject matter was covered by other instructions, and second, because a motorman who knew that his train would change the traffic signals to green for his train was required to keep a lookout for vehicles in the crossing if he knew or should have known that such vehicles might be in the crossing when the signals were changed. This is one phase of the general rule that one exercising care for his own concerns cannot assume that others will do the same if it is reasonably apparent that those others are not going to perform their duty. Stickel v. San Diego Elec. Ry. Co., 32 Cal.2d 157, 195 P.2d 416. The challenged instructions correctly state the general rule and the exception thereto.

Appellant also attacks these instructions on the ground that they fail to state the high degree of care required of a carrier toward its passengers, and impose on such carrier only the duty of ordinary care. The two challenged instructions cannot be read alone. In the present case the jury was instructed in detail, at length, and correctly, as to the duty owed by a carrier to its passengers. The challenged instructions obviously purported to state the duty of care owed by a carrier to other persons and vehicles using the streets, and not the duty of care owed to passengers. In view of the clear and extensive instructions given on the duty of care owed passengers, the jury could not, reasonably, have otherwise interpreted the instructions. Reilly v. California Street Cable R. R. Co., 76 Cal.App. 2d 620, 173 P.2d 872; Dieterle v. Yellow Cab Co., 53 Cal.App.2d 691, 128 P.2d 132.

It is next urged that certain instructions given by the court negatived the doctrine of *res ipsa loquitur*, which admittedly is applicable as between carrier and passenger. Proper instructions on the doctrine of *res ipsa loquitur* were given. They are lengthy, detailed and adequate. Among other things, these instructions, with great clarity, informed the jury of the inference of negligence arising in such cases, and also stated that this inference of negligence, by itself, might sustain plaintiff's burden of proof if not overcome by evidence of defendant. These instructions are not challenged by appellant who tacitly admits that they were adequate. But appellant does object to the following three instruc-

tions, which were not given in order but were scattered throughout the charge:

"If, after considering all of the evidence, you find that the accident might have been caused in several different ways and you cannot determine from the evidence what was the proximate cause of the accident, then there can be no recovery by the plaintiff and I instruct you to find a verdict for the defendants."

"In order for you to find a verdict in favor of the plaintiff in this action, it is necessary that you find from a preponderance of the evidence that some act or omission of the defendant driver, Norman White, at the time and place of the happening of the accident in question was negligent; and also that such negligence, if any, was a proximate cause of the injuries received by the plaintiff, if any."

"The term 'highest degree of care' which was the duty owed by the defendants to the plaintiff means the highest degree of care which can be reasonably expected of and used by a person in the operation of a common carrier or conveyance for hire. If defendant White used this degree of care immediately before and at the time of the happening of this accident, then I instruct you he was not negligent. If you find that he was not negligent, then your verdict must be in favor of the defendants, Pacific Greyhound Lines and Norman White."

Appellant urges that these three instructions conflicted with the instructions on *res ipsa loquitur*, and, in effect, negatived that doctrine. This result is accomplished by a giving to each of the challenged instructions a strained construction, and by then treating each of them as if they stood alone, and as if they were the only instructions given on the subject. The entire charge, of course, must be read to ascertain the meaning and significance of any one instruction. When so read, in view of the clear, detailed and correct instructions on *res ipsa loquitur*, it is perfectly clear that the jury could not possibly have been confused.

[6] Appellant objects to the first instruction above quoted, contending that under it he was required to prove the specific cause of the accident in violation of the rule of Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258, and that the instruction, in effect, took the inference of negligence out of the case, in violation of the rule of Ybarra v. Spangard, 93 Cal. App.2d 43, 208 P.2d 445. Properly construed, it is quite clear that the challenged instruction merely pointed out to the jury, somewhat awkwardly, that it must consider all of the evidence in determining the issue of proximate cause. In view of the specific instructions on *res ipsa loquitur* in which the jury was told quite clearly that whether or not the inference raised by the doctrine had been met by defendant was a jury question, the challenged instruction cannot reasonably be construed as removing the inference from the jury's consideration.

[7] Complaint is made of the second instruction on the ground that it takes out of the case all questions of negligence in the maintenance of its equipment by Greyhound, and requires a negligent act or omission by the driver before the jury could find that defendant company was contributively negligent. While the instruction is not particularly appropriate, there was no error in giving it. The case was tried by appellant on the theory that the driver of the bus was negligent and that such negligence was one of the proximate causes of the accident. There is not one word of testimony indicating that the bus had any faulty equipment. Appellant's own witnesses testified that the lights of the bus were on. It is true that the driver of the bus testified that *after* the bus hit the guardrail the brakes went out because the impact broke the brake line. While this last portion of his testimony may be a conclusion, it came in without objection, and there is not one word of testimony to the contrary.

[8] The third quoted instruction is challenged on somewhat similar grounds, that is, that it defines "highest degree of care" only in relation to the duty of the driver of the bus and necessarily excluded other possible acts of negligence of respondents. What was said of the second quoted in-

struction is equally applicable here. There was no evidence of any kind charging any other act of negligence on the part of respondents except the charge that the driver was negligent.

The appellant next argues that it was prejudicial error to give the following instruction on sudden emergency: "The duty of a carrier to its passengers is not an absolute, theoretical one that calls for a certain fixed prescribed course of conduct under all circumstances. Thus, if you should find that the driver of the bus was confronted by an emergency not caused by his own negligence, wherein he was required to make a choice of courses of conduct, both dangerous for someone, the fact that he chose a course that involved the risk of plaintiff's safety is not, in itself, proof of negligence. The character of the emergency, the situation confronting him, the relative seriousness of the hazards involved, the duty to any person other than plaintiff—these things all must be considered by you in determining whether there was negligence."

[9] Appellant contends that there was no evidence that warranted the giving of this instruction. He urges that such an instruction could properly have been given only if there had been evidence that there were alternative courses of action open to the bus driver, and contends that the evidence shows that no such alternatives here existed. Of course, an instruction on sudden peril should be given only where "at least two courses of action are present after the danger is perceived and where no negligence is chargeable to the person to whom those courses of action are open" Perry v. Piombo, 73 Cal.App.2d 569, 572, 166 P.2d 888, 890, but in this case the instruction was proper because the evidence is susceptible of the interpretation that the driver of the bus did have alternative courses of conduct after he saw Kane proceeding against the signal. Appellant relies upon one statement made by the driver of the bus that he saw the Kane car as he entered the intersection and then it was "too late to try to stop or anything." This one statement cannot be separated from the balance of the driver's testimony. The entire statement of the driver reads as follows: "Well, I was—just as I entered the intersection I just happened to glance to the right and I see [sic] this car just entering the intersection from the east, and it was too late to try to stop or anything, so I sort of gave way and hit my brakes as he hit me. I saw I couldn't get ahead of him. I tried to go on through before he could contact me, because I knew I couldn't stop, and just as he hit me I hit my brake." Thus, the driver did consider the possibility of stopping or accelerating, but decided to continue as he was. In other words, in the sudden emergency, he decided that all that he could do was proceed as he was going.

[10] Appellant also complains of the instruction on the ground that it fails to recognize that, even in an emergency, the duty of a carrier to its passengers is paramount to its duty to others. Of course, it is not the law, as is at least implied by appellant, that the duty of a carrier to its passengers is so absolute and so great that it requires a complete disregard of the rights of non-passengers who may be in danger. All the instruction does is to tell the jury that, where a driver of a carrier is faced with alternative courses of conduct which might involve danger to the passengers, it is not necessarily negligent to have chosen the alternative that turned out to be dangerous to appellant.

[11, 12] Appellant also claims that it was error to have given an instruction on unavoidable accident. The record shows that there were two instructions given on this subject. It is assumed by the parties that respondents proposed one of these instructions. Immediately following this instruction appears another on the same subject. The record does not show who proposed it. Respondents charge that it was offered by appellant, and appellant does not challenge this statement. Moreover, where the record does not show at whose request an instruction was given, it must be presumed that it was requested by the appellant. See cases collected 2 Cal.Jur. p. 869, § 509, at p. 870; 1 Ten Yr.Supp. p. 524; 1950 Supp. p. 222. Thus, the situation is one where both parties offered instructions on a

particular subject and the court gave both. Now appellant urges that the instruction offered by respondents should not have been given because there was no evidence that would justify giving an instruction on that subject matter. Obviously, appellant, by offering an instruction on the subject, must have believed that the issue of unavoidable accident was in the case. In such a situation appellant cannot legally complain that the court instructed on the subject. Creamer v. Cerrato, 1 Cal.App.2d 441, 36 P.2d 1094.

[13] Moreover, there was substantial evidence that the accident was unavoidable so far as the bus driver was concerned. If the accident was proximately caused by the negligence of Kane it was "unavoidable" as far as respondents are concerned. Jolley v. Clemens, 28 Cal.App.2d 55, 82 P.2d 51; Creamer v. Cerrato, 1 Cal.App.2d 441, 36 P.2d 1094. Therefore, it was not error to instruct on the doctrine.

[14] Appellant also attacks the form of the instruction on this issue offered by respondents, claiming that it stated the duty of the carrier as less than that of highest degree of care. In view of the detailed specific instructions given on this subject, the ambiguity in the challenged instruction could not possibly have misled the jury.

Appellant next objects to the refusal of the court to give the following instruction: "You are instructed that on the occasion of the accident involved in this controversy the defendant Pacific Greyhound Lines only had to use ordinary care as between it and the private automobile that it collided with, but this is not the degree of care required under the law on the part of the defendant Pacific Greyhound Lines as applied to the plaintiff, and you must not be misled by reason of the relationship of the defendant Pacific Greyhound Lines' bus and the private automobile because at all times it was the duty of the Pacific Greyhound Lines in the transportation of plaintiff to use the highest degree of care for his safety."

[15] The instruction undoubtedly was a proper one, and it would not have been error to have given it. But, had it been given, it would have been merely cumulative. There can be no doubt that the jury was instructed on both subjects discussed in the instruction in separate instructions. Therefore, it was not error to fail to give another instruction on the same subjects.

We have read the entire charge to the jury. In our opinion, the jury was fully, fairly and adequately instructed.

The judgment is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

ZENTZ v. COCA COLA BOTTLING CO. OF FRESNO.

Civ. 4308.

District Court of Appeal, Fourth District, California.

June 19, 1951.

Rehearing Denied July 11, 1951.

Hearing Granted Aug. 16, 1951.*

Action by Mary E. Zentz, owner of a restaurant, against Coca Cola Bottling Company of Fresno, for injury caused by the breaking of a bottle placed in plaintiff's cooler by defendant. The Superior Court of Fresno County, Paul A. Eymann, J., assigned, gave judgment for plaintiff and defendant appealed. The District Court of Appeal, Fourth Appellate District, Griffin, J., held that giving of general instruction on doctrine of res ipsa loquitur, as qualified by additional clauses, was not prejudicial error.

Judgment affirmed.

1. Negligence ⇐121(2)

Doctrine of res ipsa loquitur does not apply unless defendant had exclusive control of thing causing injury and the accident is of such nature that it ordinarily would not occur in absence of negligence by defendant.

2. Negligence ⇐121(2)

The doctrine of res ipsa loquitur may be applied upon the theory that defendant had control at time of alleged negligent act, although not at time of accident, provided plaintiff proves that condition of in-

* Subsequent opinion 247 P.2d 344.

strumentality had not been changed after it left defendant's possession.

3. Negligence ⇐121(3), 138(2)

In restaurant owner's action against bottling company for injury sustained when bottle exploded, evidence that driver who delivered for company placed bottles in owner's cooler, that there were no other bottles than those of company in cooler, and that when reaching in cooler to serve customer a bottle exploded cutting the leaders in owner's arm, was sufficient to support inference that bottle was not damaged by an extraneous force after delivery, and to require instruction on doctrine of res ipsa loquitur.

4. Negligence ⇐138(2)

In action by restaurant owner against bottling company for injury sustained when bottle exploded, general statement in instruction to effect that from happening of accident there arose an inference that the proximate cause was some negligent conduct on part of company, was not erroneous when qualified by clause to effect that before such instruction may be applied it must be shown that the instrument which injured owner was under control of company at time cause of injury was set in motion.

Ray W. Hays, James N. Hays, Fresno, for appellant.

L. Kenneth Say, Fresno, for respondent.

GRIFFIN, Justice.

Plaintiff was injured from the breaking of a coca cola bottle placed in plaintiff's cooler by defendant company. The facts surrounding this appeal are quite fully related in Zentz v. Coca Cola Bottling Co., 92 Cal.App.2d 130, 206 P.2d 653, where a judgment for plaintiff was reversed on account of an erroneous instruction offered by plaintiff and given by the trial court.

The first contention of defendant on this appeal is that plaintiff failed to lay the proper foundation for the giving of an instruction on the doctrine of res ipsa loquitur, and that such instruction was not applicable to the facts established, i. e., that there was no showing that the defendant had exclusive control of the instrumentality causing the injury; that plaintiff failed to show that there was a probability of defendant's negligence, and failed to show that she exercised due care during the period she was in possession of the bottle, citing Honea v. City Dairy, Inc., 22 Cal.2d 614, 618, 140 P.2d 369; La Porte v. Houston, 33 Cal.2d 167, 169, 199 P.2d 665; Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 457, 150 P.2d 436.

Additional evidence was produced on the retrial pertaining to these features of the case. Plaintiff testified that several cases of coca cola were delivered to her place of business about 3 p. m. and placed in her cooler by the driver of defendant company; that no other brand of bottles were in the case and that a short time thereafter, to serve a customer, she reached in and a bottle exploded and the leaders in her arm were cut; that she never touched a bottle at that time or after defendant's driver placed them in the cooler.

The general manager for defendant company testified under sec. 2055 of the Code of Civil Procedure that he was familiar with the operation of defendant's plant; that it operated about eight hours per day in September, 1946, and that from four to eight hours per day, five days a week, would be a fair average for the year 1946; that the plant produced approximately 140 bottles of coca cola per minute, in excess of 42,000 per day, and in excess of 10,000,000 per year; that one man made visual inspection of these bottles as they passed by him in such rapidity; that two other employees made general inspections of the washed and reissued bottles at the time they were thus cleansed; that during that year no outside nor independent laboratory tests were made of any bottles purchased by it from the manufacturer of glass bottles. He then explained the method of bottling and stated that the only test given them in the plant was a visual inspection from the outside as to any apparent defects; that after the year 1946, the company had tested, in outside laboratories, about 256 bottles. He then stated that oc-

casionally bottles burst during the process of bottling and while loading on trucks but the ones he saw, burst by reason of the manner in which the bottles were handled. Pictures of the cleaning and bottling machines were received in evidence and their operation was fully explained to the jury.

The driver who delivered and placed the coca cola bottles in the cooler at plaintiff's place of business testified that he remembered seeing bottles, other than coca cola bottles, in the cooler at the time; that when putting the coca cola bottles in the cooler he remembered breaking a bottle of it because he took four bottles at a time in his hand and reached in the cooler and hit a bottle, other than a coca cola bottle, with one of the coca cola bottles and it broke in his hand. Plaintiff stated that she was "sure" there were no bottles other than coca cola bottles in the cooler when the driver filled it because she was completely out of cold drinks until the driver brought the cases of coca cola indicated.

[1, 2] It is the rule that res ipsa loquitur does not apply unless (1) defendant had exclusive control of the thing causing the injury, and (2) the accident is of such a nature that it ordinarily would not occur in the absence of negligence by the defendant. However, many authorities state that the happening of the accident does not speak for itself where it took place sometime after defendant had relinquished control of the instrumentality causing the injury. Under the more logical view the doctrine may be applied upon the theory that defendant had control at the time of the alleged negligent act, although not at the time of the accident, provided plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant's possession. Escola v. Coca Cola Bottling Co., supra.

[3] Upon an examination of the record, the evidence appears sufficient to support a reasonable inference that the bottle here involved was not damaged by any extraneous force after delivery to the restaurant by defendant. It follows, therefore, that the bottle was in some manner defective at the time defendant relinquished control, because sound and properly prepared bottles of carbonated liquids do not ordinarily explode when properly handled.

In Escola v. Coca Cola Bottling Company, supra, where a bottle of beverage breaking in a restaurant employee's hands was charged with gas under pressure and the charging of the bottle was within the exclusive control of the defendant bottling company, it was held that an inference of defendant's negligence would arise, under the doctrine of *res ipsa loquitur,* if the bottle was excessively charged, or where an explosion resulted from a defective beverage bottle containing a safe pressure; and that the bottling company would be liable if it negligently failed to discover the flaw if the defect were visible. It held the doctrine of *res ipsa loquitur* may well be applied on the theory that defendant had control of the instrumentality causing the injury at the time of the alleged negligent act, although not at the time of the accident, provided plaintiff first proves that the condition of the instrumentality had not been changed after it left defendant's possession and that when a defendant produces evidence to rebut the inference of negligence which arises on application of the doctrine of *res ipsa loquitur* it is ordinarily a question of fact for the jury to determine whether the inference has been dispelled.

While there was evidence that employees of plaintiff made prior sales of coca cola that day, we conclude that the evidence sufficiently established plaintiff's right to a proper instruction on the doctrine of *res ipsa loquitur.* See cases cited in Escola v. Coca Cola Bottling Co., supra, 24 Cal.2d at page 457, 150 P.2d at page 438.

[4] The next complaint is that the instruction, as given, was prejudicially erroneous in that it made the general statement: "* * * from the happening of the accident involved in this case, as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendant * * *." Such a general instruction would be erroneous unless properly qualified. Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 203 P.2d 522;

Honea v. City Dairy, Inc., supra; Zentz v. Coca Cola Bottling Co., supra. The only question is whether the instruction, as given, was properly qualified. All the qualifications set forth in the instruction given in the case on the former appeal, 92 Cal. App.2d at page 132, 206 P.2d at page 655, were repeated, and these additional qualifications were added: "A defendant is deemed to have control at the time of the alleged negligent act although not at the time of the accident, provided plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant's possession. The defendant is not charged with the duty of showing that something happened to the bottle after it left its control and management. In order to be entitled to the benefit of the doctrine of res ipsa loquitur, the plaintiff must show that every person who moved or touched the bottle after it left the control of the defendant, did so with due care, and that during said time the bottle was not accessible to extraneous harmful forces."

In this connection the argument is that by the general instruction, the court, in effect, told the jury that plaintiff *was* injured by a *coca cola bottle* belonging to defendant, as distinguished from some other bottle, and did not leave to the jury the determination of that question. Had this been the only provision of the instruction on that subject, defendant may have had cause for its complaint. One of the qualifying clauses states that before such an instruction may be applied it must be shown that the "instrumentality" by which the injury to plaintiff was proximately caused, was in the possession and under the exclusive control of defendant at the time the cause of the injury was set in motion, and the injury was caused by some act or omission incident to defendant's management. No prejudicial error thus appears. Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 520, 203 P.2d 522.

The instruction, as qualified, met the complaint pointed out on the previous appeal. No prejudicial error appears in giving the instruction as thus qualified.

Defendant does not attack the sufficiency of the evidence to support the verdict of $2500 damages rendered to plaintiff by the jury.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

104 Cal.App.2d 771

PHALANX AIR FREIGHT, Inc. v. NATIONAL SKYWAY FREIGHT CORP. et al.

Civ. 14447.

District Court of Appeal, First District, Division 2, California.

June 15, 1951.

Hearing Denied Aug. 9, 1951.

Phalanx Air Freight, Inc., a corporation, sued National Skyway Freight Corporation, a corporation, and others to recover damages for breach of contract. The Superior Court in and for the City and County of San Francisco, Edward P. Murphy, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Dooling, J., held that plaintiff could not recover both for office expenses and loss of gross profit, since office expenses were an element of cost which would have been incurred in earning the profits, and that the plaintiff could not recover both the value of stationery rendered useless by defendant's conduct and the cost of new stationery to replace it.

Judgment modified and affirmed.

Prior opinion, 225 P.2d 654.

1. Carriers ⇐69(3)

In breach of contract action brought by freight forwarder against uncertified air carrier based on fact that defendant had ceased its operations by air to and from San Francisco, evidence sustained finding that San Francisco Airport was "originating airport mutually agreed upon by parties" within meaning of language used in contract under which carrier was bound

to load merchandise to be forwarded at "originating airports mutually agreed upon by parties".

2. Contracts ⇐154

Contract is to be construed so as to give it reasonable effect. Civ.Code, § 1643.

3. Contracts ⇐10(1)

Provision for termination of contract by one party at will has effect of rendering contract illusory, but a provision for termination after notice for fixed period does not have that effect.

4. Contracts ⇐10(3)

Where freight forwarder agreed to ship all freight over which it had control in airplanes operated by uncertified air carrier and carrier agreed to load merchandise for shipment at times and at originating airports mutually agreed upon by parties, contract was not illusory because of lack of mutuality, notwithstanding provision making contract terminable by forwarder at any time by giving carrier at least 30 days' notice. Civ.Code, §§ 1605, 1643.

5. Appeal and error ⇐882(3)

In breach of contract action brought by freight forwarder against uncertified air carrier, where carrier's counsel insisted at trial that there was only one contract between parties and rejected suggestion of plaintiff's only witness that there was supplemental month to month contract and secured stipulation to effect that there was only one contract, carrier would be bound by that theory of case, not only consented to but persistently insisted upon by its counsel at trial, and on appeal carrier could not successfully urge that there was no enforceable contract because essential term of contract was left to future agreement of parties in monthly renegotiations.

6. Appeal and error ⇐882(3)

The theory upon which a case is tried in court below must be adhered to on appeal.

7. Appeal and error ⇐173(2)

In breach of contract action brought by freight forwarder against uncertified air carrier, where defendant's contention that plaintiff could not recover because its operations were illegal under Civil Aeronautics Act was not urged in trial court and depended upon questions of fact raised for the first time on appeal, appellate court would not consider question.

8. Carriers ⇐69(4)

In breach of contract action by freight forwarder against uncertified air carrier, plaintiff could not recover both for office expenses and loss of gross profit, since office expenses are element of cost which would have been incurred in earning profits, nor could plaintiff recover both value of stationery rendered useless by defendant's conduct and cost of new stationery to replace it.

9. Statutes ⇐223.2(24)

The Civil Code section limiting recovery for breach of obligation to amount which party could have gained by full performance of contract and Civil Code section setting forth primary measure of damages for breach of contract must be read together. Civ.Code, §§ 3300, 3358.

10. Damages ⇐6

One whose wrongful conduct has rendered difficult ascertainment of damages cannot escape liability because damages cannot be measured with exactness. Civ.Code, §§ 3300, 3358.

11. Carriers ⇐69(5)

In breach of contract action by freight forwarder against uncertified air carrier, jury was entitled to estimate, as best it could from evidence before it, good will lost by reason of breach. Civ.Code, §§ 3300, 3358.

Burns & McKeever and James E. Burns, all of San Francisco, for appellants.

Dudley Harkleroad, Rudolph J. Scholz, San Francisco, for respondent.

DOOLING, Justice.

Plaintiff had judgment against defendant for damages for breach of contract. Defendant was operating airplanes as an uncertified carrier, i. e., it was not authorized

to hold itself out as a common carrier but was authorized only to operate as a contract carrier. Being thus unable to solicit freight in less than plane-load shipments defendant arranged with plaintiff to engage in the business of freight forwarding, whereby plaintiff would enter into contracts with individual shippers for the shipment by air of less than plane-load lots and after combining such individual shipments into plane-load lots forward them by defendant's planes. Pursuant to this arrangement plaintiff engaged in the business of freight fowarding in San Francisco using the facilities of defendant for the air-transportation.

On November 15, 1946, the parties reduced their contract to writing and it is for the breach of this written contract that plaintiff recovered, based on the fact that on January 10, 1947, defendant ceased its operations by air to and from San Francisco.

[1–4] On this appeal defendant argues that the written contract did not bind it to maintain air-operations to and from San Francisco and that the contract was illusory because of lack of mutuality. By the terms of the writing defendant bound itself "to transport said shipments for Forwarder (plaintiff), all upon and subject to and in accordance with provisions set forth in this contract * * * Air Carrier (defendant) shall load said merchandise on the airplanes of Air Carrier at the times and at the originating airports mutually agreed upon by the parties." Attached to the agreement as an exhibit was a schedule of rates which included rates "San Francisco and New York" and "San Francisco and Chicago." The evidence further showed that both before and after the execution of this writing plaintiff's business with defendant was in San Francisco. The conduct of the parties fully supports the finding that the San Francisco airport was an "orginating airport mutually agreed upon by the parties" within the meaning of that language as used in the contract. It is hornbook law that a contract is to be construed to give it a reasonable effect, Civ.Code, sec. 1643; 6 Cal.Jur., Contracts, sec. 169, p. 271, and any other construction of the contract here in question would do violence to this salutary rule.

The contract contained a provision making it terminable by plaintiff "at any time by giving Air Carrier at least thirty (30) days notice." This did not render the contract illusory as contended by defendant. While a provision for termination by one party at will has that effect a provision for termination after notice for a fixed period does not. Brawley v. Crosby etc. Foundation, Inc., 73 Cal.App.2d 103, 113 et seq., 166 P.2d 392; 1 Williston on Contracts, rev. ed., sec. 105, p. 365; 17 C.J.S., Contracts, § 100(g), p. 453. Plaintiff bound itself to ship by defendant's planes "all freight over which it has control" and it was bound to do this until notice of termination and for thirty days thereafter. It thus agreed to confer a benefit and suffer a prejudice which afforded consideration for defendant's promises to it. Civ. Code, sec. 1605.

[5, 6] By paragraph eleventh of the writing: "The rates which are enumerated on Schedule A and the volume guaranteed by Forwarder will be renegotiated monthly; but this renegotiation does not affect any provision set forth in this contract." Defendant argues that "it is clear that if no rate or volume guarantees were negotiated for a specific point, as none were negotiated for San Francisco after January, 1947, plaintiff cannot recover for any damages purported (sic) caused by defendant's termination of the instant contract, since, in effect, we have here a contract which was to be renegotiated monthly and no renegotiations having occurred no binding contract existed for subsequent months."

We were impressed with this argument of counsel for appellant and made it the basis of our first opinion in this case in which we ordered the judgment reversed. On rehearing, however, we are convinced from an examination of the record that by reason of the conduct of counsel in the trial court this question is not open to the appellant on this appeal. It seems necessary to quote rather extensively from the reporter's transcript to make clear the position there taken by appellant's

counsel. During the cross-examination of plaintiff's only witness the following occurred:

"Q. *They didn't enter into a new contract every month with you?* A. No.

"Q. *They just sent you a new sheet with the new rates on it, did they not?* A. That's right.

"Q. *And they asked you to select from those sheets the volume by weight you thought you would tender to them for the month, is that so?* A. That's right.

"Q. So the contract was signed November the 16th, (sic) and *that is the only contract you entered into—* * * *

"The Witness: That was the rider which you call your supplemental month to month contract.

"Mr. Burns: Q. *Rider, yes, but not contract. Will you stipulate, Mr. Harkleroad, there was only one contract and it was entered into on November 15, 1946?* A. Well, there was a preliminary negotiation for the contract, which we have not raised any question on. So, with the exception of that.

"Mr. Harkleroad: We will stipulate that the November 15, 1946 contract constitutes the only contract we are relying on, subject to the supplemental monthly statements. Is that satisfactory?

"Mr. Burns: Yes. I think it is the only contract you can rely on, because it is the only one you have sued for breach of.

"Q. So the testimony will be straight in the record, *there is only the one contract* and that sets forth the terms under which you agreed to act as freight forwarder, and those terms were substantially in accordance with your agreement with the Flying Tiger line? A. Yes." (Emphasis ours.)

In view of counsel's insistence that the November 15 contract was the only contract between the parties and that the parties did not enter into a new contract every month, his rejection of the suggestion of the witness that there was a "supplemental month to month contract" and finally his express request for a stipulation, which he received, that "there was only one contract and it was entered into on November 15, 1946" appellant is bound by the theory of the case, not only consented to but persistently insisted upon by its counsel at the trial. It is elementary law in the appellate procedure of this state that "the theory upon which a case is tried in the court below must be adhered to on appeal." (2 Cal.Jur. 237.)

[7] The contention that plaintiff cannot in any event recover because its operations were illegal under the Civil Aeronautics Act was not urged in the trial court and depends on questions of fact which are raised for the first time on appeal. For this reason we will not consider that question. Levitt v. Glenn L. Clark & Co., 91 Cal.App.2d 662, 205 P.2d 747; Svistunoff v. Svistunoff, 94 Cal.App.2d 651, 211 P.2d 352; Gelb v. Benjamin, 78 Cal.App. 2d 881, 178 P.2d 476; Grimes v. Nicholson, 71 Cal.App.2d 538, 162 P.2d 934.

[8] Damages were awarded by the court for the following items in the following amounts: Sales literature, tariffs, placards, notices to the trade and calling cards, office stationery, invoices and envelopes containing reference to defendant as the carrier of the freight, rendered valueless by defendant's action—$378.40; advertising as defendant's forwarder in newspapers and trade journals, likewise rendered valueless—$500; anticipated gross profit lost—$2500; expenses of operation subsequent to breach while plaintiff was unable to earn revenue—$2750; purchase of new stationery eliminating reference to defendant—$345; cost of advertising and notices to trade with reference to cessation of operations through defendant —$175; loss of good will—$3000.

It is obvious that plaintiff should not recover $2500 for loss of anticipated gross profit and $2750 for expenses of operation of the business during the period when that gross profit would have been received. The loss of gross profit is a proper item of damage since plaintiffs are out of pocket that amount through the defendant's breach, but their expenses of operating the business would as well have continued if the contract had not been breached. It is equally clear that while loss of stationery etc. bearing reference to defendant as

the carrier is a direct damage caused by the breach, plaintiff cannot have both the cost of stationery rendered useless and the cost of stationery to replace it. It must have stationery if it continues in business whether it represents defendant or some other carrier. The items of $2750 cost of operation and $345 for new stationery, totalling $3095, should not have been allowed.

[9–11] Appellant attacks the allowance of any damage except loss of net profit, citing section 3358, Civil Code: "no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides". The primary measure for breach of contract is section 3300, Civil Code: "For the breach of an obligation arising from contract, the measure of damages * * * is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

The two sections must be read together. As a result of the breach plaintiff is out of pocket $2500 anticipated gross profit, $3000 loss of good will, $500 advertising rendered valueless, $378.40 stationery etc. rendered valueless and $175 necessarily expended in advertising the cessation of its business as a forwarder for defendant. If the contract had been fully performed plaintiff would "have gained" (sec. 3358) the value of all of these items. It would have gained $2500 gross profit which would have offset its expense of operation by that amount; it would have gained the useful value of the advertising and stationery etc. which were rendered valueless; it would have gained the benefit of its good will which was damaged to the extent of $3000; and it would have gained the $175 which it was compelled to expend in advertising that it no longer represented defendant. Cf. Henderson v. Oakes-Waterman, Builders, 44 Cal.App.2d 615, 112 P.2d 662.

The supreme court said in Zinn v. Ex-Cell-O Corp., 24 Cal.2d 290, 297–298, 149 P.2d 177, 181. "One whose wrongful conduct has rendered difficult the ascertainment of the damages cannot escape liability because the damages could not be measured with exactness."

Future profits and the value of the good will of a recently established business which has not yet begun to operate at a net profit may be difficult to estimate. The difficulty is not of plaintiff's, but of defendant's making. "'In determining the amount of damages * * * the jury was entitled to estimate as best they could from the evidence before them * * * the good will * * *.' * * * 'Undoubtedly, in cases like this entire accuracy is impossible, and some difficulty is encountered in accurately assessing the damages * * * but it must not be forgotten that such difficulty would have been avoided had appellant taken care that no occasion should arise through his tort requiring such assessing of damages.'" Johnson v. Snyder, 99 Cal.App.2d 86, 89–90, 221 P.2d 164, 166, quoting from Schuler v. Bordelon, 78 Cal.App.2d 581, 586, 177 P.2d 959.

We conclude that the judgment should be reduced from $6628.40 to $3533.40. The judgment is so modified and as modified is affirmed; each party to bear its own costs on appeal.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; SCHAUER, J., dissenting.

105 Cal.App.2d 39

BOARD OF SUP'RS OF PLACER COUNTY et al. v. RECHENMACHER.

Civ. 8058.

District Court of Appeal, Third District, California.

June 23, 1951.

Proceeding for a writ of mandate by the Board of Supervisors of the County of Placer, Board of Supervisors of the County of El Dorado, and others, against Lillian Rechenmacher, County Clerk and Ex-Officio Clerk of the Board of Supervisors of the County of Placer to require the respondent to sign school district bonds. The District Court of

Appeal, Van Dyke, J., held that alleged irregularities in the school bond election did not invalidate the issue of bonds and that notice of election would not be required to be published in both counties because the school district lay in two counties.

Writ granted.

1. Schools and school districts ⇐97(7)

Where alleged irregularity was in the published notice with respect to the scheduled maturities in number and amount of school bonds to be issued but the school trustees' order with respect to the bonds was regular in all respects, the alleged irregularity did not affect substantial rights of the taxpayers and electors so as to invalidate the bonds. Education Code, § 7401 to 7595, 7402.

2. Schools and school districts ⇐97(7)

Generally, errors and irregularities in a school bond issue proceedings which do not increase or change the burden upon the taxpayers and could not mislead any elector to his prejudice will not invalidate bonds.

3. Schools and school districts ⇐97(7)

Where supervisors ordered school bonds which had been duly voted, issued in accordance with the proceedings, except with respect to five of the bonds which according to the trustee's order, were to mature in 1965, and which the supervisor advanced the maturities by two years placing them in the number of bonds that were to mature in 1963, the irregularity did not affect the substantial rigts of the electors and taxpayers so as to invalidate the issue of bonds. Education Code, §§ 7403, 7407, 7463.

4. Schools and school districts ⇐97(4)

Where school district was located partly in two counties, notice of a school bond election was not required to be posted and published in both counties but it was sufficient that the notices were posted in the district in one county. Education Code, § 7402.

5. Schools and school districts ⇐97(4)

The statute providing for publication of notice of election of school bond issue in a newspaper if there is one, in any county in which any part of the district is situated did not require that publication of notice be in the newspaper in each county in which a part of the district may lie and a publication in a newspaper in one county was sufficient. Education Code, § 7402.

Al B. Broyer, Dist. Atty. Placer County, Roseville, Frank Gillio Deputy Dist. Atty. Placer County, Auburn, Robert Roberts, Dist. Atty. El Dorado County, Placerville, for appellant.

Lillian Rechenmacher, in pro per.

VAN DYKE, Justice.

Petitioners ask that a writ of mandate be issued, directing the respondent, the County Clerk of the County of Placer, to sign as such official, bonds of the Auburn Joint Union Elementary School District of Placer County and El Dorado County. It appears from an agreed statement of facts that proceedings have been carried through intended to authorize the issuance and sale of these bonds, but it is claimed by respondent that certain matters occurring during the proceedings have resulted in the invalidity thereof to the extent that the bonds, if issued, would be void. The school district is partly in Placer and partly in El Dorado. Ninety-five per cent is in Placer County. The board of trustees of the district (hereafter called "the trustees") on November 20, 1950, ordered the calling of an election to be held in the district on December 19th following, for the purpose of submitting to the electors thereof the question whether bonds of said district should be issued and sold in the total amount of $210,000. Notice of the election was published in the Auburn Journal, a newspaper printed and published in Placer County. The election was held and resulted in there being cast a total of 895 votes, of which 674 were in favor of issuing the bonds, 212 were against and 9 were cast in blank. More than the necessary two-thirds having voted for the issuance of the bonds, the respective boards of supervisors of the two counties adopted orders for the issuance of the bonds.

It appears that there were certain contradictions relative to the total of the bonds

proposed to be issued and the schedule of maturities thereof, which developed during the proceedings. As required by the statutes, the trustees fixed the table of maturities so that, disregarding maturities not material here, bonds numbered 131 to 150 would mature in 1963, those numbered 151 to 180 in 1964 and those numbered 181 to 210 in 1965. The published notice of election, while stating that the total bonded debt was to be the sum of $210,000, contained a schedule of maturities differing from that set up by the trustees in these particulars: Bonds numbered 131 to 155 would mature in 1963, those numbered 156 to 185 would mature in 1964 and those numbered 186 to 215 in 1965. No bonds numbered above 210 were provided for in the trustees' order. The total amount of bonds included in the published notice was $5,000 in excess of what the order called for. The notices which were posted were correct and did not contain the error in the published notice. It is stipulated that a great deal of publicity was given to the bond election and a high percentage of votes was cast and there is no indication that there was ever any doubt in fact as to the total amount of bonds which it was proposed to issue. Thus in the issue of the Auburn Journal of November 21st, the first issue in which the notice was published, the matter of a bond election was featured in a news story on the front page, the heading in bold type reading: "$210,000 School Bond Election December 19." And, as we have noted, although the maturity schedule as published listed five too many bonds, so that an elector, adding them, would see that they totaled $5,000 more than $210,000, yet in the forepart of the same notice, in stating the first proposition to appear on the ballot, it was said that it would be whether or not the district would incur a bonded indebtedness in the sum of $210,000. The erroneous table of maturities appeared in the closing part of the notice. This part of the notice first repeated the statement that the bonds proposed to be issued would be $210,000 in aggregate principal amount, which was correct, and then proceeded to set up the erroneous table of maturities which would, in principal amount, aggregate $215,000.

After the election returns were canvassed, the board of supervisors of each of the two counties passed a resolution providing for the issuance of $210,000 worth of bonds. The resolutions provided for the form of the bonds in accordance with the statute. The boards did not fall into the same error which had appeared in the published notice as to the total of bonds to be issued, but nevertheless the schedule of maturities does differ from that contained in the order of the trustees. Where the latter's order called for 20 bonds numbered 131 to 150 to mature May 1, 1963, the boards' schedule of maturities called for 25 bonds numbered 131 to 155 to mature on that date. Where the trustees' order called for 30 bonds numbered 151 to 180 to mature May 1, 1964, the boards' orders called for 30 bonds numbered 156 to 185 to mature on that date, and where the order of the trustees called for 30 bonds numbered 181 to 210 to mature May 1, 1965, the boards' orders called for 25 bonds numbered 186 to 210 to mature on that date. The boards' orders did not order issuance of any bonds numbered above 210. The boards' orders differed from the trustees' order and from the posted notice only in advancing the maturities of five bonds from 1965 to 1963.

The statutory provisions for the issuance of school district bonds are found in Division 3, Chapter 17, of the Education Code, Sections 7401 to 7595. Section 7401 provides in substance that when in the judgment of the governing board of any school district it is advisable the board shall call an election to submit to the electors of the district the question whether bonds of the district shall be issued and sold for the purpose of raising money for purposes stated in the section. The action taken by the trustees of the subject district complied with the provisions of this section. Section 7402 provides that the election shall be called by posting notices signed by a majority of the governing board in at least three public places in the district and it is not contended that the trustees did not cause these notices to be properly posted. The section

then provides that if there is a newspaper of general circulation published in any county in which any part of the district is situated, the notice shall be published therein at least once in each calendar week for three successive calendar weeks prior to the election. The publication was made in the Auburn Journal and it complied with the section in all particulars except the irregularities hereinbefore stated concerning the maturity and number of the bonds. Section 7403 requires that among other things the notice shall contain the number of years, not exceeding 25, which the whole or any part of the bonds are to run and the posted notice complied with this provision. It was the published notice which in the particulars we have noted varied from the trustees' order and the posted notice. The following sections provide for the conduct of the election, including provisions as to the form of the ballots and declare that the words to appear on the ballots shall be "Bonds—Yes" and "Bonds—No" and state further that a brief statement of the proposition setting forth the amount of the bonds to be voted upon, the maximum rate of interest and the purposes for which the proceeds of the sale of the bonds are to be used *may* be printed upon the ballot, but that no defect in that statement, other than the statement of the amount of the bonds to be authorized, shall invalidate the bonds. It is not contended that the ballots furnished the electors conflicted in any way with these provisions. Seven days after the election the statute requires the trustees to publicly canvass the returns and this was regularly done. Complying with Section 7407 the trustees caused an entry of that fact to be made upon their minutes. The same section provides that the trustees shall then certify to the supervisors "all proceedings had in the premises." It is not contended that these procedural steps were not taken. It is then provided in the same section that "Thereupon the board of supervisors shall issue the bonds of the school district *in accordance with the proceedings*". Section 7463 declares: "No error, irregularity, or omission which does not affect the substantial rights of the taxpayers within the district or the electors voting at any election at which bonds of any district are authorized to be issued shall invalidate the election or any bonds authorized."

[1] The first irregularity consisted of the error made in the published notice with respect to the schedule of maturities and the number and amount of bonds to be issued. When we consider that the trustees' order was regular in all respects, that it and the posted notices alike gave true and full information, that the ballots used at the election likewise informed the electors they were voting Yes or No upon a bond issue to consist of 210 $1,000 bonds, and when we consider further that even the published notice described the bond proposition to be voted on as being for the issuance of these same 210 $1,000 bonds, we feel it must be held that the irregularity noted in the published schedule of maturities did not and could not "affect the substantial rights of the taxpayers within the district or the electors voting at the election authorizing the bonds." We therefore hold that the proceedings were valid up to and including the point where they were certified to the supervisors, and had resulted in an authorization by the electors for the issuance and sale and subsequent payment of bonds of the district, 210 in number of the face value of $1,000 each, and maturing as set forth in the order of the trustees and in the posted notice.

[2, 3] Upon certification of the proceedings to the supervisors it was the duty of those boards to "issue the bonds of the school district in accordance with the proceedings." This the supervisors did not do. They ordered bonds issued in all respects in accordance with the proceedings with the single exception heretofore noted that, with respect to five of the bonds which according to the trustees' order were to mature in 1965, they advanced the maturities by two years, placing them in the number of bonds that were to mature in 1963. We think it cannot be said that by advancing the maturities of these five bonds by two years the boards committed an error which affected the substantial rights of taxpayers or electors. It has been the general rule that errors and irregularities in bond issue proceedings which did not increase or change

the burden upon the taxpayers and could not mislead any elector to his prejudice would not invalidate the bonds. City of Redding v. Holland, 75 Cal.App.2d 178, 185, 170 P.2d 132; City of San Diego v. Millan, 127 Cal.App. 521, 527–528, 16 P.2d 357. See other cases cited in City of Redding v. Holland. It might be argued that the irregularity here in changing the maturity dates as indicated would affect the rights of taxpayers and be beyond the scope of the rule pronounced in the cited cases. But the statute here has declared that these irregularities must affect *substantial* rights before the bonds shall be invalidated. And we think the variance here comes within the protection of the statute. This is not to say that such changes could not be momentous enough to exceed the protection of the statute, in which case the bonds would be invalidated. It is only to say that the irregularity here has not reached that result.

[4, 5] It is further contended that, since the school district lies in two counties, notice of election should have been posted and published in both counties. We have already quoted Section 7402 of the Education Code, which specifies how notice shall be given and we think a reading of that section is an answer to this contention. Notices are to be posted in the district. There is no requirement that they be posted in each county. They were posted in the district and that posting was sufficient. The section further provides for publication in a newspaper if there is one "in any county in which any part of the district is situated". This is not to be read as requiring that the publication be in a newspaper in each county in which a part of the district may lie and we hold that the publication in the Auburn Journal was sufficient. See County of Sacramento v. Stephens, 11 Cal.App.2d 110, 53 P.2d 197.

It appearing that there were no errors, irregularities or omissions which affected the substantial rights of taxpayers or electors and that the bonds ordered issued will be valid obligations, it is ordered that the writ prayed for be issued.

SCHOTTKY, Justice pro tem., and PEEK, J., concur.

105 Cal.App.2d 150

PEOPLE v. BAILEY.

Cr. 831.

District Court of Appeal, Fourth District, California.

June 26, 1951.

Hearing Denied July 26, 1951.

Ted Bailey was convicted of an offense on his plea of guilty, and he filed petition for writ coram nobis alleging that the plea was obtained by fraud and duress. The Superior Court of Fresno County, Strother P. Walton, J., denied the petition, and the petitioner appealed. The Court of Appeal, Mussell, J., held that the record sustained the action of the trial court.

Order affirmed.

1. Criminal law ⇐997

Record did not warrant setting aside order denying petition for hearing on writ of error coram nobis, where petitioner did not present affidavits or evidence in support of his application alleging mere conclusions as to fraud and duress inducing plea of guilty.

2. Criminal law ⇐998

Defendant seeking to set aside conviction must proceed as one who is at least prima facie guilty, and he has burden of producing convincing proof of legal ground for setting aside the judgment.

3. Affidavits ⇐18
Criminal law ⇐558

A trial judge is not required to accept as true the sworn testimony of a witness even in absence of evidence contradicting it, and this rule applies to an affidavit.

4. Criminal law ⇐260(11)

Trial court is judge of credibility of witness whether he testifies in person or by affidavit.

5. Criminal law ⇐1028

A contention not presented to trial court and not part of record could not be considered on appeal.

6. Criminal law ⇐636(9)

Whether defendant should have been allowed to be present in court at time of hearing on application for writ of error coram nobis was within trial court's sound discretion.

7. Criminal law ⇐1166½(1)

Contention that attorneys did not properly represent defendant was not ground for reversal of order denying petition for writ of coram nobis.

8. Criminal law ⇐232

Defendant need not be represented by counsel before committing magistrate.

9. Criminal law ⇐997

In passing on application for writ coram nobis, trial court may consider unexplained delay in filing petition.

Ted Bailey, in pro. per.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

On August 20, 1949, the appellant filed a "Motion in the Nature of the Writ of Error Coram Nobis" in the Superior Court of Fresno County, in which he sought an order of the court vacating the judgment rendered against him on May 13, 1948, on the ground that he was forced to plead guilty through fraud, deceit, duress and misrepresentation. It was stated in the motion, which was verified by the appellant, that he "was advised by different persons, including officials of the court, warning him that if he did not plead guilty and was convicted, he would be sentenced to life in prison as a habitual criminal"; that at that time he was "not familiar with section 644 of the Penal Code and believed that he could be sentenced as an habitual criminal"; that he was "later confined in solitary confinement which was a denial of due process of law in obtaining a conviction of duress"; that he would "present witnesses in this court by process of subpoena that he was threatened with the habitual criminal sentence if he did not plead guilty"; and that he was "not in the vicinity where the alleged crime was committed at the time it was alleged to have been committed".

The trial court, at the request of appellant, appointed two attorneys to represent him in the matter of his petition. Appellant then filed a "Petition for Hearing on Writ of Coram Nobis", in which he stated that he had received a letter from the district attorney's office in Fresno county advising that the writ would be denied unless further proof and support of the allegations in the writ were given, and that something more was required than a sworn statement by the defendant. In this connection, the petition contains the following language: "In the opinion of petitioner it is neither proper nor necessary that the district attorney be given these additional documents of proof whereas the petitioner has stated in what the alleged illegality consists in the writ being verified by oath." The petitioner then prayed that an order be directed to the warden at the state prison at Folsom to produce and deliver petitioner at the hearing.

Appellant filed an "Affidavit for Subpoenas" in which he asked that certain persons be subpoenaed to testify in his behalf. The trial court set the hearing and ordered that the matter be submitted on the basis of affidavits and denied the request of the petitioner for personal attendance at the hearing.

Appellant's principal contention is that he was forced to plead guilty through fraud, deceit, duress and misrepresentation. However, the record fails to set forth the names of the "officials of the court" or persons who are alleged to have "warned" him that if he did not plead guilty and was convicted, he would be sentenced to life imprisonment as an habitual criminal. The time and place of the so-called "warning" or the circumstances under which appellant claims that it was given are not set forth in the record.

[1] Appellant refused to present affidavits in support of his application and failed to produce evidence to establish his right to the writ. The allegations in the motion as to the claimed fraud, deceit, duress and misrepresentations are not specific and are merely appellant's conclusions. If, as is contended by appellant, he was placed in solitary confinement for two months, the reasons therefor do not appear, and the time and place and particulars of such confinement are not set forth, nor does the record show that appellant was

thereby induced to plead guilty to the charge. No convincing proof is shown entitling appellant to set aside the order denying his petition.

[2] As was said in People v. Shorts, 32 Cal.2d 502, 508, 197 P.2d 330, 333: "The defendant then, if he would set aside such judgment, must proceed as one who is at least prima facie guilty; he, now, is the attacker and has the burden of producing convincing proof of a fact which constitutes a legal ground for setting aside the judgment. The presumption that the judgment is valid in all respects is strong; the interests of justice and of humanity require that its terms be executed promptly if it be not set aside."

[3, 4] Appellant contends that as his application for the writ is verified, it was unnecessary for him to present further proof of the facts set forth therein. However, a trial judge is not required to accept as true the sworn testimony of a witness even in the absence of evidence contradicting it, and this rule applies to an affidavit. The trial court, as the trier of the fact, is the judge of the credibility of the witness whether he testify in person or by affidavit. People v. Kirk, 98 Cal.App.2d 687, 692, 220 P.2d 976.

[5] In his opening brief appellant contends that his counsel and the district attorney told him that he could be sentenced to life imprisonment as an habitual criminal. This contention was not presented to the trial court, is not a part of the record, and cannot be considered on appeal. People v. Gilpin, 38 Cal.App.2d 24, 26, 100 P.2d 356; People v. Evans, 102 Cal.App. 2d 320, 227 P.2d 461.

[6, 7] Appellant contends that he was not allowed to appear at the time of the hearing on his application and the attorneys appointed to represent him did not confer with him. However, the question of whether or not appellant should have been allowed to be present in court at the time of the hearing was a matter within the sound discretion of the trial court. People v. Kirk, 76 Cal.App.2d 496, 498, 173 P 2d 367. The appellant's contention that his attorneys did not properly represent him is likewise without merit. People v. Krout, 90 Cal.App.2d 205, 208, 202 P.2d 635.

[8] Appellant also claims that the writ should be issued because he was denied court appointed counsel at the preliminary hearing; that he was accused of the crime because of notoriety of a rape charge for which he was on parole and that his attorneys did not properly represent him. These matters likewise were not presented to the trial court. Furthermore, the record does not show that the defendant desired the services of counsel at the preliminary examination and it was not necessary that he be represented before the committing magistrate. People v. Greene, 80 Cal.App.2d 745, 748, 182 P.2d 576; People v. Coker, 104 Cal.App.2d 224, 231 P.2d 81.

[9] In addition to the foregoing matters, the trial court had a right to consider the unexplained delay in filing the petition. People v. Krout, supra, 90 Cal.App.2d 209, 202 P.2d 635.

The order is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

105 Cal.App.2d 145

Ex parte LUKASIK.

Cr. 2295.

District Court of Appeal, Third District, California.

June 25, 1951.

Proceeding in the matter of the application of Dolores Lukasik for a writ of habeas corpus, wherein petitioner alleged that her infant children were being unlawfully detained and restrained of their liberty by the Juvenile Officer of Merced County and by the grandparents of such children. The District Court of Appeal, Per Curiam, held that Juvenile Court of Merced County could not order children into custody, and could not make children the wards of such court,

where such children were not within such county when they were taken into custody and did not reside in such county.

Order in accordance with opinion.

Infants ⇐16.4

County Juvenile Court could not order children into custody, and could not make children the wards of such court, where such children were not within such county when they were taken into custody and did not reside in such county. Welfare and Institutions Code, § 721.

Samuel K. Brantley, Jr., Merced, for petitioner.

Edward F. Peck of Anderson & Peck, Oakland, for father.

PER CURIAM.

Petitioner, the mother of Ronald William Lukasik and Kenneth Mathew Lukasik, aged 7 and 5 years, respectively, filed in this Court a Petition for a Writ of Habeas Corpus, in which she alleged that said children were being unlawfully detained and restrained of their liberty by the Juvenile Officer of Merced County and by Mr. and Mrs. Matheus Lukasik, the grandparents of said children, under a petition filed in the Juvenile Court of Merced County. This Court issued a writ, commanding said Juvenile Officer and said grandparents to appear before this court with said children.

This Court is convinced from the evidence that at the time said minor children were taken into custody in Fresno County by the Juvenile Officer of Merced County said children were neither within the County of Merced nor residing therein, but that they were and are residing in Fresno County with their mother, the petitioner. Under such circumstances it is clear that the Juvenile Court of Merced County had no jurisdiction either to order said children into custody or to make them wards of the Juvenile Court of Merced County because, under Section 721 of the Welfare and Institutions Code, such jurisdiction is limited to minors found "within the county, or residing therein".

As was said in Guardianship of Casella, 133 Cal.App. 80, at page 82, 23 P.2d 782, "As the minors were actually living in Contra Costa county and, as their legal residence was in that county while their mother resided there, both essentials of jurisdiction of the person of the minors placed that jurisdiction in the juvenile court of Contra Costa county and withheld it from the court of Santa Clara county."

For the reasons hereinbefore set forth, it is therefore ordered that the minor children, Ronald William Lukasik and Kenneth Mathew Lukasik be discharged from the illegal detention and custody in which they are now held by respondents, Mr. and Mrs. Matheus Lukasik and the Juvenile Officer of Merced County, and committed forthwith to the custody of petitioner, and that they be delivered by the respondents to petitioner at her residence in Fresno.

105 Cal.App.2d 99

PENSA v. NOFFSINGER.

Civ. 14762.

District Court of Appeal, First District, Division 2, California.

June 25, 1951.

Action by Pete Pensa against Glenn Forrest Noffsinger on a common count for work and labor performed on the specific request of defendant, wherein defendant cross-complained for rent. The Superior Court, in and for the County of San Mateo, Edmund Scott, J., rendered a judgment for plaintiff, and defendant appealed. The District Court of Appeal, Dooling, J., held that the court was entitled to find that defendant as a condition of taking over a building agreed to pay plaintiff for work already done by him and for future work.

Judgment affirmed.

1. Trial ⇐404(1)

Findings must be read together and reconciled, if possible, to support judgment

2. Work and labor ⇐28(2)

In action on common count for work and labor performed at specific request of defendant, court was entitled to find that defendant, as condition of taking over building, agreed to pay plaintiff for work already done by him and for future work.

3. Work and labor ⇐29(1)

In action on common count for work and labor, trial judge may draw on his own knowledge in fixing value of services of nontechnical character.

4. Work and labor ⇐28(4)

In action on common count for work and labor performed at specific request of defendant, finding that $1,000 was reasonable value of work and labor done was not an abuse of discretion.

Kenneth A. Johnson, Palo Alto, for appellant.

Millington, Dell'Ergo, Weeks & Morrissey, Redwood City, for respondent.

DOOLING, Justice.

Plaintiff sued on a common count for work and labor performed at the specific request of the defendant, alleging the reasonable and agreed value thereof to be $2,892. Defendant cross-complained for $375 rent owing from plaintiff to defendant. The court gave judgment to plaintiff for $1000 and defendant appeals.

The evidence most favorable to plaintiff is that he and defendant's brother undertook to rent and remodel a building, that after plaintiff had done some work of remodeling it was agreed by defendant that he would rent the building and sublet one room to plaintiff and defendant's brother for $75 per month, which was done. As to the work and labor performed by plaintiff in remodeling the building plaintiff testified:

"I had been working for a week before Glenn (the defendant) showed up * *. He would pay me for my labor from the time I started up * * *. He told me to go ahead * * * and put the place together. He would pay me for every hour that I had worked on the place * * *. He said he would pay me the current rate * * *. He says, 'Whatever carpenters get, I will pay you for that, and whatever the sheet metal man', and so we just averaged it up."

From this it appears that the court was entitled to find that defendant as a condition of taking over the building agreed to pay plaintiff for work already done by him and for future work. Plaintiff produced a time book from which he testified that he had worked a total of 964 hours for which he "took an average figure of $3 an hour". Defendant asserts that there was no testimony that this was the reasonable value of the work. He overlooks the following which went in without objection:

"Q. And you feel that this rate of $3 an hour * * * is a reasonable charge? A. I think it is very reasonable."

Plaintiff admitted his agreement to pay $75 per month rent amounting for 5 months to $375. He explained that he had not paid this rent "(f)or the simple reason that the man owed me for my labor and my time * * *."

The court found that "defendant * * became indebted to plaintiff for work and labor performed by plaintiff * * * (and) the agreed and reasonable value of said work and labor was * * * the sum of One Thousand ($1000.00) Dollars." On the cross-complaint the court found that "cross-defendants paid all rentals due * * *."

[1-4] The findings must be read together and reconciled if possible to support the judgment. Menghetti v. Dillon, 10 Cal. 2d 470, 472, 75 P.2d 596; 2 Cal.Jur. 872-873. We are satisfied from the whole record that the court's finding that the rent was paid was based upon a deduction of $375 from the total value of the work and labor performed, and that the indebtedness of $1000 found by the court represents the balance found to be due after this offset. This would figure about $1.42½ per hour. The trial judge may draw on his own knowledge in fixing the value of services of a non-technical character, Estate of Willardson, 101 Cal.App.2d —, 226 P.2d 369; Stiles v. Nunes, 98 Cal.App.2d 739,

220 P.2d 792; Estate of Reinhertz, 82 Cal. App.2d 156, 160, 185 P.2d 858, 186 P.2d 755; Collier v. Landram, 67 Cal.App.2d 752, 759, 155 P.2d 652, and we cannot find any abuse of discretion in the value fixed in this case.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

104 Cal.App.2d 827

BRIGHT'S ESTATE v. WESTERN AIR LINES, Inc., et al.

Civ. 4219.

District Court of Appeal, Fourth District, California.

June 19, 1951.

Rehearing Denied July 11, 1951.

Hearing Denied Aug. 16, 1951.

The estate of Fred R. Bright, Jr., deceased, and the administratrix thereof sued Western Air Lines, Inc., and others for loss and destruction of property rights of the estate as the result of intestate's death in an airplane crash. From a judgment of the Superior Court of San Diego County, Robert B. Burch, J., for defendants, plaintiffs appealed. The District Court of Appeal, Mussell, J., held that the complaint stated no cause of action, in the absence of an allegation that deceased left any heirs at law.

Judgment affirmed.

1. Death ⇐32

A decedent's estate has no cause of action for loss and destruction of estate's property rights as result of decedent's death because of defendant's negligent operation of airplane in which decedent was passenger for hire.

2. Executors and administrators ⇐1

An "estate" is not a legal entity and is neither a natural nor artificial person, but is merely the sum total of decedent's, incompetent's, or bankrupt's assets and liabilities.

See publication Words and Phrases, for other judicial constructions and definitions of "Estate".

3. Death ⇐32
Executors and administrators ⇐420

An estate can neither sue nor be sued, so that decedent's estate cannot recover damages for loss of decedent's future earnings.

4. Executors and administrators ⇐426

The statutory provision that executors and administrators may maintain actions against persons wasting, destroying, taking, carrying away, or converting decedent's property in their lifetimes does not give executor or administrator right to maintain action for destruction of property and property rights of decedent's estate, and damages recoverable thereunder for loss or destruction of decedent's property do not become part of his estate and inure to benefit of creditors thereof, legatees and beneficiaries. Probate Code, § 574.

5. Death ⇐11, 32

An action for wrongful death is entirely statutory, and administrator of decedent's estate has power to bring such action only as statutory trustee for benefit of decedent's heirs, if any; purpose of statute being to compensate heirs for pecuniary injuries suffered in loss of relatives by death. Code Civ.Proc. § 377.

6. Executors and administrators ⇐427

Executors and administrators, authorized by statute to sue for waste of decedents' property, have no interest in matter, but are statutory trustees to recover damages for benefit of decedents' heirs and cannot maintain action where there are no heirs. Probate Code, § 574.

7. Death ⇐31(3, 5)

Only decedent's surviving heirs at law or personal representatives can maintain action for damages resulting from his wrongful death. Code Civ.Proc. § 377.

8. Death ⇐49(1)

In action by decedent's estate and administratrix thereof to recover damages for loss and destruction of estate's property rights as result of intestate's death

in airplane crash, complaint stated no cause of action, in absence of allegation that intestate left heirs at law; action being for damages resulting from wrongful death. Code Civ.Proc. § 377; Probate Code, § 574.

9. Appeal and error ⇐909(4)

In action by decedent's estate and administratrix thereof to recover damages for loss and destruction of estate's property rights as result of decedent's wrongful death, where complaint contained no allegation of existence of surviving heirs at law of decedent, District Court of Appeal, on appeal from judgment for defendant pursuant to order sustaining demurrer to complaint, is bound to assume that there are no such heirs. Code Civ. Proc. § 377; Probate Code, § 574.

Clarence B. Smith, El Centro, John Moore Robinson, Robert M. Himrod and George R. Coan, all of Los Angeles, for appellants.

Luce, Forward, Kunzel & Scripps, San Diego, for respondents.

MUSSELL, Justice.

Plaintiffs appeal from a judgment in favor of the defendant, Western Air Lines, Inc., entered pursuant to an order sustaining a demurrer to the complaint without leave to amend.

The action was brought to recover damages for the loss and destruction of property rights of the estate of Fred R. Bright, Jr. allegedly incurred when decedent was killed on December 24, 1946, in an airplane crash caused by negligence in the operation of an airplane owned and operated by the defendant, and in which decedent was a passenger for hire. It is alleged in the complaint that as the direct and proximate result of the carelessness and negligence of the defendants the estate of Fred R. Bright, Jr. was wasted, lessened, injured, destroyed and invaded and the property rights of the said estate were lessened, injured, damaged, invaded and wasted to the damage of said estate and said property rights of said estate in the amount as therein set forth. It is then alleged that the decedent had a life expectancy of 34.29 years; that he had for several years earned $300,000 a year; and that by reason of his death his estate had been damaged in the amount of $10,287,000.00. Judgment was prayed for in said amount as general damages.

[1] The question involved, as stated by appellants, is "Does the estate of Fred R. Bright, Jr. have a cause of action against the defendant, Western Air Lines, Inc.?" We conclude that it must be answered in the negative.

[2, 3] An "estate" is not a legal entity and is neither a natural nor artificial person. It is merely a name to indicate the sum total of the assets and liabilities of a decedent, or of an incompetent, or of a bankrupt. Tanner v. Best's Estate, 40 Cal. App.2d 442, 445, 104 P.2d 1084; Johnston v. Long, 30 Cal.2d 54, 63, 181 P.2d 645. An "estate" can neither sue nor be sued. 11 Cal.Jur., p. 1055, section 680. It follows that an "estate", as such, is not entitled to recover damages consisting of the loss of future earnings of a decedent.

[4] Plaintiffs take the position that the cause of action herein is based upon the first part of Probate Code section 574, which is as follows: "Executors and administrators may maintain an action against any person who has wasted, destroyed, taken, or carried away, or converted to his own use, the property of their testator or intestate, in his lifetime, or committed any trespass on the real property of the decedent in his lifetime; * * *."

The contention is that the quoted provision specifically gives to the executor or administrator the right to maintain an action for the destruction of the property and the property rights of the estate of the decedent; that the damages permitted to be recovered by the quoted section for the loss or destruction of the testator's property become a part of his estate and inure to the benefit of those who are creditors of the estate and to the legatees and beneficiaries. We cannot agree with this contention.

[5] Section 377 of the Code of Civil Procedure provides for an action by the heirs and representatives of one killed by the wrongful act or neglect of another for damages against the person causing the death, and it has been held that an action for death is entirely statutory; that an administrator has power to bring such an action only as the statutory trustee for the benefit of the heirs of the deceased and for no other purpose; that this statute was enacted in order that the heirs might compensate themselves for pecuniary injuries suffered in the loss by death of a relative; that if the deceased had no heirs, then the statute did not apply and there could be no action for there could be no statutory trustee if there were no trust nor beneficiary. Webster v. Norwegian Mining Co., 137 Cal. 399, 400, 70 P. 276. In Estate of Riccomi's Estate, 185 Cal. 458, 460, 197 P. 97, 98, 14 A.L.R. 509, it is said:

"It is settled that the action authorized by the section is one solely for the benefit of the heirs by which they *may be compensated for the pecuniary loss suffered by them* by reason of the loss of their relatives. The money recovered constitutes no part of the estate of deceased, and where the action is brought or the money recovered by the personal representative of the deceased, such personal representative is acting solely as a statutory trustee for the benefit of the heirs on account of whom the recovery is had."

In Luis v. Cavin, 88 Cal.App.2d 107, 118, 198 P.2d 563, the court held that damages recoverable for pecuniary loss suffered by a wife by the reason of the unlawful death of her husband, when recovered, do not become a part of the decedent's estate and are not distributed to the heirs from the estate.

[6-8] Section 574 of the Probate Code authorizes the maintenance of an action by executors and administrators for waste of the property of their testator. However, such executors and administrators have no interest in the matter. They are statutory trustees to recover damages for the benefit of the heirs of the estate and where there are no heirs, there can be no action. In the instant case, the complaint does not allege the existence of heirs at law of the decedent nor does it appear therefrom that the action is prosecuted for the benefit of any person or persons. Despite appellants' statement to the contrary, the action is one for damages resulting from wrongful death and only the surviving heirs at law or the personal representative of the deceased can maintain such an action. Since the complaint fails to allege that the deceased left heirs at law, it does not state a cause of action. Davis v. Southern Arizona Freight Lines, Ltd., 30 Cal.App.2d 48, 49, 85 P.2d 897.

Section 574 of the Probate Code was considered and applied in Hunt v. Authier, 28 Cal.2d 288, 169 P.2d 913, 171 A.L.R. 1379. In that case one Mounsey killed a Dr. Hunt and then took his own life. Hunt's surviving widow and children filed a claim against the estate of Mounsey for waste and destruction of their property, their property rights and estate. The court held that the injuries suffered by the plaintiffs by the lessening of their estate and the invasion and deprivation of their pecuniary interest and right to future support from their decedent by the commission of the wrongful act was a destruction of or injury to their property and an invasion of their property rights within the meaning of the statute and that the cause of action survived as to property damages in favor of the beneficiaries.

In Moffat v. Smith, 33 Cal.2d 905, 206 P.2d 353, plaintiff brought an action seeking the recovery of damages for injuries sustained in an automobile collision alleged to have been due to carelessness and negligence on the part of one David D. Copenhaver, the latter having died subsequent to the accident. The action was brought against the executrix of his last will. The court held that the cause of action did not abate with the death of the negligent tort feasor but was properly brought against the executrix of his estate since the injured person's right to his own future support constituted property within the meaning of Probate Code section 574 authorizing an action against the personal representative of a tort feasor for the de-

struction of plaintiff's property during the tort feasor's lifetime.

In Cort v. Steen, 36 Cal.2d 437, 224 P.2d 723, the court stated that the determination in Hunt v. Authier and Moffat v. Smith, supra, rested on the construction of section 574 of the Probate Code providing for survival in cases of damage to property.

We find nothing in the language of these cases indicating that a cause of action arises in favor of an "estate" and in each case the action was brought by or for the persons entitled to receive the benefit of the decedent's earnings.

[9] Plaintiff Elizabeth J. Bright, also known as Elizabeth J. Stires, appears herein as administratrix of the estate of the decedent, Fred R. Bright, Jr. and not as a beneficiary or heir. She is not seeking to recover for pecuniary loss suffered by her but as statutory trustee for the benefit of the estate. There being no allegation in the complaint of the existence of heirs, we are bound to assume that there are none. Webster v. Norwegian Mining Co., supra, 137 Cal. at page 399, 70 P. at page 276.

The record shows no request or desire on the part of plaintiffs to amend the complaint and there is no suggestion that it could be amended.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

105 Cal.App.2d 104

PEOPLE v. CONSIGLI.

Cr. 2724.

District Court of Appeal, First District, Division 2, California.

June 25, 1951.

Guido Consigli was convicted in the Superior Court in and for the City and County of San Francisco, Milton D. Spiro, J., of violating section 288 of the Penal Code, and he appealed. The District Court of Appeal, First Appellate District, Division Two, Nourse, P. J., held that failure to give cautionary instruction relating to testimony concerning offense similar to one with which defendant was charged, to show intent, was not reversible error, in absence of request for such instruction.

Judgment affirmed.

1. Criminal law ⇐561(1)

The offense charged in an information must be proved to a moral certainty beyond a reasonable doubt.

2. Criminal law ⇐374

Where accused is charged with an offense, and testimony of another similar offense committed by accused is introduced to show intent, such similar offense does not have to be proved to a moral certainty beyond a reasonable doubt.

3. Criminal law ⇐824(8)

In prosecution for crime against child, where at conclusion of testimony of another girl as to similar offense, court instructed that such testimony could only be considered on question of intent, failure to give further cautionary instruction relating to testimony of such girl was not reversible error in absence of request for such instruction. Pen.Code, § 288.

Anthony S. Devoto, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Deputy Atty. Gen., Winslow Christian, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Defendant was tried to a jury on an information charging a violation of section 288 of the Penal Code. Following a verdict of guilty defendant was sentenced on an order granting probation for a period of five years on condition that he be confined in the county jail for a period of ninety days and pay a fine of $250. He appeals from this order, from the judgment, and the order denying a new trial. The appeal

is based on two grounds—the inherent improbability of the testimony of the prosecuting witness, and the failure to give a cautionary instruction relating to the testimony of another girl detailing another similar offense.

The prosecuting witness was a girl of nine years. Before her testimony was taken she was carefully examined by the trial judge who ruled that she was competent. Briefly her story of the occurrence was that she and her two younger sisters had for sometime been visiting in defendant's home at his invitation to watch his television. Frequently she sat beside the defendant on the davenport watching the pictures while her sisters and defendant's wife busied themselves in other parts of the house. She testified that on the night in question the defendant put one arm around her and with the other hand fondled her private parts. The defendant's explanation of the occurrence was that they were watching wrestling matches on the screen and that when those matches became exciting he inadvertently "expressed his emotions" by pressure upon the girl's legs. But the little girl testified that this pressure was always made underneath her clothing.

Appellant cites only De Arellanes v. Arellanes, 151 Cal. 443, 90 P. 1059. Respondent cites People v. Carlson, 73 Cal. App.2d 933, 940, 167 P.2d 812; People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758; and similar cases holding that there must be a physical impossibility that the testimony is true before a reviewing court may hold that it is inherently improbable.

Though appellant argues the "improbability" of the girl's testimony, it seems more likely that he relies on her contradictions and rambling statements as showing insufficiency in the evidence. But the trial court and the jury had the right to analyze her testimony and to determine what should be taken as true. In this they were aided by appellant's own testimony of the occurrence which was an admission of the essential elements of the offense charged.

[1, 2] To show the intent of the defendant the State offered the testimony of another girl, aged 8½ years, of a similar offense committed at another time in the same room, on the same davenport, when a similar picture of a wrestling match was shown on the television screen exciting similar "emotions" on the part of the appellant. At the close of her testimony the proceedings were interrupted while the court gave the usual admonitory instruction that such testimony was offered and could be considered for the purpose of showing the intent of appellant alone. Appellant complains that the court failed to give the ancient maxim of Sir Matthew Hale relating to proof of charges of this character. Such an instruction was given covering the main case. There was no special call for a repetition here as the appellant was not on trial for an attack upon the second girl. The offense charged in the information must be proved to a moral certainty beyond a reasonable doubt. No such stricture is made on evidence of a similar offense. People v. Lisenba, 14 Cal. 2d 403, 430, 94 P.2d 569; People v. Albertson, 23 Cal.2d 550, 579, 145 P.2d 7.

[3] The authorities cited by appellant holding that a cautionary instruction should be given in relation to the testimony of the prosecutrix do not support the theory that such an instruction should be given (without a request by the defendant) relating to the testimony of another witness covering a similar offense. The theory of the Matthew Hale maxim is that the prosecutrix in cases of this character might be induced to give false testimony of the occurrence knowing the defendant's difficulty in disproving the charge. But the similar offense does not have to be proved beyond a reasonable doubt, and if "sufficient to arouse more than mere suspicion; it must afford 'substantial evidence' that the prior offense was in fact committed by the defendant." People v. Albertson, 23 Cal.2d 550, 579, 145 P.2d 7, 22. Such being the case it was incumbent upon appellant to have requested any further instruction desired relating to the other offense, and

having failed to make such request, he cannot complain at this time. People v. Simeone, 26 Cal.2d 795, 808, 161 P.2d 369.

Judgment and orders affirmed.

GOODELL and DOOLING, JJ., concur.

105 Cal.App.2d 78

AULT et ux. v. ROSS GENERAL HOSPITAL.

Civ. 14598.

District Court of Appeal, First District, Division 2, California.

June 25, 1951.

John M. Ault, and Anna M. Ault sued the Ross General Hospital, a corporation, to recover damages for injuries received by Mrs. Ault when she fell while getting out of a bed at night in an unlighted room in the hospital. The Superior Court in and for the County of Marin, Ben V. Curler, rendered judgment for the defendant after jury verdict and plaintiffs appealed. The District Court of Appeal, Dooling, J., held that the evidence presented questions for jury as to the hospital's negligence and the patient's contributory negligence.

Affirmed.

1. Hospitals ⇐8

In action by a patient against a hospital for injuries received by patient when she fell while getting out of bed at night in an unlighted room in a hospital, the evidence presented questions for the jury as to the hospital's negligence and the patient's contributory negligence.

2. Appeal and error ⇐882(12)

In action by a patient against a hospital for injuries received by patient when she fell while getting out of bed at night in an unlighted room in a hospital, where trial court at plaintiff's request gave an instruction that the standard or reasonable care required by law is the degree of care and diligence used by the hospitals generally, in this locality, the plaintiff could not complain of an instruction that the measure of a duty of a hospital is to exercise that degree of care used by hospitals generally in that community.

3. Appeal and error ⇐882(12)

An appellant cannot complain of an instruction at the respondent's request when he requested a similar instruction.

4. Trial ⇐295(12)

A party is not entitled to have an instruction couched in any particular language so long as instructions as a whole substantially inform the jury of the applicable rules of law.

Lawrence A. Cowen, San Rafael, for appellants.

Gardiner & Riede, San Rafael, for respondents.

DOOLING, Justice.

Plaintiff Mrs. Ault (hereinafter called the patient) and her husband sued defendant hospital for injuries received by the patient when she fell while getting out of bed at night in an unlighted room in the hospital. The trial before a jury resulted in a verdict for defendant and plaintiffs appeal from the judgment entered thereon.

The patient had been admitted to undergo an operation for cataracts on her eyes. Her physician gave the hospital no instructions that they should exercise any unusual precautions with the patient. There is evidence that a nurse's aid had shown the patient the call button pinned to the sheet beside her pillow, and had instructed her to stay in bed and to use the call light if she needed anything in the night. There was an electric light at the head of the bed operated by a pull-chain. The patient's own physician testified that while the patient's eyesight was greatly impaired "she identified a letter six inches in height at a distance of about 15 feet." In a lighted room he would expect her to see a stool that was under a bed at a distance in excess of six feet. During the night, without using the call bell or turning on the

light, the patient started to get out of bed in the darkness. She put down her right foot upon an object which felt like a stool. She determined that it was a stool because she felt that it was higher than the floor. "Q. So that I may follow your testimony a little better, is it true that you placed your right foot on this object, and while you were attempting to put your left foot on the floor, it threw you? A. That is right." These stools were ordinarily kept under the bed "because we bump them in the dark otherwise." Many of the facts above recited were contradicted by other testimony but, following the familiar rule, those most favorable to the judgment must be accepted on appeal.

[1] These facts presented both defendant's negligence and the patient's contributory negligence as questions for the jury's determination. Whether it was contributory negligence for the patient to attempt to get out of bed in the darkness in a strange hospital room, and whether after her right foot rested on an object which felt like a stool it was contributory negligence to place her weight on this unfamiliar object while attempting to put her left foot on the floor presented jury questions. Whether it was negligence to leave the stool at the side of the bed when the stool would be visible to the patient if the room was lighted, and after instructing the patient not to get out of bed but to press the call button if she needed anything in the night, was equally a question for the jury. Appellants say in their opening brief: "Obviously, the presence of the stools or benches in the room to which she was assigned was a menace to her safety in her known eye condition." When the patient undertook to get out of bed in the darkness her eye condition became immaterial, and from her own physician's testimony if the room had been lighted he would have expected her to see the stool.

Appellants complain of two instructions given at defendant's request. One, which is typical of both, was in the exact language of the rule governing the duty of care owing by hospitals to their patients quoted from 41 C.J.S., Hospitals, § 8(3) page 349 in Wood v. Samaritan Institution, 26 Cal. 2d 847, 851–852, 161 P.2d 556 and Rice v. California Lutheran Hospital, 27 Cal.2d 296, 299, 163 P.2d 860. We are bound to accept, as was the trial judge, a rule of law so recently expressly announced and reiterated by the supreme court.

[2] Appellants, however, object on two grounds to the following sentence: "The measure of a duty of a hospital is to exercise that degree of care, skill, and diligence used by hospitals generally in that community, and required by the express or implied contract of the undertaking."

They say that the reference to "hospitals generally in that community" was misleading and confusing to the jury because there was no evidence of the practice or standards in hospitals generally in the community. If there is any merit in this criticism it is not open to appellants because at their request the court gave an instruction containing these words: "The standard or reasonable care required by law is the degree of care and diligence used by hospitals generally, in this locality."

[3] An appellant cannot complain of an instruction given at the respondent's request when he requested a similar instruction. Warren v. City of Los Angeles, 91 Cal.App.2d 678, 683, 205 P.2d 719; Blythe v. City and County of San Francisco, 83 Cal.App.2d 125, 132, 188 P.2d 40; Benton v. Douglas, 82 Cal.App.2d 784, 787, 187 P.2d 469; Shapiro v. Equitable Life Assur. Soc., 76 Cal.App.2d 75, 94, 172 P.2d 725; 24 Cal.Jur. 870.

Appellants also object to the words "required by the express or implied contract", saying: "There was no evidence whatever in the record to guide or chart the jury to affix this part of the instruction to anything." As respondent points out the arrangements made by the physician with respondent for the reception and care of the patient were testified to by the physician and the incidents surrounding the reception of the patient into the hospital were also in evidence.

[4] Appellants also complain of the failure to give two instructions requested by them concerning the hospital's duty. The instructions given adequately covered that

subject and a party is not entitled to have an instruction couched in any particular language so long as the instructions as a whole substantially inform the jury of the applicable rules of law. 24 Cal.Jur. 806–810.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

105 Cal.App.2d 126

HOWARD v. HOWARD.

HOWARD v. HOWARD et al.

Civ. 17899, 17900.

District Court of Appeal, Second District, Division 1, California.

June 25, 1951.

As Modified on Denial of Rehearing July 24, 1951.

Actions for divorce by Winifred Howard against Fred Howard and by Frederick Allan Howard against Winifred Davis Howard and another. The actions were tried together and the Superior Court of Los Angeles County, J. O. Moncur, J., rendered judgments denying wife a divorce and granting husband a divorce and adjudging certain realty to be community property of the parties, and from such judgments and orders denying her motions for new trial, Winifred Davis Howard appealed. The District Court of Appeal, Hanson, J. pro tem., held that the evidence was insufficient to sustain judgment granting husband a divorce in absence of corroboration of his testimony other than by testimony and admissions of wife.

Appeals from orders denying new trial dismissed, judgment denying a divorce to wife affirmed and judgment granting husband a divorce reversed and new trial ordered.

1. Appeal and error ⇐758(1)

Where wife appealed from judgment denying her a divorce and judgment granting husband a divorce, but her briefs did not assign any errors with respect to the action she instituted, appeal from judgment denying her a divorce would be deemed abandoned.

2. Divorce ⇐82

Action by husband for divorce did not abate by reason of pendency of action for divorce previously instituted by wife, in absence of plea in abatement.

3. Divorce ⇐127(4)

Evidence was insufficient to sustain judgment granting husband a divorce in absence of corroboration of husband's testimony other than by testimony and admissions of wife. Civ.Code, § 130.

4. Divorce ⇐127(4)

Testimony of a third person, not a party to divorce action, is required by way of corroboration of testimony of a party in support of ground for divorce. Civ. Code, § 130.

Barry Sullivan, Los Angeles, for appellant.

A. Brigham Rose, Los Angeles, for respondent.

HANSON, Justice pro tem.

This is an action for divorce or rather we should say two actions for one and the same divorce, one instituted by the wife against her husband and the other by the husband against the wife.

The wife instituted her action for divorce *in propria persona* by filing her complaint on February 3, 1949 but without serving her husband with summons. Without knowledge of her action the husband filed his action for divorce on March 14, 1949. The wife filed an answer therein to the merits and not by way of abatement. The husband likewise filed an answer in the action instituted by the wife. In that answer he specifically averred that he had instituted a separate action for divorce against her in which summons had been issued and served and that he reserved the right to prosecute that action.

The two actions came on for trial at the same time before the same judge with a stipulation on the part of the parties that all evidence introduced in either action should be deemed introduced in the other.

[1] The trial judge found that the husband was entitled to a divorce and that a certain real property title to which was of record in the adult daughter of the wife by a former marriage, was the community property of the parties to the divorce actions. From a judgment entered accordingly in the action of the husband and a judgment entered in her action denying her a divorce without any adjudication as to the property rights of the parties, the wife appeals. As her briefs do not assign any errors with respect to the action she instituted, we deem that appeal to be abandoned. In the action instituted by her husband the wife assigns as error (1) a want of jurisdiction in the court below, (2) insufficiency of the evidence to warrant granting a divorce to the husband, (3) insufficiency of evidence to sustain the court's award as to property. In view of the conclusion we have reached as to the disposition that must be made of the case we shall not discuss the last error assigned.

[2] The contention that the court was without jurisdiction to entertain the action of the husband is based on the thought that it abated *ipso facto* because it was filed after the action by the wife. The rule is otherwise. Capuccio v. Caire, 189 Cal. 514, 209 P. 367; 1 C.J.S., Abatement and Revival, § 80, p. 119.

[3, 4] The next contention made by the appellant wife is that the evidence in behalf of the husband was insufficient to sustain a decree of divorce in his favor. It is plain to us that the evidence would have been ample to sustain the decree were it not for the fact that the evidence was not corroborated in any particular except as to the residence requirements. The fact that the testimony and admissions of the wife amply corroborated the evidence of the husband is of no avail as the statute, Civ.Code, sec. 130, expressly lays down the rule that "No divorce can be granted * * * upon the uncorroborated statement, admission, or testimony of the parties". In short, testimony of a third person, not a party, is required by way of corroboration. Dean v. Dean, 97 Cal.App. 2d 455, 218 P.2d 54.

The judgment in the husband's action (Civil 17900) is reversed and a new trial is ordered; the judgment denying a divorce to the wife in her action (Civil 17899) is affirmed. The appeals from the orders denying motions for new trial are dismissed.

WHITE, P. J., and DRAPEAU, J., concur.

104 Cal.App.2d 571

WYSOCK v. BORCHERS BROS. et al.

Civ. 14584.

District Court of Appeal, First District, Division 1, California.

June 5, 1951.

Rehearing Denied July 5, 1951.

W. J. Wysock brought an action against Borchers Bros., a copartnership composed of Robert H. Borchers, and others, and against Robert H. Borchers, and others, doing business under the fictitious name and style of "Borchers Bros.," and others, for injuries sustained by plaintiff when plaintiff's automobile was hit by a truck belonging to "Borchers Bros." The Superior Court in and for the county of Santa Clara, John D. Foley, J., rendered a judgment adverse to defendants and denied defendants' motion for a new trial and defendants appealed. The District Court of Appeals, Fred B. Wood, J., held, inter alia, that refusal of trial court to strike out evidence that truck driver did not have a chauffeur's license or a driver's license when collision occurred was reversible error.

Judgment reversed and appeal from order denying a new trial dismissed.

1. Automobiles ⇐244(11, 43)

In action for injuries resulting when plaintiff's automobile which was traveling from secondary street through intersection in city with arterial street, collided with defendant's truck which entered intersection at plaintiff's left and was traveling on arterial street, photographs introduced in

evidence and taken of vehicles after collision did not conclusively demonstrate that truck was in outer lane of arterial street as truck entered intersection, and did not demonstrate conclusively that plaintiff was contributorily negligent in attempting to pass in front of truck.

2. Trial ⇐76

When a question is asked a witness which clearly shows the answer sought to be elicited, an objection is deemed waived if not timely made, but there may be circumstances, as when answer comes before an objection can be interposed, when doctrine of waiver is not reasonably applicable.

3. Appeal and error ⇐237(2)

Plaintiff could not claim that defendant had waived right to move to strike out question asked of truck driver as to whether truck driver had chauffeur's license or driver's license at time of collision, and negative answer to question, which waiver was asserted on grounds that question was twice asked and answered before defendant objected, where delay in objecting was slight and plaintiff did not press point when motion was made.

4. Automobiles ⇐145, 157

The nonpossession of an operator's or chauffeur's license is not of itself proof that a person is an incompetent or careless driver.

5. Automobiles ⇐243(11)

In action for injuries resulting when plaintiff's automobile which was traveling from secondary street through intersection in city with arterial street, collided with defendant's truck which entered intersection on plaintiff's left and was traveling on arterial street, whether driver of truck possessed a chauffeur's or driver's license when collision occurred was not admissible to show competency or negligence of truck driver. Vehicle Code, §§ 754, 755.

6. Appeal and error ⇐1047(3)

In action for injuries resulting when plaintiff's automobile which was traveling from secondary street through intersection in city with arterial street, collided with defendant's truck which entered intersection on plaintiff's left and was traveling on arterial street, refusal of trial court to strike out evidence that truck driver did not have a chauffeur's or driver's license when collision occurred was error requiring reversal of judgment for plaintiff where evidence was so nearly in balance that evidence would have furnished substantial support for verdict for either party.

7. Trial ⇐260(8)

In action for injuries resulting when plaintiff's automobile which was traveling from secondary street through intersection in city with arterial street, collided with defendant's truck which entered intersection on plaintiff's left and was traveling on arterial street, refusal to give defendant's requested instruction that defendant, if acting with due care, had right to assume that plaintiff would exercise due care, was not error as to defendant when given instructions adequately covered subject matter of requested instruction.

Campbell, Hayes & Custer and Frank L. Custer, all of San Jose, Edward J. Niland, Santa Clara, of counsel, for appellants.

James F. Boccardo, David S. Lull, San Jose, for respondent.

FRED B. WOOD, Justice.

Defendants appeal from the judgment rendered against them in an action for damages for personal injuries sustained by plaintiff when his automobile was hit by a cement truck owned by the defendants Borchers Bros., and driven by their employee, defendant Bidar. They appeal, also, from an order denying their motion for a new trial.

Appellants claim the judgment should be reversed for these reasons, asserted by them: (1) As a matter of law, the negligence of the respondent contributed proximately to his own injury, (2) the trial court erroneously refused to strike certain evidence, and (3) the trial court erroneously refused to give certain instructions requested by appellants.

In respect to their first point, appellants concede that if respondent's testimony is

worthy of belief the evidence supports the verdict. They claim that certain photographs in evidence, taken of the vehicles after the accident, demonstrate conclusively that the collision could not conceivably have taken place where respondent said it did, and render respondent's account of the movements of his car and of other vehicles inherently improbable and entitled to no weight whatsoever. Before considering these photographs, it is desirable to give a brief resume of the other evidence in the case.

The collision occurred on the morning of November 10, 1947, at the intersection of Lincoln Avenue and San Carlos Street, in San Jose. San Carlos Street is an east-west arterial, 77 feet 6 inches wide, with a center dividing strip 13 feet 6 inches wide. The roadway on either side of the center strip is divided into two traffic lanes. The outer lane next to the curb is 19 feet 6 inches wide; the inner lane, 12 feet 6 inches wide. The center strip does not extend into the intersection with Lincoln Avenue. Where the center strip terminates on either side of the intersection, there is a raised traffic island, with a guard rail on the end away from the intersection and a sign on the end toward the intersection. Lincoln Avenue runs north and south. North of San Carlos Street the paved portion of Lincoln Avenue is 26 feet wide and is divided into two lanes, the west lane being 9 feet and the east lane 17 feet wide. There was an arterial stop sign on Lincoln Avenue, about 10 feet north of the north curb line of San Carlos. Respondent's car was moving southerly on Lincoln toward San Carlos, and appellants' truck westerly on San Carlos toward Lincoln.

Respondent testified that he came south on Lincoln Avenue at about 25 or 26 miles an hour, stopped at the stop sign, looked east and west to observe traffic on San Carlos; saw a bread truck parked on the northeast corner of the intersection, which obscured his vision; put his car into low gear and moved about 6 feet beyond the stop sign, and saw two or three passenger cars approaching him from the east in the outer lane of San Carlos, the cars being 100 to 150 feet away, and appellants' truck in the inner lane about two car lengths behind the lead passenger car; that those vehicles were then traveling at about 25 to 30 miles an hour; that he then proceeded into the intersection, in low gear, at about 2 miles per hour, and as he was crossing the dividing line of the lanes in the north side of San Carlos he observed that the cars approaching him in the outer lane had decreased their speed to 5 or 10 miles, and thought that the truck in the inner lane was slowing to the same speed as the cars; that the truck and the cars were then about 60 to 70 feet from the intersection; that respondent then continued through the intersection at about 4 or 5 miles an hour, looked to his right and saw some cars coming from the west on the south side of San Carlos about 20 or 30 feet from the intersection. He moved forward, intending to stop between the traffic islands, shifted into second gear and increased his speed to about 6 miles an hour. When his car was well into the inner lane on the north side of San Carlos (about ready to go into the space between the traffic islands), just west of the center line of Lincoln, he saw the truck out of the corner of his eye, about 10 feet away, and then there was a crash. He did not recall whether the impact shoved his car west or ahead or anywhere else, but that it seemed as though it shoved him west; that after the accident his car was facing south. He also testified that the impact must have pushed his car into the signpost on the westerly traffic island because the car did not previously have a dent in the right front fender, but that he did not know whether his car hit the signpost and did not recall exactly where his car ended up after it was shoved west; that he was dazed by the collision but did not become unconscious, and that he pulled himself out of the car and sat on the running board until he was taken to the hospital. Upon the taking of his deposition, respondent had testified that he first came to a complete stop with his front wheels within a foot or so of the northerly curb on San Carlos (which would be about 10 feet south of the stop sign); in explanation thereof, at the trial, he said he had thought the stop sign was about a foot or two from the curb

or gutter. Upon his deposition, he testified he did not see the truck until he had moved into the outer lane, and that the truck at that time was 60 or 70 feet away; at the trial, he testified that the deposition was in error in this regard, and that he was in the parking lane (just north of the outer traffic lane) when he first saw the truck.

Appellant Bidar testified that he turned west into San Carlos from Sunol Street (parallel to and one block east of Lincoln), entering the inner lane on the north side of San Carlos; that as he approached Lincoln he was traveling 18 to 20 miles an hour, and when about 10 feet from the intersection he began to cut into the outer lane, after looking into his rear-view mirror and observing no vehicle behind him. Later, during the trial, he said he was 10 feet from the intersection when he completed getting into the outer lane. Upon deposition, he testified he had turned into the outer lane about 30 feet from the intersection. He said that at that time all the vehicles ahead of him had passed the intersection of Lincoln and San Carlos, and he observed none behind him; that as he completed his move into the outer lane his rear left duals were on the white center line; he looked to his right and saw no vehicles, continued on, and first saw respondent's car coming into the intersection at a point 6 feet south of the stop sign on Lincoln and just west of the center of Lincoln, at a speed of 25 to 30 miles an hour. Later, he testified that he first saw respondent when the latter was opposite the stop sign and near the west curb of Lincoln; upon deposition, that respondent was then right in front of Bidar, about the middle of the north side of San Carlos. At that time, the truck was 3 or 4 feet into the intersection and in the southerly portion of the outer lane of San Carlos. Bidar said he immediately swung his truck to the left and applied his brakes, and that respondent's car swung into the westerly crosswalk and then swerved back in an easterly direction. Bidar located the point of impact near the northeast corner of the westerly traffic island, that is, that the front of respondent's car was about a foot away from that corner of the island, right alongside the island. The right side of the truck's bumper hit respondent's car about in the middle. He did not recall whether either vehicle moved from the point of impact; they were in contact when they came to rest; then Bidar backed the truck up 2 or 3 feet.

One Gebhart, a bystander, testified that he observed respondent's car coming south on Lincoln Avenue at about 30 miles an hour; that it did not slow down at any time before the collision; that as he watched it he caught a glimpse of the truck but did not see the latter long enough to estimate its speed. He located the point of impact at about the center of the outer lane of San Carlos Street and the westerly pedestrian crosswalk which extends north and south across San Carlos (some 20 feet north of the westerly traffic island). But, in a writing signed by him a day or two after the accident, these statements appeared concerning respondent's car: "I did not see the passenger car before it was in San Carlos," and "The car was going about twenty-five to thirty miles per hour, from its speed and my driving experiences I am confident it did not come to a stop before entering San Carlos. Then I heard a crash and turned around and saw a man get out of the right front door and sit down on the running board"; and this statement concerning appellants' truck, "I can't say whether or not I saw the transit mix before the accident." Upon the trial, he said he answered some questions which were written down and read to him; that he did not read the statement but it was read to him and he signed it.

Another bystander, Huebner, testified that he noticed the truck approaching from the east in the outer lane of San Carlos Street about a half a block away from the intersection and that there were no other vehicles between the truck and the intersection; that he saw respondent's car coming into view on Lincoln Avenue at a speed of 30 to 40 miles an hour; that the brakes were applied to it and the car skidded about 8 feet in the gravel at the side of the street, its speed reducing to 20 to 25 miles per hour; that the brakes were then released and the car continued at this

speed into the intersection without stopping. He said he saw the truck approaching at not exceeding 20 miles an hour, and then the truck and the car came together; that as they met the front duals of the truck were almost on the easterly line of the west north-south crosswalk and the front of respondent's car was about 3 feet from the westerly traffic island. An investigating highway patrol officer, Lee, testified that shortly after the accident Huebner told him that he, Huebner, did not see respondent drive through the stop sign and did not see respondent's car before the impact. Huebner testified that he told Lee that he saw respondent's car come into the intersection without stopping, and saw the accident.

Officer Lee arrived on the scene soon after the accident. He placed respondent's car, as he found it, diagonally across the westerly north-south pedestrian crosswalk and the inner lane of San Carlos, pointing southeasterly, the right front of the car about 8 feet east of the westerly traffic island. He said the truck was facing the left side of respondent's car, a few feet from it, facing in a southwesterly direction, straddling the inner and outer lanes of San Carlos, with its left front wheel in the inner lane and its right front wheel in the outer lane next to the dividing white line. In his notes he had indicated the point of impact as 12 feet west of the center line of Lincoln Avenue and about 21 feet south of the stop sign (which would put it in the outer lane of San Carlos and about 5 feet east of the easterly line of the westerly north-south crosswalk). However, his point of impact was based upon an assumption that certain tire marks which he traced were made by respondent's car. He was not positive whether those tire marks were made by respondent's car. He said he had no way of determining when those tire marks were made and so was not in a position to say they were made by respondent's car. He said he did not actually know what the point of impact was; it could have been further to the west or to the east than he had assumed it to be; he did not know whether or not the impact was at on near the traffic island.

Appellants claim that the photographs (Exhibits A to E, incl., particularly A and D) demonstrate that the truck was in the outer lane of San Carlos as it entered the intersection. That fact, in turn, demonstrates, they say, (1) that respondent was clearly guilty of contributory negligence in attempting to pass in front of the truck, if the truck was in the outer lane, and (2) that respondent's testimony concerning the movement of his car and the movement of other vehicles was inherently improbable and physically impossible.

How do these photographs demonstrate that the truck was in the outer lane as it entered the intersection? The angle of the truck and the tire marks behind the truck (as shown in Ex. D) forcefully demonstrate this fact, say the appellants. They claim that the photographs establish the point of impact some 15 or more feet north and west of where the plaintiff located it.

These photographs (Exhibits A to E) were shown to Officer Lee. He said they depicted the vehicles involved in this accident; that they generally depicted the position of the cars, taken at different angles at the scene of the accident; he did not know when these pictures were taken; he could not say that these pictures portray the position of those vehicles; he did not see them taken and had no independent recollection of where they were taken. There is nothing in the record to show when or where or by whom these several photographs were taken. For aught that appears, Exhibits A and B depict respondent's car near the traffic island and in about the position Officer Lee described it and located it on a map, as observed by him after the accident. That is approximately where Bidar and Huebner said it was at the time of the impact and in the same north-south position but about 14 feet west of where respondent said it was at the time of the impact. The fact that the passenger car was hit broadside and was extensively damaged by a truck which with its load weighed 13 tons, furnished the jury a basis for an inference that the car was shoved westward. If we assume the jury drew that inference (we may assume it did), neither Exhibit A nor Ex-

hibit B demonstrates that the point of impact as described by respondent was inherently improbable or physically impossible.

[1] Exhibit D, upon which appellants also rely, is equally inconclusive. It was taken from the rear of the truck, apparently at a point in the northerly portion of San Carlos Street, east of the intersection, looking west. It shows the truck in the intersection, pointing at a slight angle southwesterly toward the passenger car. But the picture must have been taken after Bidar had backed the truck away from the car. We cannot be certain of the distance between the vehicles. Bidar said 2 or 3 feet. Officer Lee said several feet; he was not certain as to the exact distance. Exhibits A, B, and C, showing side views of the front of the truck, suggest that Bidar may have backed it appreciably more than 3 feet. And there is no evidence concerning the direction in which he backed it; i. e., whether along the course it first traveled or a different course. Nor can we say that the marks leading back, perhaps a couple of feet, from the rear duals of the truck in Exhibit D, if tire marks, were made by this or some other vehicle. Officer Lee, asked if certain tire marks shown in Exhibit E (precisely what marks, the record does not show) were those he had observed, said "I just can't recall whether those were the exact tire marks, or not." This evidence (which the jury considered and weighed with the other evidence in the case) is quite inconclusive, certainly falls far short of demonstrating that respondent's testimony was inherently improbable and, as a matter of law, unworthy of belief. Instead, these photographs illustrate the aptness of the observation that "Perhaps there is nothing more certain about an automobile accident than the fact that the visible results afterward are not an infallible guide in determining what occurred." Hawthorne v. Gunn, 123 Cal.App. 452, 455, 11 P.2d 411, 412; see, also, Brown v. Jack & Jeff Transfer Co., 102 Cal.App.2d 559, 228 P.2d 323. We conclude that the evidence supports the verdict and that there is no basis for holding, as a matter of law, that respondent committed negligence which was a contributing cause of the injuries sustained by him.

The evidence which appellants claim should have been stricken related to the fact that Bidar, who operated the truck at the time of the accident, did not possess a chauffeur's or a driver's license. Appellant Bidar was being examined by respondent under the provisions of section 2055 of the Code of Civil Procedure. The following questions were asked, answers given, and motions and rulings made:

"By Mr. Lull [attorney for respondent]: Q. Now, Mr. Bidar, on the 10th day of November, 1947, you neither possessed a chauffeur's or driver's license, did you? A. That is right.

"Q. You didn't have a chauffeur's license? A. That is right.

"Q. Didn't have a driver's license?

"Mr. Custer [attorney for appellants]: I am going to object as incompetent, irrelevant, and immaterial, your Honor, move to strike the answer as incompetent, irrelevant, and immaterial.

"Mr. Lull: I think that there are numerous cases to the effect that when a person drives a commercial vehicle they are supposed to be possessed of a certain degree of skill and—

"The Court: Objection is overruled.

"Q. To clarify your answer again, you had neither a chauffeur's nor a driver's license, did you? A. That is right.

"Mr. Lull: No further questions.

"Mr. Custer: That is all at this time."

After respondent rested and before putting on evidence of their own in chief, appellants moved to strike those questions and answers, and requested the court to admonish the jury to disregard them. The court denied this motion upon the authority of Moore v. Re, 131 Cal.App. 557, 22 P.2d 45.

Later, upon direct examination, Bidar testified that while in the army he operated motor vehicles of a type similar to the truck involved in this accident, did so from the latter part of 1941 until he got out of the army in 1945; that he had his army driver's

license; that he went to work for Borchers Bros. in 1946 and had been driving this type of equipment since then; that he took the state examination for a license and passed it but had not, prior to this accident, been able to get his license because he did not have a vehicle to use in making the required driving demonstration; that a few days after this accident he took the driver's demonstration test and got his chauffeur's license.

Upon the conclusion of the taking of testimony, appellants again made, and the court denied, a motion to strike all evidence concerning whether or not Bidar had an operator's or chauffeur's license.

[2, 3] Respondent contends that the motion to strike came too late, because the question was twice asked and answered before an objection was interposed. It is true that when a question is asked which clearly shows the answer sought to be elicited, an objection is deemed waived if not timely made. However, there may be circumstances (as when the answer comes before an objection can be interposed) when the doctrine of waiver is not reasonably applicable. Here, the delay in making the objection was slight. Counsel for respondent met the issue and the court decided the motion on the merits. There is implied a finding by the court that the delay occurred under circumstances which negatived a waiver. Respondent should not be permitted now to claim a waiver. If he had presented that point at the time the motion was made, appellants would have had an opportunity then to explain and possibly excuse the delay.

In support of the denial of the motion to strike, respondent invokes Moore v. Re, supra, 131 Cal.App. 557, 22 P.2d 45, in which the court approved the admission of evidence that the driver of a truck did not possess an operator's license, upon the ground that such evidence "was not admitted as a proximate cause of the injury, but was proper to be considered by the jury on the general question of negligence, and also as bearing on the ability and qualifications of the driver." 131 Cal.App. at pages 560–561, 22 P.2d at page 47. The Moore case is not authority for the admission of such evidence as a proximate cause of the injury. Here, in the absence of a limitation, it was admitted for all purposes.

The Moore case has been criticized in later decisions, though not expressly overruled, for allowing such evidence on the issue of negligent operation of a vehicle. That ruling was predicated upon the fact that an operator's license was no longer issued merely for identification purposes but was based upon an examination of the applicant to test his knowledge of traffic regulations and his ability to operate and control a motor vehicle. Our study of the licensing features of the Vehicle Code leads us to a different conclusion concerning the evidentiary value, in a negligence case, of the possession or nonpossession of a license.

[4] The nonpossession of an operator's or chauffeur's license is not of itself proof that a person is an incompetent or a careless driver. He may be exceedingly competent and careful but may have neglected for a few days or weeks to renew his license. It expires by limitation. Veh. Code, §§ 276, 277. Or, he may be a person of whom a license is not required, such as an officer or employee of the United States when operating a government vehicle on government business, § 251, or a nonresident who has a license issued by his home state or country or whose home state or country does not require a license, during the period permitted and under the conditions prescribed by section 252.

Indeed, the refusal, suspension, or revocation of a license does not necessarily token an administrative determination that the applicant or licensee is negligent or incompetent. There are quite a number of grounds other than negligence or incompetence, for such action. Among such other grounds for refusal are these: Failure of an applicant to furnish the department of motor vehicles information required, or the use by him of a false or fictitious name in an application for a license. § 271. A license may be suspended for these reasons, among others: Willful violation, for 15 days, of one's written promise to appear in court, a promise given upon arrest for *any* violation of the Vehicle Code, § 278; one's failure to stop after

an accident or to give certain information to other persons involved in the accident, §§ 292 and 308; failure to satisfy a final judgment for damages or to furnish proof of financial responsibility as prescribed by sections 410 to 418, inclusive; or failure to make certain reports or to furnish security following an accident, as prescribed by section 419. A license may be revoked for any of the reasons for which issuance of a license may be refused. § 306. It must be revoked upon conviction of the theft or unlawful taking of a vehicle in violation of section 503 or upon conviction of any felony in the commission of which a motor vehicle is used. § 304.

Nor does possession of a license necessarily mean that the department has determined that a person is competent to operate the particular type of vehicle which in fact he is operating at the time an accident occurs. When issuing either an operator's or a chauffeur's license, the department may impose restrictions suitable to the licensee's driving ability, with respect to the "type of, or special mechanical control devices required on, a motor vehicle which the licensee may operate or such other restrictions applicable to the licensee as the department may determine to be appropriate to assure the safe operation of a motor vehicle by the licensee." § 273.

Nothing that we have found in the statutory law indicates an intent upon the part of the Legislature to establish the possession of an operator's or chauffeur's license as a minimum standard of care in the operation of a motor vehicle or to create a presumption of negligence if one drives without such a license or to make unlicensed driving evidence of negligent operation of a vehicle. Quite to the contrary are the provisions of sections 754 and 755 of the Vehicle Code. They declare that no record of the suspension or revocation of any such license by the department of motor vehicles and no record of the conviction of any person for any violation of the Vehicle Code is admissible as evidence in any court in any civil action. The reasonable inference is that this licensing feature, while designed to promote safe driving upon the highways, is a device for the more efficient enforcement of the many and varied police regulations that govern the use of the highways.

Decisions subsequent to the Moore case tend to support the views which we have expressed. In Strandt v. Cannon, 29 Cal. App.2d 509, 85 P.2d 160, an instruction was held erroneous which told the jury that an operator's license is a certificate evidencing the fact that its holder has demonstrated competency to drive a motor vehicle "'and if the driver of a vehicle is unlicensed, that fact, if it is a fact, is *prima facie* evidence in the eyes of the law, that such driver is incompetent.'" 29 Cal. App. 2d at page 513, 85 P.2d at page 161. The court, in the majority opinion, criticizes the doctrine of the Moore case and reviews authorities in this and other states, 29 Cal.App.2d at pages 515 to 518, 85 P.2d at pages 163 to 164, of the report. Justice Marks, in his concurring opinion, furnishes an especially cogent analysis 29 Cal.App.2d at pages 519 to 523, 85 P.2d at pages 165. We quote the following portion:

"The instruction given requires the trier of fact to infer from the fact that Layton was unlicensed, (1) that he was incompetent; (2) that from such incompetency he was negligent at the time and place of the accident; (3) that such negligence was the proximate cause of the accident. There is no rule of law that permits such piling of inference on inference nor any rule drawn from experience that would justify it. The reasonable inferences to be drawn from the fact that a driver is unlicensed should be (1) that he has carelessly failed to apply for a license; (2) that he has carelessly permitted his license to expire from lapse of time without securing a new one; or (3) that his license has been suspended or revoked. Evidence supporting this latter inference is not admissible in a civil suit. Sec. 754, Vehicle Code. I cannot see how negligence and proximate cause can be predicated on any such inferences.

"If it should be assumed that the lack of an operator's license justified the inference of the lack of competency of a driver, still the instruction should not have been given. In this kind of a case the courts are not interested in the competency or

incompetency of a driver but only in his actions at the time and place of the accident. The question of his competency or incompetency is wholly immaterial to the questions at issue, namely, negligence and proximate cause. This rule has long been established in California." 29 Cal.App.2d at pages 519–20, 85 P.2d at page 165.

In Hunton v. California Portland Cement Company, 50 Cal.App.2d 684, 123 P.2d 947, the defendant claimed that the plaintiff was negligent because he permitted his son to drive his truck without a chauffeur's license (the son had an operator's license), and that the lack of such a license was evidence that the driver was negligent. The court disposed of that contention in these words: "We believe the question is disposed of in the case of Strandt v. Cannon, 29 Cal. App.2d 509, 85 P.2d 160, where the proposition was clearly laid down that the driver's negligence is to be determined by the facts of the accident, and that the failure to have an operator's license is not evidence of the driver's incompetence or negligence, or that such negligence, if any, was the proximate cause of the accident." 50 Cal.App.2d at page 691, 123 P.2d at page 951.

This does not mean that there can be no set of circumstances in a negligence case in which evidence of a driver's lack of a license is admissible in respect to some issue framed by the pleadings. This was recognized in the Strandt case when it distinguished Owens v. Carmichael's U-Drive Autos, Inc., 116 Cal.App. 348, 2 P.2d 580, upon the ground that there liability was imposed upon an owner who negligently entrusted his automobile to another on the theory, as alleged in the complaint, "that the defendant 'negligently let and hired' the automobile to a named man; that defendant 'negligently permitted' said man 'to drive and operate said automobile upon the highway'; that defendant knew that said man 'was not competent to operate' said automobile; and that said man 'was not licensed to drive any automobile upon such highway'. The court held that under the circumstances the fact that respondent corporation knew that the driver had no driver's license was sufficient to put it upon inquiry as to his competency and it was for the jury to determine under the circumstances whether respondent was negligent in permitting him to drive her car. At the time of this decision it was a violation of the law for an owner to entrust his car to an unlicensed person." 29 Cal.App.2d at pages 514–515, 85 P.2d at page 162.

Similarly, in Shifflette v. Walkup Drayage and Warehouse Company, 74 Cal.App. 2d 903, 169 P.2d 996, such evidence was deemed proper upon the issue whether or not one of the parties had been negligent in employing a truck driver. The evidence was strictly limited to that issue. This appears from the following statement of the reviewing court, 74 Cal.App.2d at page 908, 169 P.2d at page 999: "The court instructed the jury that the evidence to the effect that the truck driver had no license was admitted only for the purpose of consideration in connection with all other evidence of the question of whether the owner knew or was put on inquiry to know that it was entrusting the operation of its truck to one who was not a competent driver. It was also stated in the instruction that in determining whether the company was negligent and whether its negligence was a proximate cause of the injury the jury could consider what knowledge, if any, the evidence showed the owner to have concerning the lack of an operator's license." In holding that the submission of this issue of knowledge was not error, the court distinguished the Strandt and Hunton cases upon the ground that those cases did not involve the employment of an operator of a motor vehicle, as did the Shifflette case, and that the instruction given in the Shifflette case was consistent with the general principles of law set forth in the Strandt and Hunton cases because it expressly told the jury that "'the possession or lack of an operator's license is not evidence that defendant, Charles Hameister, was or was not generally a competent driver; nor is it evidence that he was or was not negligent on the occasion in question.'" 74 Cal.App.2d at page 909, 169 P.2d at page 999.

In the instant case, there was under the pleadings no issue concerning the competency of the driver of the truck, nor the

element of employment by appellants Borcher Bros. of a driver under circumstances which charged them with knowledge or notice that he might be incompetent. Respondent suggests that such an issue was presented by the complaint in the allegation that defendants "carelessly managed and operated a truck." We find in that allegation no such issue, nothing more than a charge of negligent conduct.

Respondent further urges that error, if any, in the denial of the motion to strike was cured by waiver when the appellants put in evidence of the experience of Bidar as a truck driver and of the facts concerning the delay in obtaining a license. We derive no such conclusion from the introduction of that evidence. The fact that they renewed their motion before tendering that evidence dispels any possible inference of an intent upon the part of appellants to withdraw their objection. Upon the denial of the renewed motion, the jury still had before it for consideration the fact that Bidar had no license at the time of the accident. The appellants were then under the practical necessity of offering such evidence as they might have concerning Bidar's experience as a driver and the delay in obtaining a license. In such a situation, their offering that evidence furnished no basis for predicating a withdrawal of their objection by waiver or estoppel, or upon any other theory.

[5] We conclude that the denial of the motion to strike was in error, and that the error was prejudicial. There were a number of conflicts in the testimony, some of which we have noted. The evidence was so nearly in balance it would have furnished substantial support for a verdict for either party. We cannot say but that in the minds of the jury Bidar's lack of a license tipped the balance in respondent's favor.

[6] Nor was this error cured by the instructions given the jury. Appellants requested and the court refused the following instruction: "You are instructed that the evidence introduced in this case concerning the fact that Mr. Bidar did not have a license was not admitted as a proximate cause of the injury." The court gave the following instruction: "I instruct you that the negligence of the operator of a vehicle is to be determined by the facts existing at the time of the accident. The fact that Mr. Bidar did not have a license was immaterial unless there was some causal relationship between the injuries and the failure to have a license or the violation of the statute in failing to have one."

The instruction requested was sound as far as it went, removing the evidence of lack of a license from consideration as a proximate cause of the injury. The instruction given was correct as an abstract statement of law but not appropriate to the issues and the facts in this case. It committed to the jury the decision whether or not there was a "causal relationship between the injuries and the failure to have a license or the violation of the statute in failing to have one." In making that decision, the jury was advised and guided only by instructions of an abstract nature concerning proximate cause, such as the instruction that "The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the injury." Such instructions, even if correct as abstract propositions, may have misled the jury. More serious, was the committing to the jury of the determination of the causal relationship when, as we have concluded, in law there was none under the issues and facts of this case. We cannot tell whether or not the jury based their verdict upon a determination that there was such a causal relationship. If they did, as they may have, the verdict would be without foundation in law and the judgment should be reversed. It is like the situation presented in Moon v. Payne, 97 Cal.App.2d 717, 218 P.2d 550. The plaintiff had sustained injuries from a fire set by defendant, for the burning of rubbish, without first obtaining a permit.

The trial court found for the plaintiff upon the sole ground that failure to obtain the required permit constituted an act of negligence per se and was the proximate cause of the injuries. The reviewing court held that the ordinance did not prohibit the burning of rubbish. It merely required a permit from the fire chief. And there was "no evidence in the record to create a causal connection between the failure of the defendant to procure a license and the injury sustained." 97 Cal.App.2d at page 719, 218 P.2d at page 551. The court concluded that "while the question of probable cause is ordinarily one for the trier of fact, Dennis v. Gonzales, supra, 91 Cal.App.2d [203], 207, 205 P.2d 55, it becomes one of law in the instant case when there is no evidence that the failure of defendant to obtain the permit was a proximate cause of the injuries sustained. Satterlee v. Orange Glenn School Dist., supra, 29 Cal.2d [581], 590, 177 P.2d 279." 97 Cal.App.2d at page 720, 218 P.2d at page 552. So, in the instant case, the possibility that the jury may have based its verdict upon a putative causal relationship between the injuries and the failure to have a license or between the injuries and the violation of the statute in failing to have one, requires that the judgment be reversed.

[7] Appellants claim that the trial court committed reversible error in refusing their requested instruction to the effect that the defendant, if acting with due care, had a right to assume that the plaintiff would exercise due care. The instruction which the court did give on that subject was identical to form 138 of California Jury Instructions, Civil. It was immediately followed by an instruction identical to form 138–A of the same work. We consider those instructions proper and that they adequately covered the subject matter of the instruction which appellants requested and the court refused.

The judgment is reversed. The appeal from the order denying a new trial, a non-appealable order, is dismissed.

PETERS, P. J., and BRAY, J., concur.

104 Cal.App.2d 793

LAGISS v. KRAINTZ.

Civ. 14620.

District Court of Appeal, First District, Division 2, California.

June 18, 1951.

Action by Anthony G. Lagiss against Rudolph J. Kraintz as building inspector of Contra Costa County for writ of mandate to compel issuance of permit to construct building for retail business purposes in district zoned for residential purposes. The Superior Court in and for the County of Contra Costa, Hugh H. Donovan, J., entered judgment for defendant, and plaintiff appealed. The District Court, Dooling, J., held that court would not speculate on whether future conditions when or if they came into being might render ordinance unconstitutional as applied to such changed conditions, but ordinance must be unconstitutional as applied existing facts in order to presently hold it invalid.

Judgment affirmed.

1. Mandamus ⇐163

Demurrers to petition for writ of mandate are recognized as proper in original proceedings in supreme court and district courts of appeal. Rules on Appeal, rule 56 (c).

2. Municipal corporations ⇐601(17)

Courts will not speculate on whether future conditions, if they come into being, might render zoning ordinance unconstitutional as applied to such changed conditions, but ordinance must be unconstitutional as applied to existing facts in order to be held presently invalid.

3. Counties ⇐21½

Where petition attacking county zoning ordinance stated that there was no retail business within three miles from population which petitioner's proposed business would serve, and additional allegation showed that there was area zoned for business within quarter mile of petitioner's premises, even though such area contained no retail businesses, county authorities had performed their duty by providing ample space by ordinance for retail business for district.

4. Mandamus ⇐154(4)

Allegation in petition attacking validity of zoning ordinance and seeking writ of mandate compelling issuance to landowner of permit for erection of retail business building that area presently zoned for business would be substantially eliminated by highway to be constructed, presented no ground for present attack on ordinance even though such future development might later give landowner legal ground for complaint

5. Municipal corporations ⇐601(12)

Fact that landowner's property located in district zoned for residential purposes would be more valuable if zoned for business use does not render zoning ordinance unconstitutional.

6. Mandamus ⇐154(4)

Where landowner attacked zoning ordinance and sought writ of mandate compelling issuance of permit for construction of retail business building in area zoned for residential uses, allegation that no use was being made of property on side of road on which landowner's property was located for over one mile to north did not establish invalidity of ordinance, since one of reasons for zoning regulation is guidance of future development for protection of residential areas.

7. Municipal corporations ⇐122(2)

Person who seeks to avoid application of zoning ordinance has burden of establishing, in face of strong presumption to contrary, that ordinance is unreasonable as to his property.

Edmund S. Barnett, Walnut Creek, for appellant.

Francis W. Collins, Dist. Atty. of the County of Contra Costa, Matthew S. Walker, Deputy Dist. Atty., Martinez, for respondent.

DOOLING, Justice.

Appellant sought a writ of mandate in the superior court to compel respondent, building inspector of Contra Costa County, to issue him a permit to construct a building, on property owned by him facing on Acalanes Road in that county, to be used for retail business purposes. A demurrer was sustained to his petition with leave to amend and, upon his failure to amend, the judgment was entered against him from which he appeals.

[1] Appellant argues that there is no provision in our law for a demurrer to a petition for writ of mandate. Demurrers to such petitions are a commonplace in our procedure, are recognized as proper in original proceedings in the supreme court and district courts of appeal by Rule 56(c), Rules on Appeal, and have the sanction of express judicial decision in Matteson v. Board of Education, 104 Cal.App. 647, 650, 286 P. 482.

The allegations of the petition show that appellant's property is zoned as Transitional Residential Agricultural under the county zoning ordinance, which permits its use for single family dwellings, small farming or horticultural production. The number of persons whose day to day family maintenance needs could be readily and conveniently served by a retail business on plaintiff's property is approximately 800 residing in approximately 202 homes, and within the immediate future it is reliably estimated that said population number will have increased to more than 2000 persons. The nearest existing businesses supplying day to day needs of these persons are more than three miles away from said population with no public means of transportation thereto.

[2] We pause to remark that the allegations of probable future changes contained in the petition, of which the allegation of the estimated future increase in population is an example, can not be looked to as a legal ground for striking down the ordinance. It must be unconstitutional as applied to existing facts in order to be held presently invalid. Courts will not speculate on whether future conditions, when or if they come into being, may render the ordinance unconstitutional as applied to the changed conditions. If the conditions do so change petitioner will then have his remedy if the new conditions render the operation of the ordinance invalid as to him.

[3] The allegations that no retail businesses catering to day to day needs exist within less than three miles from the population which appellant's proposed business would serve might, standing alone, justify a judicial inquiry into the reasonablness of the zoning ordinance in that respect. They do not stand alone however. The petition contains the following additional allegations touching this subject: 1200 feet south of appellant's property Acalanes Road intersects State Highway No. 24 and on the north side of that highway there is zoned for business 2800 feet of highway frontage. If that area, which is within one quarter of a mile of appellant's property, does not have businesses there established to meet the day to day retail needs of the 800 persons referred to in the complaint, it affords ample space for such businesses which is all that the county authorities can be constitutionally required to do.

[4] Appellant's allegations that present plans for construction of a freeway will eliminate 95.7% of said business frontage property on Highway No. 24 is an allegation of an expected future fact which, while it may, if it occurs, give appellant legal ground for complaint, furnishes no present ground to attack the ordinance.

[5, 6] The fact that across the road from appellant's property there are a public high school and a cabinet shop furnishes no ground for attack on the ordinance. The petition fails to tell us whether they are non-conforming uses existing when the ordinance was adopted, which would itself justify their continuance. Acker v. Baldwin, 18 Cal.2d 341, 345, 115 P.2d 455; 12 Cal.Jur. 10-yr. Supp., Zoning, sec. 19, pp. 160–161. Nor does the fact that appellant's property would be more valuable if zoned for business make the ordinance unconstitutional. Feraut v. City of Sacramento, 204 Cal. 687, 693, 269 P. 537; Zahn v. Board of Public Works, 195 Cal. 497, 512, 234 P. 388. The same is true of the allegation that no use is being made of the property on the side of Acalanes Road on which appellant's property is situated for over one mile to the north, since "one of the bases for zoning regulations is the guidance of future development for the protection of residential areas." Lockard v. City of Los Angeles, 33 Cal.2d 453, 466, 202 P.2d 38, 46, 7 A.L.R.2d 990; Sunny Slope Water Co. v. City of Pasadena, 1 Cal.2d 87, 93, 33 P.2d 672.

[7] The latter case repeats an often stated rule applied to comprehensive zoning ordinances: "Before respondent can succeed in its efforts to avoid the application of the ordinance to it, it must be held that it established that the ordinance is unreasonable as to it, in the face of a strong presumption to the contrary." 1 Cal.2d at page 92, 33 P.2d at page 674. We find nothing in the petition which meets this burden.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

104 Cal.App.2d 810

TAMBLE v. DOWNEY, Insurance Commissioner.

Civ. 14655.

District Court of Appeal, First District, Division 2, California.

June 19, 1951.

Action by Myron James Tamble against Wallace K. Downey, as Insurance Commissioner, for writ of mandate annulling order revoking license of plaintiff. The Superior Court in and for the City and County of San Francisco, Edward P. Murphy, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Dooling, J., held that viewing transaction engaged in by plaintiff in light most favorable to judgment of trial court, plaintiff had merely taken application for insurance which was signed by person other than purported applicant with full disclosure of such procedure to insurance company and transaction was innocuous and innocent of wrong.

Judgment affirmed.

1. Administrative law and procedure ⇐235, 744
Constitutional law ⇐318

State-wide administrative agencies cannot constitutionally exercise judicial functions and due process of law requires trial de novo in superior court when findings of such agency are attacked by mandamus.

2. Administrative law and procedure ⇐747
Madamus ⇐173

It is essence of trial de novo that court is authorized by law to exercise its independent judgment on the evidence.

3. Appeal and error ⇐1011(1)

Where independent judgment of trial court is exercised upon conflicting evidence, findings of such court are conclusive on appeal.

4. Evidence ⇐588

Testimony of a witness is inherently improbable only when no reasonable person could believe his testimony.

5. Insurance ⇐12

Where life insurance agent had allowed application to be signed by one other than party designated as applicant for insurance and agent had informed his principal of such transaction and agent testified that he had been reprimanded by company for so taking application, but it did not appear whether policy had been issued, transaction was innocuous and innocent of any wrong and revocation of agent's license was not warranted.

6. Appeal and error ⇐931(1)

On appeal every intendment must be indulged in favor of judgment, findings must be liberally construed to uphold rather than to defeat it and appellate court must draw from findings those inferences which will support judgment.

Edmund G. Brown, Atty. Gen., T. A. Westpahl, Jr., and William M. Bennett, Deputies Atty. Gen., for appellant.

Joseph C. Haughey, San Francisco, for respondent.

DOOLING Justice.

The insurance commissioner appeals from a judgment annulling by writ of mandate an order revoking the license of respondent as a life insurance agent.

The hearing officer's findings, which were adopted by appellant, found that respondant made false and fraudulent representations in the sale of insurance policies or knowingly wrote false answers in the applications for such policies in each of four cases. As to each of these incidents respondent gave testimony before the hearing officer denying the charges of misconduct. The trial judge chose to believe the testimony of respondent and found that none of these charges was true.

[1–3] Since the decision of our supreme court in Standard Oil Co. v. State Board of Equal., 6 Cal.2d 557, 59 P.2d 119, our courts are committed to the principle that statewide administrative agencies cannot constitutionally exercise judicial functions. From this it results that due process of law requires a trial *de novo* in the superior court when the findings of such an agency are there attacked by mandamus, Drummey v. State Bd. of Funeral Directors, 13 Cal.2d 75, 87 P.2d 848, and it is the essence of a trial *de novo* that the court is "authorized by law to exercise its independent judgment on the evidence". Moran v. Board of Medical Examiners, 32 Cal.2d 301, 308, 196 P.2d 20, 25. Where that independent judgment is exercised upon conflicting evidence, as here, the findings of the trial court are necessarily conclusive on appeal.

[4] Appellant asserts that respondent's testimony is inherently improbable. Inherent improbability only exists when no reasonable person could believe the testimony. People v. Robinson, 87 Cal.App.2d 772, 774, 197 P.2d 776. An examination of respondent's testimony makes it perfectly clear that it does not fall within this category.

[5] One charge requires more extended discussion. As to that charge respondent himself gave the only testimony. He testified that in answer to an inquiry by mail purportedly signed by Hazel Moreing he

called at the address given on the postcard and there met Luverne Pinning. Mrs. Pinning explained to him that she had sent the card because Mrs. Moreing was a very dear friend and Mrs. Pinning wanted to take out a policy for Mrs. Moreing as a gift to her because Mrs. Moreing had helped her in many ways in the past. Respondent said: "That is very irregular", but "I was persuaded by her sincerity, and I took her application * * * She just literally begged me to take it for her because she wanted to do this lady a favor * * * I think she paid the annual premium at that time." The application was filled out from information given by Mrs. Pinning and Mrs. Pinning signed Mrs. Moreing's name to it. "I didn't realize I was doing anything wrong at that time because this lady was so sincere in her effort to purchase the policy for this very dear friend, and I was persuaded by her, and I did permit her signing the application at that time. Later on I was reprimanded for it * * * The office stated that I was not supposed to take applications for somebody else, signed by another individual. * * * I submitted the application through the regular channels * * * All of the applications are inspected by our State Manager, Mr. Joseph. And at that time I was reprimanded for it."

The trial court found that this transaction occurred, as it was bound to do, but concluded that it constituted no violation of the Insurance Code nor any grounds for disciplinary action.

It is to be observed of this testimony that it leaves several facts uncertain. It does not expressly appear whether or not a policy of insurance was issued on this application, although the more probable inference is that none was issued since the testimony is that "all of the applications are inspected by our State Manager, Mr. Joseph. And *at that time* I was reprimanded for it." It does not expressly appear whether or not respondent informed his superiors in the company that Mrs. Moreing's name had been signed by Mrs. Pinning, although the evidence will support that inference since Mr. Joseph according to the testimony must have known that fact at the time of inspecting the application and no other probable way of his learning that fact at that time is apparent. It does not expressly appear whether or not Mrs. Pinning received back the premium paid by her, but we must assume in the absence of proof to the contrary that she did.

There was no finding by the hearing officer or by the court that a policy was issued, that respondent did not inform his company at the time of submitting the application that Mrs. Moreing's name was signed by Mrs. Pinning, or that Mrs. Pinning suffered any financial loss by the transaction. It is worthy of notice that, while there was no written finding on the subject, during the hearing the hearing officer apparently drew the inference that respondent had made a full disclosure to his principal for he said: "The testimony is that he did tell the company, and he was reprimanded by the company." Mr. Joseph who could have established all these facts was present at the hearing but was not called to testify. The trial court was entitled to believe that the transaction was one in which respondent, after informing Mrs. Pinning that it would be "very irregular", permitted himself to be persuaded to take the application from Mrs. Pinning and immediately informed his company of what he had done. So viewed, as we must assume in support of the judgment the trial court viewed it, the transaction was innocuous and innocent of any wrong. It was as if respondent had said to Mrs. Pinning: "This is very irregular, but I will submit the matter to my company in this way and see if they will issue a policy for Mrs. Moreing as you wish." If the company, knowing all the facts, had chosen to issue a policy on the application it would have been estopped to avoid it on the ground that the application was not in fact signed by Mrs. Moreing. If the company, as we must assume it did, refused to issue a policy no harm was done to Mrs. Pinning, to Mrs. Moreing or to the company.

[6] On appeal every intendment must be indulged in favor of the judgment, the findings must be liberally construed to uphold rather than to defeat it, and the appellate court must draw from the find-

ings those inferences which will support the judgment. 2 Cal.Jur., Appeal and Error, sec. 511, pp. 871–873.

The judgment is affirmed.

NOURSE, P. J. and GOODELL, J., concur.

104 Cal.App.2d 735

THREE SIXTY FIVE CLUB v. SHOSTAK.

Civ. 14526.

District Court of Appeal, First District, Division 1, California.

June 14, 1951.

Three Sixty Five Club sued Louis K. Shostak for declaration of rights of plaintiff as lessee and of defendant as purchaser from lessor, who had orally waived the provision in a recorded lease authorizing lessor to recapture one floor of the leased premises. The Superior Court in and for the City and County of San Francisco, Herbert C. Kaufman, J., rendered judgment for plaintiff and defendant appealed. The Court of Appeal, Agee, J. pro tem., held that the circumstances of the lessee's possession, including extensive improvements which lessee would not have made if the recapture clause were still in effect, put the purchaser upon notice of the oral waiver and that lessee was not estopped from asserting such waiver.

Judgment affirmed.

1. Vendor and purchaser ⇐232(1)

Possession of realty by one other than vendor is notice or evidence of notice to an intending purchaser sufficient to put him on inquiry as to occupant's rights, unless under peculiar circumstances there is no duty to make inquiry.

2. Vendor and purchaser ⇐232(9)

Where tenant's possession extends beyond premises covered by recorded lease, an intending purchaser has duty to inquire as to tenant's rights not included in the lease.

3. Vendor and purchaser ⇐232(1)

If circumstances as to possession put a purchaser on inquiry, he is chargeable with knowledge of all that a reasonably diligent inquiry as to occupant's rights and claims might have disclosed.

4. Vendor and purchaser ⇐232(1), 245

The circumstances of each case determine whether an inquiry should be made by intending purchaser into reason for possession by one other than vendor, and this is ordinarily a question of fact.

5. Vendor and purchaser ⇐232(9)

Where recorded lease of three floors of building to nightclub owner gave lessor right to recapture second floor for an uncertain amount of rent, and did not include stairway leading to nightclub, fact that lessee had installed more extensive improvements than he would probably have installed if recapture provision were still in effect, such inconsistencies between circumstances of lessee's possession and provisions of recorded lease to put purchaser from lessor upon inquiry as to tenant's rights, including rights under lessor's oral waiver of the recapture provision, and hence purchaser could not avail himself of the recapture provision.

6. Estoppel ⇐32(2)

Where reliance, by purchaser from lessor, upon recorded lease containing provision for recapture of part of premises by lessor was unreasonable because circumstances of lessee's possession put purchaser upon notice of lessee's rights under original lessor's oral waiver of recapture provision, lessee was not estopped by recordation of lease from asserting the oral waiver.

7. Estoppel ⇐87

To warrant reliance, a representation must be such as would induce a reasonable man to act upon it.

8. Stipulations ⇐14(11)

Under stipulation as to facts submitting case to trial court, providing that court had at request of parties examined demised premises "as an aid to draw his conclusions from the evidence to be considered by him,"

viewing of premises did not constitute additional or independent evidence but merely permitted trial court to better understand the evidence.

Freed, Gebauer & Freed, San Francisco Eli Freed, Emmett Gebauer, and Scott Fleming, all of San Francisco, of counsel, for appellant.

Theodore M. Monell, Ernest J. Torregano, San Francisco, for respondent.

AGEE, Justice pro tem.

On August 29, 1941, the then owner, Bligh, of the four-story building located at the southeast corner of Market and Fremont Streets in San Francisco leased the second, third and fourth floors thereof to plaintiff's predecessors in interest for the purpose of conducting a night club. Clause 3 of the lease provided: "The Lessees hereby grant to the Lessor the option of leasing the second floor of said premises at any time during the term mentioned herein at a monthly rental that will not be in excess of one-third of the entire rental being paid by Lessees at the time said option is exercised." In June or July, 1943, the plaintiff went to Bligh and told him that he would like to construct six dressing rooms and a corridor along the westerly wall of the second floor, including the installation of a magnesite floor and ventilation equipment, but would not do so unless Bligh would waive his right to recapture the westerly half of the second floor. Bligh orally agreed to do so and plaintiff went ahead with the improvements, which cost approximately $10,000. For some reason not disclosed by the record, plaintiff caused the lease to be recorded on July 8, 1944. Nothing on the record disclosed the waiver. In July, 1945, defendant Shostak bought the building. He dealt with Bligh's agent, Bligh being in Europe with our military forces. Shostak did not know of the oral waiver. He relied upon the record title as disclosed by the title search ordered by him, the terms of the lease, a copy of which he read, and an examination of the premises. Shostak did not know who had caused the lease to be recorded. There is no showing that he relied upon the time of recordation. He observed that the entire third floor was occupied by the night club, the fourth floor was almost entirely vacant, and the second floor contained the 1943 improvements mentioned above, together with a rehearsal room and playroom, liquor storage space, a carpentry shop, small rooms for use in creating the "girl in a fishbowl" illusion, and incidental storage space. The expense required to move these facilities to the fourth floor would be substantial in amount. The only means of ingress and egress provided for in the lease was by means of elevators giving access to the Market Street entrance. In the latter part of 1942 and early part of 1943 there was constructed a stairway leading from the leased premises to Fremont Street. This was done to comply with fire regulations, the fire marshal having ordered the premises closed because of the lack of such additional exit. The cost of construction was shared by the plaintiff and Bligh. Shostak made no inquiry of the plaintiff or of Bligh's agent or anyone else concerning the rights of the plaintiff. On November 30, 1945, Shostak gave written notice of his election to recapture the second floor and demanded that plaintiff vacate. Thereupon plaintiff commenced this action against Shostak to have the rights of the parties declared. Shostak appeals from an adverse judgment which held that he was bound by the oral partial waiver of the recapture clause.

Appellant makes two contentions: (1) that the possession of the tenant night club, having been consistent with and explained by the record title, did not constitute notice of asserted rights outside of the record, and (2) that the tenant, having recorded its lease knowing that said lease contained a provision (clause 3) which had been waived in part, is estopped to assert said waiver as against appellant who purchased without knowledge thereof.

The trial court found that "defendant was not entitled to rely upon the recordation of the lease as evidencing the entire rights of the plaintiff in the premises, and that defendant by reasonable investigation could readily have discovered that plaintiff

was entitled to possession of the westerly half of the second floor of said premises occupied by it, and that the defendant's predecessor had waived his right and option to lease or recapture said portion of the second floor of said premises."

[1–4] Possession of real property by one other than the vendor is notice or evidence of notice to an intending purchaser sufficient to put him on inquiry as to the rights of the occupant unless under the peculiar circumstances of the case there is no duty to make inquiry. 25 Cal.Jur. 834–836. An example of the exception to the general rule is where the possession is consistent with the record title and there are no circumstances which would indicate the need of inquiry. Smith v. Yule, 31 Cal. 180. Where a tenant's possession extends beyond the premises covered by a recorded lease, an intending purchaser has a duty to inquire as to the tenant's rights not included in the lease. Dreyfus v. Hirt, 82 Cal. 621, 23 P. 193. If the circumstances as to possession are such as to put a purchaser on inquiry, he is chargeable with knowledge of all that a reasonably diligent inquiry as to the rights and claims of the occupant might have disclosed. 25 Cal.Jur. 836. The circumstances of each case determine whether an inquiry should be made. This is ordinarily a question of fact. The recent case of Basch v. Tidewater Associated Oil Company, 49 Cal.App.2d Supp. 743, 117 P.2d 956, 121 P.2d 545, discusses all of the foregoing principles.

The circumstances and inconsistencies relied upon by respondent are as follows: The stairway leading to Fremont Street from the night club was not a part of the demised premises, the lease having only included "the exclusive right to the use of the elevators." The substantial improvements on the second floor made by the tenant were obviously recent and were peculiarly adapted to the use and operation of the night club on the third floor. It would seem unlikely that these improvements costing $10,000 would have been installed when at any time the landlord could have recaptured the second floor for not more than one-third of $550 per month. Clause 3 is so worded that the trial court in its opinion held that a reading of it alone was sufficient to make it the duty of appellant to make an inquiry to find out if the option had been exercised or waived. The amount of rent to be paid by the landlord upon recapture of the second floor was uncertain, the lease providing it was not to be "in excess of one-third" of $550 per month. This was an additional circumstance which should have excited inquiry as to whether an exact amount had been agreed upon.

[5] For the foregoing reasons we believe that the trial court was correct in holding that there were sufficient circumstances and inconsistencies between the apparent possession of the tenant and the terms of the recorded lease to put upon the purchaser the duty of making a reasonable inquiry as to rights of the tenant not included in the lease.

[6, 7] Estoppel arising from the recordation of the lease is not available to appellant because his reliance upon the recorded lease alone was unreasonable. In other words, he had no right to so rely. "To warrant reliance, a representation must be such as would induce a reasonable man to act upon it." 10 Cal.Jur. 637–638.

[8] This case was submitted to the trial court on a stipulation as to the facts and contained the following provision: "That the court has, at the request of both parties and in their presence, examined the demised premises *as an aid to draw his conclusions from the evidence to be considered by him* in his determination of this matter." (Emphasis added.) Because of the wording we believe that the viewing of the premises did not constitute additional or independent evidence but merely permitted the trial court to better understand the evidence contained in the stipulated statement of facts.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

104 Cal.App.2d 782

PEOPLE v. MIDDLEWORTH.

Cr. 754.

District Court of Appeal, Fourth District, California.

June 15, 1951.

Robert J. Middleworth was convicted of issuing a check with intent to defraud, and he filed application for writ of error coram nobis. The Superior Court of San Diego County, John A. Hewicker, J., entered order denying writ, and defendant appealed. The District Court of Appeal, Griffin, J., held that where facts relied on by defendant in application were known to him at time of trial, but were not brought to attention of trial court at time of trial or on motion for new trial, matters based on facts could not be raised for first time by means of writ of error coram nobis.

Order affirmed.

1. Criminal law ⇐997

Grounds which should have been considered on appeal from judgment or on motion for new trial in criminal prosecution, cannot furnish basis for issuance of writ of error coram nobis.

2. Criminal law ⇐997

Where defendant was convicted of issuing a check with intent to defraud, and matters relating to alleged conspiracy between defendant's counsel and district attorney to withhold competent evidence were known to defendant at time of trial, but were not brought to attention of trial court at time of trial or on motion for new trial, defendant could not raise that question for first time by means of writ of error coram nobis. Pen.Code, §§ 476a, 1203; Government Code, § 6201; Const. art. 1, § 13; U.S.C.A.Const.Amend. 14.

3. Criminal law ⇐997

Purpose of review by way of writ of error coram nobis is to secure relief, where no other remedy exists, from judgment rendered while there existed some fact which would have prevented its rendition if court had known it and which, through no negligence or fault of defendant, was not then known to court, and applicant must show that facts were not known to him and could not in exercise of due diligence have been discovered substantially earlier than time of motion for writ.

4. Criminal law ⇐661

Agreement between district attorney and counsel for defendant to withhold irrelevant and immaterial evidence would not constitute a conspiracy against defendant.

5. Criminal law ⇐982

Where defendant was convicted of issuing a check with intent to defraud, and admitted three prior convictions, probation was properly denied. Pen.Code, § 1203.

6. Criminal law ⇐997

Where defendant was convicted of issuing a check with intent to defraud, but had not appealed, affidavit in support of application for writ of error coram nobis which did not show that defendant was prejudiced by failure to produce certain witnesses or by failure to produce certain evidence, or that withheld evidence was relevant to issue presented at trial, was insufficient, and writ was properly denied. Pen.Code, §§ 476a, 1203; Government Code, § 6201; Const. art. 1, § 13; U.S.C.A.Const.Amend. 14.

Robert J. Middleworth, in pro. per.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant was charged in an information with, and convicted by a jury of the crime of issuing a check for $15.80 with intent to defraud. He admitted three prior convictions: (1) of robbery, first degree; (2) violation of section 6201 of the Government Code; and (3) of forgery, and of serving time on each charge in the State's prison at San Quentin.

On March 10, 1950, he was sentenced to State's prison on the instant charge, sentence to run consecutively in relation to the unexpired portion of defendant's previously existing sentence. No appeal was taken from the judgment.

Now, on September 11, 1950, defendant, in propria persona, filed in the Superior Court of San Diego County an application for a writ of error coram nobis alleging errors which may be summarized as follows: (1) that he was "unjustly and unlawfully convicted" in that he did not intend to defraud the bank upon which the check was drawn; (2) that he was "denied and deprived" of a fair and impartial trial, in violation of Article I, Section 13 of the Constitution of California, the "Fourteenth Amendment, Section 1, of the United States Constitution", and sections 476a and 1203 of the Penal Code in that his counsel and the district attorney "connived and conspired" to keep and withhold evidence from the trial court; (3) that the district attorney held conversations with the jurors during the trial and poisoned their minds against him; and (4) that the trial court, although it granted a "probation hearing", "denied probation", because the "district attorney submitted evidence of defendant's prior convictions". As we construe defendant's contentions in his brief, in effect, he wants the judgment of his conviction set aside and a new trial ordered, so that he may be allowed to subpoena certain named witnesses in defense of his claimed innocence.

Defendant filed several of his own affidavits in support of his contentions, in which he stated that his wife opened a joint account and received a joint account signature from the bank for the purpose of "identifying checks"; that he agreed to "waive a single account" of his own, and that he and his wife agreed to form a joint account "for both of them"; that he went to the bank before going to Nevada to divorce his wife and received a check book; that he was instructed by the clerk at the bank to cross off the words "Main Office" from the checks and write in the branch at which he had his account; that he failed to do this because he was nervous due to the threatened divorce proceeding and "overlooked many trifling" matters; that he issued these checks in good faith, without intent to defraud the bank; that he had sufficient funds in his personal account to cover all of his personal checks and that his wife had failed to inform him that she had overdrawn the account. He insists that the bank statements and records were not introduced properly in court as evidence and were not properly examined by his own attorney because his attorney and the district attorney conspired to withhold such evidence. He claims that he now has possession of the statements and records of the bank to support his contention that he did not intend to defraud the bank and that this evidence would establish his innocence, and that he can now prove that "funds and credits to his account were in financial soundness and financially good". He asserts on appeal that his mother asked that she be permitted to testify at the trial but both his attorney and the district attorney refused to allow her to do so and that the judge refused to grant him a hearing on his application for probation because the district attorney submitted evidence of prior convictions.

The trial judge who tried the original case and who was familiar with the facts did, on September 13, 1950, hear the matter, and considered the authorities and affidavits presented. He then signed an order which recites: "* * * it appearing to the court that said application is without merit and that there is no legal cause shown why said application should be granted, the same is hereby denied."

[1] As will be noted, many of the matters urged by the defendant as grounds for the issuance of the writ should have been considered on an appeal from the judgment or on a motion for a new trial, and therefore furnish no basis for the issuance of the writ of error coram nobis. People v. Chapman, 96 Cal.App.2d 668, 670, 216 P.2d 112; People v. Egan, 73 Cal.App. 2d 894, 900, 167 P.2d 766; People v. Bailey, 91 Cal.App.2d 578, 581, 205 P.2d 418; People v. Navarro, 74 Cal.App.2d 544, 552, 169 P.2d 265; People v. James, 99 Cal.App. 2d 476, 222 P.2d 117.

[2, 3] There is no showing, other than the conclusion of the defendant, as stated in his affidavit, that defendant's counsel and the district attorney ever conspired to

keep and withhold any competent or material evidence from the trial court. Any facts that were then known to defendant could well have been brought to the attention of the trial court at the time of trial or on a motion for new trial. Unless the claimed matters, which were apparently then known to defendant, were called to the attention of the trial court, defendant may not, after the judgment of conviction has become final, raise such question for the first time by means of a writ of error coram nobis. See, People v. Shorts, 32 Cal.2d 502, 507, 197 P.2d 330; and People v. Adamson, 34 Cal.2d 320, 326, 210 P.2d 13, 15, where the limitations of review by way of writ of error coram nobis are defined, the court saying it is a "remedy of narrow scope. * * * Its purpose is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it and which, through no negligence or fault of the defendant, was not then known to the court"; and that an "applicant for the writ 'must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ; otherwise he has stated no ground for relief.'"

[4–6] It does not appear what facts were known to defendant's mother or that such facts as were known to her were relevant to the issue presented at the time of trial. There is no sufficient showing that defendant was prejudiced by the failure to produce any of the witnesses mentioned or by the failure to produce the evidence referred to in defendant's affidavit. Any understanding that defendant's counsel and the district attorney may have had in reference to the presentation of the evidence to the court, if such evidence were irrelevant and immaterial, would not constitute a conspiracy. The court was informed of the previous felonies committed by defendant by virtue of the information charging them and the defendant's admission of such charges. Probation was properly denied. Penal Code, Section 1203. Since the claimed grounds set forth by defendant for his release by means of a writ of error coram nobis were properly held to be insufficient, the trial court was justified in denying the writ.

Order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

104 Cal.App.2d 786

COUNTER v. COUNTER.

No. 14619.

District Court of Appeal, First District, Division 1, California.

June 18, 1951.

Christopher G. Counter, individually, and as administrator of the estate of Katherine Counter, deceased, brought action against Richard P. Counter to cancel a deed. The Superior Court in and for the City and County of San Francisco, H. A. Van der Zee, J., entered judgment against defendant, and he appealed. The District Court of Appeals, Bray, J., held that evidence was sufficient to sustain findings that deed executed and physically delivered by grantor and his wife was intended to be a testamentary disposition, and held that deed was entirely inoperative and could be cancelled.

Judgment affirmed.

1. Deeds ⇐56(2)

Manual delivery does not effect delivery of a deed unless act be accompanied with intent that deed shall become operative as such, and that it shall presently pass title, without reservation of any right of revocation or recall.

2. Deeds ⇐66

Whether a deed was delivered with intent that it should presently pass title, is question of fact for jury.

3. Deeds ⇐194(1)

Physical delivery of a deed raises inference that grantors are immediately parting with title.

4. Deeds ⇐194(1)

Inference that grantors are immediately parting with title, raised by physical delivery of deed, may be overcome by evidence showing that such was not intention of grantors.

5. Wills ⇐93

In action by grantor to cancel deed to real property, evidence was sufficient to sustain finding that deed executed and physically delivered by grantor and his wife was not intended to presently pass title to grantee, but was intended as a testamentary disposition to take effect after death of both grantor and his wife.

6. Deeds ⇐56(3)

Essential requisite to validity of a deed is that it has passed beyond control of grantor for all time.

7. Deeds ⇐56(2)

Grantor's intention in delivering a deed is to be determined in the light of all the circumstances surrounding the transaction.

8. Appeal and error ⇐1010(1)

Finding regarding intent of grantors in executing and delivering deed and as to whether grantors parted with all control over instrument and then actually transferred title to grantee, will not be disturbed on appeal, where there is substantial evidence to support the conclusions.

9. Wills ⇐88(2)

Where grantor and his wife executed and physically delivered deed to grantee, but there was no intention of presently transferring title, and it was intended that title vest only after death of grantor and his wife, deed was entirely inoperative as constituting an attempt by grantors to make testamentary disposition of property, and could be canceled.

10. Wills ⇐88(2)

A testamentary disposition may be had only by will executed as required by law of wills, and a deed, intended to be testamentary, cannot be given effect.

Hoge, Pelton & Gunther, San Francisco, Reginald M. Watt, Leo V. Killion, San Francisco, of counsel, for appellant.

Frank J. Perry, John F. O'Sullivan, San Francisco, for respondent.

BRAY, Justice.

Defendant appeals from a judgment entered against him in an action brought against him by his father individually and as administrator of the estate of his deceased wife, the son's mother, to cancel a deed to real property.

Question Presented.

Does physical delivery of a deed control over circumstances showing that the delivery was intended only as a testamentary disposition and was without intent to pass title?

Facts.

Plaintiff and his wife Katherine owned certain real property in San Francisco, consisting of three flats, one of which was occupied by them as their home. The property was given originally to plaintiff by his mother. How an interest in it got into the wife does not appear. They had two children, defendant and a daughter, Bernice. Defendant lived there with his parents until after the death of the mother. He evidently was her favorite, but did not get along too well with his father. On one occasion Mrs. Counter stated to plaintiff that she would like to have their affairs arranged so that in case anything happened to them defendant would get three-quarters and Bernice one-quarter of the property. This was the only discussion of the matter prior to the making of the deed. Mrs. Counter had been confined to her bed for a considerable period. Defendant testified that his mother told him she wanted his attorney to draw some papers for her. Defendant called his attorney and then the mother took the phone, saying that she wanted a gift deed prepared deeding the property to her son and daughter. No further discussion was had. The attorney assumed that Mrs. Counter meant that the property was to go in equal shares to the children, and so prepared the deed conveying an undivided one-half interest to each. He then phoned defendant, stating that he would be out on December 31, 1937. On that day the attorney brought with him a Mrs. Townsend, a notary public. When

they arrived Mrs. Counter was in bed. Another woman, Mrs. Raggio, now deceased, who was Mrs. Counter's nurse, and plaintiff and defendant were present. Just prior to the attorney's arrival, defendant had gone around the corner to the place where plaintiff was working and had him come home. In the presence of the group, the attorney showed the deed to both plaintiff and Mrs. Counter. Both read it. The attorney asked "if that was the way they wanted it." Plaintiff stated that he wanted his half to go to the son and daughter. Mrs. Counter said she wanted her half to go to the son. The attorney then wrote in ink on the deed, changing the disposition from one-half to each, to two-thirds to defendant and one-third to Bernice. As the attorney stated on cross-examination, his arithmetic was poor. To meet the wishes of the grantors, the disposition should have been three-quarters and one-quarter. The attorney then asked if the deed was the way plaintiff and Mrs. Counter wanted it and they said it was. It was then signed by both. The notary acknowledged it. The attorney then told plaintiff and Mrs. Counter "that to make the deed effective they would have to give it to Richard [defendant] at that time." Plaintiff gave it to Mrs. Counter, and she gave it to defendant. The attorney and the notary then left. At no time was anything else said about the deed. The attorney did not advise either plaintiff or Mrs. Counter as to whether or not the deed would convey present title, nor the effect of a delivery of the deed. Plaintiff testified that on this day prior to the arrival of the attorney there was a conversation between himself and Mrs. Counter in the presence of the boy in which Mrs. Counter said she wanted to give defendant three-quarters and the daughter one-quarter after plaintiff's death. Plaintiff suggested they be treated equally. The attorney said nothing after his arrival except to tell plaintiff and Mrs. Counter to sign the deed. The first plaintiff knew about the deed was when the attorney arrived with it. Plaintiff also testified that after the attorney and notary left he took the deed back from defendant, stating, "Listen, I don't want this recorded until something happens to me. * * * I still own it." Plaintiff then placed the deed in a tin box in the bureau drawer. The next morning he went to get the deed and it was gone. Plaintiff testified that it was his intention that the deed not become effective until after he died. "When I signed that deed of gift, that was signed in love and affection, not to be executed until my death, only." Defendant testified that in the presence of the attorney his mother and father told the attorney how they wanted the property divided after their death. Defendant denied the statement plaintiff claimed to have made to him after the deed was signed. He also claimed that he, and not his father, placed the deed in the bureau drawer. The next day defendant took the deed from the drawer and gave it to the attorney for safe keeping. Defendant contradicted himself by first saying that after the deed was handed him he "figured" the deed was his and then stating that he knew that both his mother and father intended to keep the property until they died and had no intention of parting with it until they died. Mrs. Counter died March 29, 1947, about nine years after the deed episode. Plaintiff at all times considered the property his, managed it, collected the rents, paid income tax on the amount collected, paid the cost of upkeep, insurance, taxes, of all of which defendant was aware. Plaintiff remarried May 4, 1948. Two days thereafter defendant obtained the deed from the attorney and recorded it. At no time prior thereto did defendant assert any claim to the property, attempt to collect any rents, offer to pay any expenses. The daughter never made any claim to the property and deeded back to plaintiff the one-third interest mentioned in the deed.

1. Physical Delivery.

[1–5] Defendant's main contention is that the physical delivery of the deed to defendant vested title in the grantee subject only to a life estate in the grantors, regardless of the circumstances of the delivery. He contends that such delivery bars any claim that the intention of the grantors was otherwise. This contention

disregards one of the most important matters in connection with the delivery of a deed, which is, what was the intention of the grantors? "The delivery of a deed is not effected by a mere manual tradition of the instrument, unless the act 'be accompanied with the intent that the deed shall become operative as such' [citation]; i. e., that it shall presently pass title, without the reservation of any right of revocation or recall. [Citation]. Whether or not the requisite intent existed is a question of fact for the trial court or jury." Hefner v. Sealey, 175 Cal. 18, 19, 164 P. 898, 899. Physical delivery raises an inference that the grantors are immediately parting with the title. But that inference may be overcome by evidence showing that such was not the intention of the grantors. Here, while the circumstances were such as to support a conclusion, had the trial court made it, that the grantors intended to vest title reserving to themselves only a life estate, such a conclusion is not compelled. A very reasonable conclusion is the one drawn by the court, namely, that the grantors did not intend to part with the title but merely intended the deed as a testamentary disposition to take effect upon their death. The fact that the father and the son did not get along too well, that the only discussion of a disposition of the property was a disposition after their deaths,* that the attorney at no time inquired as to when they intended the deed to take effect nor explained to them the legal effect of their action, that immediately plaintiff took the deed from defendant and placed it in plaintiff's own tin box, the complete control of the property by plaintiff and the absence of any indication by defendant that he considered that title had passed (of course, if plaintiff and his wife had merely reserved a life estate they would have been entitled to the rents, so the failure of defendant to be concerned with the rents is not necessarily significant; however, the fact that all expenses including those of maintenance were paid by plaintiff and no offer of help by the alleged remainderman is an item to be considered), the admission of defendant that he knew that the grantors had no intention of parting with the property until they died (even though he contradicted this admission), are all circumstances supporting the court's finding that the grantors, by the physical delivery of the deed, did not intend to part with title but intended only that the deed was to be testamentary in character and not to take effect until after the death of both.

The attorney testified that he told the grantors that the deed would not be effective for any purpose unless it was delivered that day. Such a statement to a layman gives no hint of the legal effect of a physical delivery. To a layman it is completely consistent with a conclusion that to be good as a testamentary disposition it must be handed over. The fact that when plaintiff discovered the next day the deed had been taken from the tin box he did nothing about it, while a circumstance which the court might have felt supported defendant's contention, is not compelling or conclusive. Such circumstance is not completely inconsistent with plaintiff's belief that the deed was testamentary in character.

Defendant's Authorities.

[6, 7] Defendant has cited a number of authorities on the subject of delivery of deeds. They are all cases in which the court found that the intention of the grantor was to effect an immediate parting with title. None of them support defendant's contention that the fact of physical delivery bars an inquiry into the intention with which such delivery is made. Bury v. Young, 98 Cal. 446, 33 P. 338, a leading case in California, upon which defendant mainly relies, does not so hold. The full facts in that case are not set forth. However, it appears that the grantor called an attorney to his bedside for legal advice

* Mrs. Counter had been ill for ten years. She had had a stroke and had been bedridden for a considerable time. Hence plaintiff, when stating that the deed was only to be effective after *his* death, obviously felt that he would be the last to die.

as to the disposition of his property and then still acting on his advice the grantor signed and acknowledged the deed, and gave it to the attorney with instructions not to record it but to deliver it to the grantees on his death. Thereafter he endeavored to get the deed back and the attorney refused to give it to him. In an action after his death, the court held that by the delivery of the deed title passed to the grantees subject to a life estate in the grantor. On appeal the question was whether the findings supported the judgment. The findings after reciting that the grantor had delivered the deed to the attorney, *for the grantees,* stated that the grantor had then and there parted with all dominion over the deed and reserved no right to have or enjoy any other or further interest in the premises than to hold the use thereof until his death. It was held that such findings did not support the judgment. It must be noted that the trial court found from the evidence, probably based upon the fact that the grantor was advised by the lawyer and was following his advice, that the grantor reserved no rights. Actually the Bury case supports our conclusion, for the court said, 98 Cal. at page 451, 33 P. at page 340: "The essential requisite to the validity of a deed transferred under circumstances as indicated in this case is that, when it is placed in the hands of the third party, it has passed beyond the control of the grantor for all time. That question is determined by the grantor's intention in the matter, and his intention in making the delivery is a question of fact, to be solved by the light of all the circumstances surrounding the transaction." See also Hotaling v. Hotaling, 193 Cal. 368, 382, 224 P. 455, 56 A.L.R. 734.

[8] In Merritt v. Rey, 104 Cal.App. 700, 286 P. 510, where the court found that the grantor intended to pass immediate title, the facts are so dissimilar to ours as not to require further comment. However, the court there laid down the rule which binds us here, 104 Cal.App. at page 705, 286 P. at page 512: "The question regarding the intent of the grantor in executing and leaving the deed with the conveyancer and as to whether she thereby parted with all control over the instrument and then actually transferred title to the grantee are problems of fact to be determined by the court, and its solution will not be disturbed on appeal, where there is substantial evidence to support the conclusions."

In Herman v. Mortensen, 72 Cal.App.2d 413, 164 P.2d 551, the attorney explained at length to the grantor the effect of delivery before she parted with the deed, thus providing substantial support for the jury's implied finding that the grantor contended that title should vest immediately in the grantee. Des Granges v. Des Granges, 175 Cal. 67, 165 P. 13, and Knudson v. Adams, 137 Cal.App. 261, 30 P.2d 608, were factually different from our case

[9, 10] The evidence in this case brings it under the rule set forth in Williams v. Kidd, 170 Cal. 631, 637, 151 P. 1, 3: "If the deed is handed to the depositary without any intention of presently transferring title, but, on the contrary, the grantor intended to reserve the right of dominion over the deed and revoke or recall it, there is no effective delivery of the deed as a transfer of title. So, too, if it be the intention of the grantor when he deposits a deed that it shall only be delivered to the grantee by the depositary after the death of the grantor, and that the title is to vest only upon such delivery after his death, then the deed is entirely inoperative as constituting an attempt by the grantor to make a testamentary disposition of his property. This may only be done by will executed as required by the law of wills of this state, and a deed, the purpose of which is intended to be testamentary, cannot be given effect."

In Azevedo v. Azevedo, 1 Cal.App.2d 504, page 506, 36 P.2d 1078, 1079, the main contention of defendant here is answered: "However, manual tradition alone is not enough; the transfer of possession must be with the intent of presently passing title, and must not be hampered by any reser-

vation of right of revocation or recall * * *."

The judgment is affirmed.

PETERS, P. J., and AGEE, Justice pro tem., concur.

105 Cal.App.2d 68

MULLI et al. v. MULLI.

Civ. 14364.

District Court of Appeal, First District, Division 2, California.

June 25, 1951.

Hearing Denied Aug. 23, 1951.

Action by Jack Mulli and wife against Marion Mulli to be declared owners of undivided one-half interest in certain real property. The Superior Court in and for the City & County of San Francisco, George W. Schonfeld, J., entered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, Nourse, P. J., held that parties who had fully performed oral promise to pay off indebtedness on property, to contribute to personal living expenses of owner of property and in compliance with subsequent oral agreement had made improvements were entitled to enforcement of oral promise of owner that owner would hold one-half interest in property for benefit of such parties.

Judgment affirmed.

1. Trusts ⇐25(1)

Where owner of property declares that he holds it for benefit of another but does not use the word "trust" there may nevertheless be sufficient manifestation of intention to create trust by declaring himself trustee of property.

2. Trusts ⇐17(8)

There is exception to general rule that no express trust in land based on entirely oral transaction can be enforced when beneficiary as such with consent of trustee enters into possession of land or makes valuable improvements thereon or irrevocably changes his position in reliance upon the trust. Civ.Code, § 852.

3. Trusts ⇐17(8)

Where owner of property agreed to hold one-half interest for benefit of other parties in consideration of oral promise by such other parties to pay off certain indebtedness on property and to contribute to owner's personal expenses, and by subsequent agreement, to make improvements, and indebtedness was paid off and contributions were made to owner's expenses and valuable improvements were made by other parties, there was enforcible express trust of one-half interest in land in favor of parties who had fully performed such oral agreement. Civ.Code, § 852.

4. Appeal and error ⇐544(1)

On appeal on judgment roll finding that cause of action is not barred by statute of limitations or laches is normally conclusive since question whether findings are supported by evidence cannot be reviewed.

5. Limitation of actions ⇐103(4)
Trusts ⇐365(2)

Complaint to enforce express trust in land which was filed approximately 12 years after declaration of trust but approximately six months after first breach or repudiation of declaration was not barred by statute of limitations nor laches, since period of limitations runs as to voluntary trust only from time beneficiary acquires knowledge of breach.

6. Trusts ⇐359(1), 371(1)

An action by beneficiary against trustee to enforce express trust is within province of court of equity and same requirements of pleading are not applicable thereto as to suit for specific performance of contract.

Erskine, Pillsbury & Tulley and Leonard A. Worthington, all of San Francisco, for appellant.

Hancock, Elkington, Rothert & Low, San Francisco, for respondents.

NOURSE, Presiding Justice.

Defendant Marion Mulli appeals on the judgment roll only from that part of a

judgment which decrees that plaintiff Viva Armstrong Mulli and the Estate of Jack Mulli, also known as John Herman Jansen, Deceased, are the owners of an undivided one-half interest in the real property located at 121 San Pablo Avenue, San Francisco, California, and orders said defendant to convey forthwith to the said plaintiffs an undivided one-half interest in said real property. The only question presented on this appeal is whether or not the findings are sufficient as a matter of law to support said judgment.

The findings relating to this part of the case are in substance as follows: (the parties being hereinafter indicated by their first names only) Jack, who was a brother of Marion, died on August 29, 1948 and Viva, his widow, as executrix of his estate, was substituted in his place in this action. In December, 1936, Marion, who was then divorced, had record title subject to a mortgage to the San Pablo Avenue property. In that month Viva and Marion entered into an oral agreement by which Viva and Jack agreed to pay off the indebtedness in a sum in excess of $7000 secured by said mortgage, in monthly instalments. Marion agreed to grant to Viva and Jack an undivided one-half interest in said property, to hold said undivided one-half interest for the benefit of Viva and Jack, to allow Viva and Jack to live upon the premises as long as they, or either of them so desired, to convey said one-half interest to them upon demand and should the property be sold prior to the actual conveyance of the title of said undivided one-half interest to Viva and Jack that Marion would pay to Viva and Jack one-half of the proceeds from such sale. In reliance on said agreement and the promises of Marion made therein Viva and Jack paid off said indebtedness and mortgage and expended thereupon the sum of $8,986.60; payments to the creditor were made from December, 1936, to October 1947; in November, 1946, the final payment was made, the amount of $818.75 being advanced by Marion; from December, 1946, through October, 1947, Viva and Jack reimbursed Marion for said $818.75 by making payments to her in the sum of $75 per month. The oral agreement has been fully performed in every respect with the exception of the actual conveyance of the record title to an undivided half interest in said property to Viva and Jack.

In December, 1936, Viva and Marion orally agreed further that Viva would live with Marion upon said property and that so long as they lived together thereupon Marion would deposit any income which she received in a joint bank account established by them and that Viva would deposit in said bank account such additional funds as were required for the payment of the house expenses, personal expenses and living expenses of both Marion and Viva, and that said payments by Viva would be additional consideration for the agreement of Marion to transfer an undivided half interest in the property to Viva and her husband. Viva lived upon the premises with Marion from December, 1936, until December, 1947. All the personal expenses, household expenses and living expenses of both parties for the period were paid for from the joint bank account. From such payments the sum of $21,947.80 was expended for the benefit of Marion alone. In December, 1947, Marion refused to allow Jack to live on said property with his wife Viva, whereupon Viva moved from said premises. She had fully performed all the conditions of her agreement with Marion.

In the spring of 1937, when the property needed repairs and permanent improvements, Viva and Marion agreed further that certain repairs, permanent improvements and additions to the property would be made, all of which would be paid for by Viva, that Viva would also pay the taxes, insurance and St. Francis Wood assessment for as long as the parties lived together on the property and that said payment by Viva would be additional consideration for the promise of Marion to transfer an undivided half interest in the property to Viva and her husband. Pursuant to said oral agreement Viva expended $5,139.63 for improvements and repairs, $2,566 in the upkeep, $2,840.27 for taxes, $559.50 for insurance and $374.46

for St. Francis Wood assessment on said property.

To the joint bank account of Viva and Marion a sum in excess of $72,420.69 was contributed by Viva and Jack whereas the total contribution to said joint bank account by Marion amounted to $1,950. From said joint bank account there was expended on the property in payment of the mortgage and the other items hereinabove stated $20,467.80 over and above the sum of $21,947.80 expended for the personal benefit of Marion as hereinabove stated. Viva fully performed all the terms and conditions of said oral agreement on her part to be performed with the assent of Marion and Marion has accepted all the benefits of said performance. None of said benefits were intended or accepted as a gratuity. Nothing further remains to be done under said oral contract except the conveyance by Marion to Viva and to Viva as executrix of the Estate of Jack, of an undivided one-half interest in said property.

Marion breached the agreement for the first time in December, 1947, by refusing to allow Jack to live upon the property. After December, 1947, she further breached the agreement by refusing to convey any interest in the property to Viva and Jack and by denying that Viva and Jack had any interest in said property. It is not true that the cause of action relating to said property is barred by the statute of limitations. Sections 339, subd. 1 or 343, C.C.P., or by the statute of frauds, Sections 1624 or 852, C.C.; Sections 1971 or 1973, C.C.P., or by laches in the enforcement of plaintiffs' rights.

From these findings the court made the conclusions that Viva and Jack are the owners of an undivided one-half interest in the San Pablo Avenue property, the record title of which property stands in the name of Marion and which undivided one-half interest in said property is held in trust for Marion for the benefit of Viva and the Estate of Jack.

[1] Appellant contends that the findings do not support the conclusion of a resulting or constructive trust and that the action is necessarily barred by the statute of frauds and the statute of limitations. The second cause of action, here involved, clearly purported to state a cause of action for the enforcement of an express oral trust. It is alleged in substance that in consideration of certain stated promises of Jack and Viva, Marion agreed that Jack and Viva would own a one-half interest in said property, that Marion would hold said one-half interest in trust for them and would convey it to them on demand and that if the property were sold the proceeds would be divided equally between the parties, and further that Jack and Viva carried out their part of said agreement and spent specified amounts of money pursuant thereto that and how Marion breached the agreement and refused to recognize the interest of Jack and Viva or to convey it to her with a prayer that the court declare that Marion holds an undivided one-half interest in said real property in trust for plaintiffs and require her to convey said interest to them. There is no express finding that Marion agreed to hold said interest "in trust" for Viva and Jack, but only that she agreed to hold said interest *for their benefit* and a conclusion of law that said interest is held in trust by Marion for their benefit. This makes no difference. "Where the owner of property declares that he holds it for the benefit of another, this may be a sufficient manifestation of intention to create a trust by declaring himself trustee of the property, although he does not use the word 'trust.'" 1 Scott on Trusts, 147–148. In Luco v. De Toro, 91 Cal. 405, 417, 18 P. 866, 27 P. 1082, an express trust was held to exist on the basis of such declaration lacking the word trust. It is then the same whether the court finds the trust as a fact or as a conclusion from the agreement expressly found.

[2, 3] As a rule no express trust in land based on an entirely oral transaction can be enforced. Civ. Code, sec. 852; Holtze v. Holtze, 2 Cal.2d 566, 568, 42 P.2d 323. However such trust is enforceable "if, with the consent of the trustee, the beneficiary as such enters into possession of the land or makes valuable improvements thereon or irrevocably changes his position in reliance

upon the trust." Restatement, Trusts, § 50; Haskell v. First Nat. Bank, 33 Cal.App.2d 399, 91 P.2d 934; 1 Scott on Trusts, § 50, p. 280; 1 Bogert on Trusts, § 92; and compare Lamb v. Lamb, 171 Cal. 577, 581, 153 P. 913; Feeney v. Howard, 79 Cal. 525, 530, 21 P. 984, 4 L.R.A. 826. In this case the findings clearly show that respondents with the consent of appellant made valuable improvements on the property in reliance upon the trust. As stated before, the parties were found to have agreed in December, 1936, that Viva and Jack would pay off the mortgage on the property and contribute to Marion's personal and living expenses in consideration of a half interest in the property or its proceeds and to have agreed in the spring of 1937 that Viva and Jack would pay for certain repairs, permanent improvements and additions to be made to the property without any new consideration but in consideration only of the interest in the property to which they were already entitled because of the agreements of December, 1936. This 1937 agreement as found was not a binding agreement which would have required new consideration, Main St. & A. P. R. Co. v. Los Angeles Trac. Co., 129 Cal. 301, 61 P. 937; Krobitzsch v. Middleton, 72 Cal.App.2d 804, 808, 165 P.2d 729, but in its legal significance no more than an express consent of the parties to the making of the improvements at Viva and Jack's cost in reliance on the trust, effective to take said trust out of the statute in accordance with the quoted rule. The valuable character of the improvements is sufficiently shown by the amount of more than $5000 found to have been expended for them by Viva.

Appellant relies on cases in which the beneficiary of an oral declaration of trust in land has been denied relief in equity of which the one nearest to the facts of this case is Wittenbrock v. Cass, 110 Cal. 1, 42 P. 300. However in that and other cases cited by appellant the so-called part performance exception to the statute of frauds in relation to trusts was not considered and they are therefore without value as authority with respect to that point.

[4, 5] Appellant's contention that the action is barred by the statute of limitation and laches is without merit. The findings that the cause of action is not barred in that manner are normally conclusive on an appeal on the judgment roll where the question whether the findings are supported by the evidence cannot be reviewed. Archer v. Harvey, 164 Cal. 274, 276, 128 P. 410; Morris v. Board of Education, 119 Cal.App. 750, 752, 7 P.2d 364, 8 P.2d 502. But even if there were no such express findings the other facts found would not have justified a conclusion that the action was barred by the statute or by laches. In case of a voluntary trust the period of limitation commences to run from the time the beneficiary acquired knowledge that the trust has been repudiated. Cortelyou v. Imperial Land Co., 166 Cal. 14, 20, 134 P. 981; Kornbau v. Evans, 66 Cal.App.2d 677, 684, 152 P.2d 651; 25 Cal.Jur. 271. The findings show that in this case there was no breach or repudiation before December, 1947, whereas the complaint was filed on June 10, 1948. As the action was brought well within the limitation period and no special circumstances are found which would cause the enforcement to be inequitable, there can be no question of laches. Stevenson v. Boyd, 153 Cal. 630, 635–36, 96 P. 284, 19 L.R.A., N.S., 525.

[6] Appellant's argument that the complaint does not state a cause of action for the specific performance of an oral contract to convey real property does not require discussion as the judgment must be upheld as one enforcing an express trust. To an action by a beneficiary against a trustee to enforce an express trust, which action is within the peculiar province of a court of equity, Bacon v. Grosse, 165 Cal. 481, 492, 132 P. 1027, the same requirements of pleading do not apply as to a suit for the specific performance of a contract. 25 Cal. Jur. 229; 23 Cal.Jur. 416; Juranek v. Juranek, 29 Cal.App.2d 276, 279, 84 P.2d 195.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

104 Cal.App.2d 816

ROBERTS v. WESTERN PAC. R. CO.

Civ. 14673.

District Court of Appeal, First District, Division 2, California.

June 19, 1951.

Rehearing Denied July 19, 1951.

Hearing Denied Aug. 16, 1951.

Action by E. Roberts against the Western Pacific Railroad Company and others for interpretation of railroad collective bargaining agreement, and to recover damages for alleged wrongful discharge of employment. The Superior Court in and for the City and County of San Francisco, Preston Devine, J., entered a judgment for the defendant railroad and the plaintiff appealed. The District Court of Appeal, Schottky, J., held that a state court had no jurisdiction to interpret a railroad collective bargaining agreement.

Affirmed.

See also, Cal.App., 232 P.2d 563.

1. Labor relations ⇐511

A state court had no jurisdiction to interpret a collective bargaining agreement between a railroad and a union, in view of Railway Labor Act. Railway Labor Act, § 3, 45 U.S.C.A. § 153.

2. Courts ⇐484

In action by employee against a railroad for wrongful discharge, where the amount in controversy was less than $3,000, the Superior Court properly transferred the cause to the Municipal Court. Civ. Code, § 2170; Code Civ.Proc. § 396.

S. Roberts, in pro. per.

E. L. Van Dellen, San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

Plaintiff and appellant filed an action against respondent railroad company and against two defendants who are officials of the Brotherhood of Railway and Steamship Clerks.

The first cause of action of the complaint alleged that plaintiff was hired as a clerk by respondent railroad company in 1945 and worked as such clerk until September 1949; that he was in a craft covered by a collective bargaining agreement between the railroad and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, etc.; that such collective agreement contained provisions setting forth the rights of the railroad employees as to seniority, promotions, displacements, etc. and the procedural requirements necessary to assert and to protect these rights. The complaint set forth Rule 40(a) of said agreement which reads:

"In reducing forces seniority rights shall govern. At least 48 hours advance notice will be given employees affected in reduction of forces or abolishing positions, and the Division and General Chairmen shall be furnished a copy of such notice. Employees whose positions are abolished may exercise their seniority over union employees; other employees affected may exercise their seniority rights in the same manner. Employees displaced, whose seniority rights entitle them to a regular position shall assert such rights within 10 days. Employees who do not possess sufficient seniority to displace a junior employee shall be considered as furloughed." The complaint went on to allege that on August 7, 1949, plaintiff was displaced, or "bumped" by a senior employee, and as his seniority rights were such as to entitle him to a regular position he came within the scope of the portion of said Rule 40(a) which required that in order to protect his seniority rights he must assert such rights within 10 days; that not knowing of any other job in or near San Francisco he could "bump" into under the Rules, he called upon the Railroad Company's Freight Agent's Chief Clerk and told him he thought he would have to go on furlough under Rule 40(b) and was given blank forms for such purpose by said Chief Clerk; that he executed said forms on August 9 and mailed two of them to the Company's Division Superintendent and two others to defendant Frank James as General Chairman of the Brotherhood; that he received no notice or indication that there was any objection to his going on furlough or that his forms were not proper; that on September 7, 1949 he was advised by letter that he had violated Rule

40(a) in that he failed to assert his seniority rights to certain positions at San Francisco held by employees junior to him within the 10 day period, and that therefore he had lost his seniority and his name had been dropped from the Clerks Seniority Roster; that on September 13, 1949, he was informed by letter that he was not to report for further work at the company's office. The complaint further alleged that plaintiff's said discharge was contrary to said Agreement and that defendants Frank James and W. L. Hatfield by and with their advice and interpretations of said Agreement aided and abetted the Company in their discharge and dismissal of plaintiff and that all the defendants were actuated by animosity and malice toward plaintiff. Plaintiff then alleges that by reason of his wrongful dismissal he has been damaged by the loss of wages amounting to about $64 per week, purchase of law books and supplies amounting to $29.07.

In his second cause of action plaintiff realleged all of the foregoing and alleged further that the two individual defendants and certain officers and employees of the Railroad Company "actuated by ill-will, hatred, enmity and malice toward plaintiff, entered into a conspiracy to vex, annoy and harass plaintiff in order and in an effort to cause him to resign his position with the company, and in the event they were not successful, then by procuring, and causing his discharge and dismissal therefrom." The three alleged overt acts of conspiracy were that one of the individual defendants removed certain papers from appellant's desk and repeatedly complained to appellant's superior that appellant was not doing and was not capable of doing his work properly, and that in March 1949 certain of the officers and employees of the railroad refused to allow appellant to exercise his seniority rights on a specified job.

In his third cause of action appellant realleged the foregoing and contended that under California Civil Code, sec. 2170 and under sec. 3 of the Interstate Commerce Act, 49 U.S.C.A. § 3, the railroad owed a duty to appellant which had been violated.

The prayer of the complaint demanded that plaintiff be restored to his former position and seniority; that he recover wages for the time lost; that he recover $29.07 special damages and $1000 exemplary damages; and further prayed for a declaratory judgment setting forth the meaning and effect of the collective bargaining agreement as he interpreted it.

Respondent Railroad Company demurred to each of the three causes of action upon the ground that no cause of action was stated against respondent and also that the court had no jurisdiction of the subject matter of the action. In its memorandum opinion the trial court stated:

"The cases recently decided by the Supreme Court of the United States entitled Slocum v. Delaware, Lackawanna & Western R. Co., 339 U.S. 239, 70 S.Ct. 577, 94 L.Ed. 795, and Order of Ry. Conductors v. Southern Railway Co., 339 S.Ct. 255, 70 S.Ct. 585, 94 L.Ed. 811, seem to decide plainly that a State Court has no jurisdiction to interpret a collective bargaining agreement or order the reinstatement of an employee. Therefore, so far as this action purports to pray for equitable relief, it is beyond the jurisdiction of the Court and the demurrer may be sustained without leave to amend.

"As to the action for damages for wrongful discharge, a State Court has jurisdiction under the case of Moore v. Illinois Central Railroad, 312 U.S. 630, [61 S.Ct. 754, 85 L.Ed. 1089]. However, jurisdiction for such action for damages would lie with the Municipal Court because the amount of such damages is under $3000, and therefore the action will be transferred to the Municipal Court of the City and County of San Francisco under the provisions of section 396 of the Code of Civil Procedure.
* * *

"Because the Court has no jurisdiction this Court will not pass on the question whether or not the complaint states a cause of action for wrongful discharge."

The court then made and entered its judgment and order reciting the ruling of the court as set forth in the Memorandum Opinion, and decreeing that insofar as the complaint seeks relief other than for damages for breach of plaintiff's contract of

employment, defendant Railroad Company be granted judgment, and ordering that insofar as the complaint purported to set forth a cause of action for damages for breach of plaintiff's contract of employment, the action be transferred to the Municipal Court of San Francisco.

From this judgment and order plaintiff has appealed.

Appellant, appearing in propria person, has filed three lengthy briefs, making numerous contentions, but in view of the fact that the issues involved upon this appeal are exceedingly simple we shall confine our discussion to those issues.

[1] We believe that the trial court correctly determined that it had no jurisdiction to interpret a collective bargaining agreement under the Railway Labor Act or to order the reinstatement of an employee. We believe that in the recent cases of Slocum v. Delaware, Lackawanna & Western R. R. Co., 339 U.S. 239, 70 S.Ct. 577, 94 L.Ed. 795, and Order of Railway Conductors v. So. Railway Co., 339 U.S. 255, 70 S.Ct. 585, 94 L.Ed. 811, the Supreme Court of the United States has settled the question of the jurisdiction of courts to interpret railroad collective bargaining agreements. These cases hold that neither a State nor a Federal Court has such jurisdiction but that Congress has vested exclusive jurisdiction in the National Railroad Adjustment Board. In the Slocum case, supra, Mr. Justice Black said at pages 240, 243, 244 of 339 U.S., at pages 577, 579, 580 of 70 S.Ct., at pages 798, 799, 800, of 94 L.Ed.:

"Section 3 of the Railway Labor Act confers jurisdiction on the National Railroad Adjustment Board to hold hearings, make findings, and enter awards in all disputes between carriers and their employees 'growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions * * *.' The question presented is whether state courts have power to adjudicate disputes involving such interpretations when the Adjustment Board has not acted. * * *

"The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements. The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the Board's initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems. * * *

"Our holding here is not inconsistent with our holding in Moore v. Illinois Cent. R. Co., 312 U.S. 630, 61 S.Ct. 754, 85 L.Ed. 1089. Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provision of a collective-bargaining agreement, its interpretations would of course have no binding effect on future interpretations by the Board.

"We hold that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive. The holding of the Moore case does not conflict with this decision, and no contrary inference should be drawn from any language in the Moore opinion."

[2] We believe also that the trial court correctly determined that under the allegations of the complaint, as of the date of the filing thereof, the amount of damages

sought was under $3000, and that while under the case of Moore v. Illinois Cent. Railroad, supra, a state court would have jurisdiction in an action for wrongful discharge, the jurisdiction of this asserted cause of action was in the Municipal Court of San Francisco, and the trial court was fully justified under sec. 396, C.C.P., in ordering the cause transferred to that court. The trial court expressly declined to pass upon the question of whether or not the complaint states a cause of action for wrongful discharge and it is not necessary to decide that question.

In view of the foregoing the judgment and order are affirmed.

NOURSE, P. J., and GOODELL, J., concur.

104 Cal.App.2d 814

ROBERTS v. WESTERN PAC. R. CO. et al.

Civ. 14631.

District Court of Appeal, First District, Division 2, California.

June 19, 1951.

Rehearing Denied July 19, 1951.

Hearing Denied Aug. 16, 1951.

Action by S. Roberts against the Western Pacific Railroad Company, Frank James and another to recover damages for wrongful discharge. The Superior Court in and for the City and County of San Francisco, Theresa Meikle, J., entered an order dismissing the complaint after having sustained the demurrer of the individual defendants without leave to amend and plaintiff appealed. The District Court of Appeal, Schottky, J., held that the trial court erred in sustaining the demurrer to plaintiff's action for wrongful discharge without giving leave to amend, even though the complaint was no doubt subject to a special demurrer.

Order affirmed in part and reversed in part.

Pleading ⇐225(2)

In action by a former employee against railroad and officials of a railroad brotherhood for reinstatement of job, and to recover damages for wrongful discharge, the trial court erred in sustaining the demurrer of the individual defendants to plaintiff's cause of action for wrongful discharge, without giving leave to amend.

S. Roberts, in pro. per.

Leo Fried, San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

This is an appeal from an order of the trial court dismissing the complaint of the plaintiff after having sustained the demurrer of defendants James and Hatfield without leave to amend. The complaint is the same complaint as the one involved in the appeal of plaintiff from the judgment in favor of defendant Western Pacific Railroad Co., No. 14673, Cal.App., 232 P.2d 560, and we refer to the opinion in that case, this day filed, for a summary of the allegations of the complaint.

In view of what we have decided in case No. 14673, we believe that the ruling of the trial court sustaining respondents' demurrer without leave to amend was correct insofar as the complaint seeks relief for reinstatement to his former position and declaratory relief as to the interpretation of the collective bargaining agreement, but that under the case of Moore v. Illinois Cent. R. R., 312 U.S. 630, 61 S.Ct. 754, 85 L.Ed. 1089, the court erred in sustaining the demurrer without leave to amend insofar as the asserted cause of action for damages for wrongful discharge is concerned. While the complaint, evidently drawn by plaintiff who is not a lawyer, is inartificially drawn, and no doubt subject to special demurrer, yet as against a general demurrer, a ruling sustaining such a demurrer without leave to amend cannot be upheld.

In view of the foregoing the order of the trial court dismissing the complaint is affirmed insofar as it relates to plaintiff's

asserted cause of action for reinstatement and declaratory relief and reversed insofar as it relates to plaintiff's asserted cause of action for damages for breach of contract.

NOURSE, P. J., and GOODELL, J., concur.

105 Cal.App.2d 27

PEOPLE v. GREBE.

Cr. 752.

District Court of Appeal, Fourth District, California.

June 22, 1951.

Rehearing Denied July 2, 1951.

Hearing Denied July 19, 1951.

Charles Arthur Grebe was convicted in the Superior Court of San Diego County, John A. Hewicker, J., and he appealed from the judgment and from an order denying a new trial. The District Court of Appeal, Barnard, P. J., held, inter alia, that trial court did not abuse discretion in denying defendant's motion for order suspending proceedings and for jury trial on question of defendant's present sanity.

Judgment and order affirmed.

1. Criminal law ⇐625

To order trial of question of defendant's sanity on ground of doubt arising as to such matter before judgment in pending prosecution, such doubt must arise in mind of trial judge. Pen.Code, § 1368.

2. Criminal law ⇐625

In prosecution for robbery, and for failing to perform duties required under statute requiring driver of motor vehicle involved in accident resulting in death or injuries to stop and fulfill certain requirements, and for assault with a deadly weapon with intent to commit murder, trial court did not abuse discretion in denying defendant's motion for order suspending proceedings and for jury trial on question of defendant's present sanity. Pen.Code, § 1368.

3. Criminal law ⇐1166½(12)

In prosecution for robbery, and for failing to perform duties required under statute requiring driver of motor vehicle involved in accident resulting in death or injuries to stop and fulfill certain requirements, and for assault with a deadly weapon with intent to commit murder, wherein sole question was whether defendant was sane at the time, action of trial court in questioning defendant's experts was not prejudicial to defendant, as against contention that defendant's experts were questioned so extensively as to indicate that court assumed guilt of defendant, and that court thus disclosed to jury that court discredited defendant's witnesses, and had no confidence in defendant's case and believed defendant guilty.

4. Criminal law ⇐1172(2)

In prosecution for robbery, and for failing to perform duties required under statute requiring driver of motor vehicle involved in accident resulting in death or injuries to stop and fulfill certain requirements, and for assault with a deadly weapon with intent to commit murder, wherein sole question was whether defendant was sane at the time, statement of trial court that jury could disregard testimony of experts did not require reversal of conviction where remarks were made to correct impression left by counsel for defendant in argument to jury that testimony of experts appointed by court was entitled to more weight than testimony of other experts, and oral recommendation made after verdict was returned disclosed that jury considered expert testimony and understood its real purport and effect, and where instructions on expert testimony were correct. Pen. Code, § 1127b.

Charles E. Karpinski and Ann Wansley, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent

BARNARD, Presiding Justice.

The defendant was charged, in separate counts, with robbery, with failing to per-

form the duties required by section 480 of the Vehicle Code, and with assault with a deadly weapon with intent to commit murder. He pleaded not guilty, and not guilty by reason of insanity. Shortly before the trial he moved, under section 1368 of the Penal Code, for an order suspending proceedings, and for a jury trial on the question of his present sanity. After a hearing this motion was denied. He then withdrew his plea of not guilty, and a jury found him sane at the time the offenses were committed. He has appealed from the judgment and from an order denying his motion for a new trial.

The appellant was a dental technician, first class, in the U. S. Navy, and was stationed in San Diego. On October 21, 1950, he purchased a gun, to be delivered the next day. On October 22, he talked about the gun several times to a waitress in a cafe, saying he did not know what to do with it as he did not have a permit to carry it. He got the gun about 4:00 P.M., and the waitress persuaded him to put it in his locker in a near-by locker club. He kept talking about the gun, told her he wanted to kill somebody, and took the gun out of the locker two or three times but she persuaded him to put it back. He left this waitress about 6:15 P.M.

Shortly after 7:00 P.M. he used the gun to take a car from the owner, in downtown San Diego, telling the owner that he needed the car because he had to go to Los Angeles. A few minutes later, while driving down Broadway, he struck and injured a boy who was crossing the street at a marked cross-walk, and drove on without stopping. At about 8:00 P.M. he left the stolen car in La Jolla, and persuaded the driver of another car to take him to a bar and buy him a drink. They then went for a drive during which the appellant took out the gun and told the other man he thought of killing him but would not do so because "you bought me a drink." When asked why he wanted to do that he replied that he had already killed two people that night. As they were returning to the business district of La Jolla an officer on a motorcycle approached from the rear, on his way to assist in a road block being set up to catch the appellant. When the appellant saw the officer approaching he stepped on the brake. The other man jumped out and yelled for help. The appellant also got out and, while the officer was resting his motorcycle on its stand, fired five shots two of which struck the officer. The appellant then ran up a hill and hid in some bushes. He was arrested about an hour later as he approached a bus stop in La Jolla.

On the way to the police station he expressed concern as to whether the officer he had shot had a family, and asked whether or not capital punishment was used in this state. He was questioned at the police station, his statements being taken down by a shorthand reporter. He gave a detailed statement of all that had occurred, claiming he was drunk, and expressed regret at having struck the boy. He said that when the motorcycle officer approached and the driver of the car yelled for help he was desperate and shot so he would have a chance to run for the bushes. He also said that he shot at the motorcycle, and that these were warning shots to keep the officer from chasing him. He stated that he had taken the car in San Diego because he hated the navy and wanted to get away from it.

At the trial, witnesses who had seen the appellant on October 22, including the owner of the stolen car, the driver of the second car, and the officers who talked with him that evening, testified as to his actions and statements. All of them said he was not drunk when they saw him. There was evidence that he had been in the navy about 9 years, a part of the time on the reserve list; that during World War II he spent some months in two hospitals, being diagnosed as having "Occupational fatigue"; that after World War II he studied to become a mortician and passed the examination; that after working a while at that trade he had been recalled to active service; and that his work in the navy was of a highly satisfactory character. Copies of his medical reports while in the navy were introduced in evidence.

Five doctors testified. One was a navy doctor who explained the appellant's naval hospital records, and testified that he saw no evidence of psychosis in appellant's ac-

tions as shown by the records. Three were called by the appellant, two of them having been appointed by the court. The fifth was called in rebuttal by the prosecution. All of the defense doctors agreed that the appellant was not "psychotic" at the time they examined him or at the time of the trial. One of them testified that he showed signs of a psychopathic personality, meaning that when confronted with problems of everyday living he at times found himself incapable of adjusting himself to ordinary standards; and that in his opinion he was psychotic and did not know the difference between right and wrong at the times these crimes were committed. The main reason he gave for this opinion was that his behavior on the occasion in question was erratic and impulsive and he had nothing to gain from it. While he stated that the appellant's behavior after he stole the car was such as might be attributable to either a normal person or a psychotic one, he stated that he concluded that if the appellant had been sane he probably would have shot more accurately at the motorcycle officer. Another of these doctors, who had been appointed by the court, expressed the opinion that the appellant did not know the difference between right and wrong at the times in question because he thought the appellant was probably then "suffering from an abnormal state of intoxication, pathological intoxication." He explained that pathological intoxication is a condition following the consumption of alcohol and associated with very abnormal or very unusual conduct whereas ordinary intoxication is associated with belligerent and aggressive acts. The third of these doctors, also appointed by the court, testified that he thought the appellant had a psychopathic personality "with psychotic episodes" and that at such times he believed the appellant was, quite likely, psychotic; that it was very difficult to say whether the appellant knew the difference between right and wrong at the time in question, that "possibly he did not know the difference between right and wrong but we have no way of accurately determining it"; that the appellant's behavior at the time in question might be compared to a person who is under the influence of alcohol or what might be called a pathological intoxication; and that while such people appreciate at the time that what they are doing is wrong they go ahead and carry out these anti-social acts. He admitted that the desire to have an automobile would constitute a motivation for stealing a car and that a hurried departure after stealing a car, a hit and run, and an attempt to escape from an officer after committing these crimes would not be psychotic. He finally testified that it was quite possible that the appellant knew that he was doing wrong and that part of his acts were caused by fear and panic. The doctor called in rebuttal by the prosecution testified, from an examination of the medical records of the appellant and in response to a hypothetical question based upon a summary of his actions which resulted in these charges, that he saw no evidence that the appellant was psychotic. He concluded, on the basis of the facts presented to him that the appellant was a psychopathic personality, and that while he had periods of emotional outbursts he was able to distinguish between right and wrong and appreciated the nature and quality of his acts during such periods.

[1, 2] The appellant first contends that the court erred in denying his motion to have the question of his present sanity submitted to a jury, under section 1368 of the Penal Code. At the hearing on this motion two psychiatrists testified. One of them testified that at the time he saw the appellant "I couldn't make a diagnosis of a psychosis within the meaning of the law." The other testified that the appellant is a psychopathic personality with anti-social trends, and that "I would hesitate to state that he is psychotic at this particular time." While both doctors stated that the appellant was emotionally unstable neither would state positively that he considered the appellant unable to assist his attorneys in a rational defense of the case. With the permission of counsel the appellant was himself called to the stand and the judge asked him many questions concerning his past life and service in the navy, all of which he answered with a rather unusual showing of clarity and intelligence. While

conceding that the doubt here involved must be one arising in the mind of the trial judge, People v. Perry, 14 Cal.2d 387, 94 P.2d 559, 124 A.L.R. 1123, it is argued, citing People v. West, 25 Cal.App. 369, 143 P. 793, that where there are statements under oath of a credible person that the defendant is insane a doubt arises as a mattetr of law. In People v. West, the defendants committed the crime while confined in a state hospital for the insane, where they had been but for a short time, and the statement under oath there involved disclosed that the defendants could not, or would not, say anything to their attorneys about the facts of the case. No abuse of discretion here appears.

[3] It is next contended that the court was guilty of prejudicial misconduct in questioning the witnesses for the appellant. While conceding the right of the court to ask a few questions of the witnesses, it is contended that this was here done so extensively as to indicate that the court assumed the guilt of the defendant, and that the court thus disclosed to the jury that he discredited the appellant's witnesses, had no confidence in his case, and believed him guilty. The argument on this point covers 63 pages of the appellant's briefs and it is unnecessary to review it in detail.

Nearly all of these questions were asked of the expert witnesses. Most of them were asked after the cross-examination was finished, although some were asked prior thereto. It clearly appears from the record that these questions were asked for the purpose of bringing out material facts and disclosing the true situation. It was thus brought out that these experts had formed their opinions from short interviews with the appellant and his brother and from a reading of the naval medical reports, and that they had not talked with anyone who had seen the appellant at or near the time the crimes were committed. These witnesses had all testified to the effect that the appellant was not in a settled state of insanity, that he had a psychopathic personality with anti-social trends at times, and that on occasions he may have lapsed into a "psychotic episode". Some of them thought there were two or three such episodes in his past life, basing this upon his statements to them and the medical records from the navy. The effect of their testimony was that they were of the opinion that he had had another such episode at the time these crimes were committed. The reasons they gave for these opinions were unsatisfactory on their face. The questions asked by the court were directed to the facts underlying these reasons, and to whether or not an effort had been made to learn all material facts which were available. In no instance did the court express his own opinion. The effect of the questions asked, of which complaint is made, was unfavorable to the appellant only because of the admissions made in the answers thereto which disclosed the weakness of the reasons given for the opinions expressed.

After reading the entire record we are unable to view the questions thus asked as constituting either error or prejudice. This is particularly true in such a case as this where commission of the acts was conceded, and the sole question presented was whether or not the appellant was sane at the time. In the decision of that question the opinion of expert witnesses is important, but the weight to be given to such opinions depends on the reasons upon which they are based. To that end the full facts should be brought out, and it is not improper for the court to ask questions for that purpose when the evidence seems to indicate that important facts and considerations have been overlooked. The right to thus examine the alienists appointed by the court is expressly given by Section 1027 of the Penal Code. The questions were not objected to at the time they were asked. Moreover, the court fully instructed the jury that he had not intended to express during the trial any opinion as to which witnesses were or were not worthy of belief, or what inferences should be drawn from their testimony; that if he had said or done anything which may have suggested that he was inclined to favor either party the jury was not to be influenced thereby; that in asking questions of certain witnesses his object had been merely to bring out in greater detail facts

not fully covered; and that the jury was not to assume that because he had asked any questions of the witnesses that he held any opinion as to the matters to which the questions related.

It is contended that the court committed prejudicial error in making the following statement to the jury: "As I will instruct you later on, as I instruct you in every case in which experts testify, although they do testify the jury may disregard any testimony which any of them give, all the testimony any of them give, if you so desire. It is entirely up to you. You don't have to take into consideration their testimony. You may reject it. So it is entirely up to you whether you want to accept their testimony."

[4] It is argued that the court thus indicated his belief that the appellant's witnesses should be disregarded, and also told the jury that, in considering expert testimony, it was to be guided by its own whim or desire rather than by the rule of reason. The remarks in question were a part of an explanation made by the court immediately prior to giving his instructions. In arguing to the jury counsel for the appellant had contended that some of the doctors, having been appointed by the court, were the court's witnesses rather than witnesses for the appellant, and had endeavored to create an impression that their testimony was entitled to greater weight because of that fact. Before beginning his instructions the court referred to this matter and explained that he had appointed two psychiatrists as required by law; that neither side had to call them; that each side might call them if it wished; that "Whoever calls them, it is that person's witness"; that in this case four doctors, including the two appointed by the court, were called by the defense, and another doctor by the prosecution; and that either side was free to call any psychiatrist it desired. The court then used the language first above quoted. The instructions followed and at the appropriate time the court, as the appellant admits, gave a correct instruction on expert testimony following the language of section 1127b of the Penal Code.

While the remarks complained of are not to be commended, and are in part erroneous, they were made for the purpose of correcting the impression left by an argument which had been improperly made. The remarks applied equally to all the expert testimony, and the jury was told that the real instruction on this subject would be given later, which was done. The oral recommendation made after the verdict was returned discloses that the jury did consider the expert testimony, and understood its real purport and effect. No reversible error appears.

It is argued that this was a close case as shown by the fact that the jury was out nearly eight hours, and that after the verdict was read and the jury polled the foreman announced that "The jury would like to recommend special consideration." These facts seem to be explained by the testimony of the doctors. While their testimony was vague and unsatisfactory they agreed that the appellant had an unfortunate personality and that he was not entirely normal in every respect. Several of them testified that he needed help and some form of treatment, but none knew just what treatment should be given, and two expressed doubt of the success of any treatment. On the motion for a new trial the affidavits of two jurors were presented in which they said that the jury intended to indicate their feeling that the appellant was "in need of medical and psychiatric treatment." While the jury realized that the appellant was in need of treatment of some sort, it did not believe he was insane in the legal sense. While two of the doctors expressed the opinion that the appellant was insane at the time the acts were committed, and a third expressed the opinion that he was probably insane, the reasons they gave for those opinions were far from satisfactory and there was ample evidence to the contrary. Moreover, the doctors expressing that opinion testified that he was sane at the times they examined him and at the time of the trial, but thought he had had two or three psychotic periods in his past life and must have had such a period at the time in question. They had not seen or talked to anyone who had

seen him near the time in question. Evidence of what he said and did at, before and shortly after that time strongly indicates that he then knew the difference between right and wrong and knew exactly what he was doing. The evidence amply supports the verdict, and when the entire record is considered the question of insanity, in a legal sense, does not appear to have been a close one.

Complaint is further made with respect to several other instructions given and refused, which were admittedly correct in themselves. Neither error nor prejudice appears and the matters are not sufficiently important to require amplification.

The judgment and order are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

105 Cal.App.2d 22

VAN AMERSFOORT et al. v. YOUNG et al.

Civ. 4221.

District Court of Appeal, Fourth District, California.

June 22, 1951.

A. Van Amersfoort and another sued T. B. Young and others for an injunction against interfering with or preventing plaintiffs' use of a roadway across defendants' lands and damages for prevention of such use. From a judgment of the Superior Court of San Diego County, Joe L. Shell, J., granting a permanent injunction, defendants appealed. The District Court of Appeal, Mussell, J., held that the evidence supported the trial court's conclusion that plaintiffs' adverse user of the roadway ripened into a prescriptive right before defendants acquired their land.

Judgment affirmed.

1. Appeal and error ⇐1010(1)

Whether use of easement is adverse and under claim of right or permissive and with consent of owner of servient tenement, and nature of user is sufficient to put such owner on notice thereof, are fact questions for trial court, judgment of which must be affirmed, if supported by any substantial evidence.

2. Appeal and error ⇐931(1)

On appeal from judgment, all conflicts in evidence must be resolved in prevailing party's favor and evidence viewed in light most favorable to him.

3. Easements ⇐36(1)

Where open, uninterrupted use of easement for sufficient time to create presumption of grant is shown, hostile intent and adverse use under claim of right will be presumed, and servient owner, claiming that user's acts were permissive or allowed merely as matter of accommodation, has burden of rebutting such presumption, which otherwise constitutes sufficient proof and establishes right.

4. Appeal and error ⇐1010(1)

Any evidence throwing any light on question whether use of easement was under license or claim of right presents fact question, on which trial court's finding is conclusive.

5. Easements ⇐36(3)

In suit to enjoin defendants from interfering with or preventing plaintiffs' use of roadway across defendants' land, evidence supported trial court's conclusion that plaintiffs' adverse user of roadway ripened into prescriptive right before defendants acquired their land.

Wm. Mackenzie Brown, Los Angeles and Fred E. Lindley, San Diego, for appellants.

Harry O. Juliani, Oceanside, for respondents.

MUSSELL, Justice.

Defendants appeal from a judgment permanently enjoining them from interfering with or in any manner preventing the free and unobstructed use by plaintiffs of a roadway across the lands of defendants.

The trial court found as follows:

1. That since the month of August, 1935, the plaintiff, A. Van Amersfoort, has been and now is the owner of an 80-acre tract of land lying northerly of defendants' land known as the "Hammond Ranch", which is situated easterly from the town of Encinitas, San Diego County, California.

2. That at the time of the purchase of said land by plaintiff there was a well defined roadway running from the county road at the west line of defendants' property in the easterly direction to and past the site of the old Hammond house on defendants' land, then turning north and running along the east side of an old fence, to the north line of defendants' property, and there entering upon the property of plaintiffs. (It was then stated that the road was 12' in width and the center line was particularly described.)

3. That from August, 1935, to the time of filing this action, the plaintiff used said roadway openly, notoriously and continuously for the purpose of going to and from his land, the 80 acres lying at the north of defendants' property, for the purpose of cultivating or improving said land.

4. That the use of the roadway aforementioned was not by permission or a license from the defendants or from any of their predecessors in interest of the Hammond ranch.

5. That during the month of March, 1949, the defendants placed barbed wire upon and across the roadway at the gate-opening, leading from defendants' land into plaintiffs' land, and thereby barred the plaintiffs from entering their land.

6. That plaintiffs were thus prevented from entering their property for the period of approximately thirty days, as a result of which their fruit trees upon said land were damaged for lack of care, in the sum of $30.00.

From the foregoing facts the court concluded that by the use of the said road openly, notoriously and adversely, for more than five years, commencing in the year 1935, the plaintiffs had acquired an easement by prescription in the described roadway; that said easement was acquired by the plaintiffs prior to the acquisition of the property by the defendants; that the defendants are entitled to maintain gates at the ends of the roadway in question and that the plaintiffs are entitled to the injunctive relief prayed for in the complaint.

The decisive question here involved is whether the findings and judgment are sufficiently supported by the evidence.

Plaintiffs' land, an 80-acre tract, abuts the defendants' land directly to the north thereof and was purchased by plaintiff A. Van Amersfoort in August, 1935, from one Richard M. Kimball. The defendants purchased their land during the spring of 1945 from the Elliott Company, which had acquired it from the Hammond family some time in 1932.

Plaintiffs testified that they had continuously used the road from 1935 until the fall of 1947, when they found a portion of it plowed by a tenant of the defendants; that for about two months thereafter they deviated slightly from the old road by reason of such plowing and then immediately began again to follow the entire course of the old road as they had done during the period since 1935; that their use of the questioned right of way was not by permission of the owner or of anyone else. Plaintiff A. Van Amersfoort testified that shortly after acquiring the 80 acres, he started to clear it and planted Eucalyptus and Pine trees on the south border; that he openly and continuously used the roadway in question to go to and from his land by automobile and from time to time planted fruit trees on the land, raised crops and in 1946 employed a crew of well drillers, who drilled a water well near the south line of his property.

Defendant Young testified that he made a thorough inspection of the Hammond property in 1944 and that there was no roadway running north from the site of the old Hammond farm house along the east side of the Hammond property. However, several of plaintiffs' witnesses, two of whom were members of the old Hammond family, who had lived on the Hammond ranch for many years, testified to the existence of the road and to its continuous and open use by the plaintiffs for nearly

14 years and the evidence is overwhelming that the roadway existed and was in fact used continuously, openly and without objection on the part of anyone by the plaintiffs until the defendant Young plowed up a portion of it during the winter of 1947–1948 and objected to plaintiffs' crossing the plowed area.

During the month of March, 1949, the defendants obstructed plaintiffs' use of the right of way and barred them from entering their land and the present action followed.

Defendants argue that the plaintiffs used the roadway in question under a permissive use and in support of this contention rely upon the testimony of Richard Kimball, whose uncle formerly owned the plaintiffs' property. Kimball testified that he, on several occasions, went over the land with his uncle and that his uncle always asked Mr. Hammond's permission to cross the Hammond property to go to the land, which is now owned by the plaintiffs; that on one occasion he heard Mr. Hammond tell his uncle that a right of way would have to be on the extreme west line of the property because he didn't want them going through the ranch; that this statement was made in 1924 or 1925. However, Mr. Kimball stated that he did not tell the real estate broker who handled the sale of the property to plaintiffs nor did he inform the plaintiffs that his uncle's use was permissive only and there is no suggestion in the record that plaintiffs or either of them were ever informed of such a claimed permissive use except defendant Young's testimony that in 1945–1946 he gave plaintiffs' tenant, one Charles Lilliegreen, permission to cross the ranch for the purpose of putting in and harvesting a bean crop. This testimony was denied by witness Lilliegreen.

It is also argued by the defendants that the fact that one Roy Lux, who was manager of defendants' property for the prior owner thereof, during some five years until his death in March, 1944, also had a lease from the plaintiffs from 1937 to 1944, which fact interrupted the adverse user by the plaintiffs. However, the record shows that during all of the period of time when Lux was using a portion of plaintiffs' property, that the plaintiff A. Van Amersfoort himself was continuing to openly, continuously and notoriously use the road for the purpose of access to and egress from his property and was actively engaged in the development thereof.

[1, 2] Whether the use of an easement is adverse and under a claim of right, or permissive and with the owner's consent, and the nature of the user is sufficient to put the owner on notice, are questions of fact. If there is any substantial evidence to support the judgment, it must be affirmed. All conflicts must be resolved in favor of the prevailing party and the evidence viewed in a light most favorable to him. O'Banion v. Borba, 32 Cal.2d 145, 147–148, 195 P.2d 10. In that case the court, in discussing the acquisition of easements by prescription concerning the presence or absence of a presumption that the use is under a claim of right adverse to the owner of the servient tenement, and of which he has constructive notice upon the showing of an open, continuous, notorious and peaceable use for the prescriptive period, said, 32 Cal.2d at page 149, 195 P.2d at page 13: "The preferable view is to treat the case the same as any other, that is, the issue is ordinarily one of fact, giving consideration to all the circumstances and the inferences that may be drawn therefrom. The use may be such that the trier of fact is justified in inferring an adverse claim and user and imputing constructive knowledge thereof to the owner. There seems to be no apparent reason for discussing the matter from the standpoint of presumptions. For the trial court the question is whether the circumstances proven do or do not justify an inference showing the required elements. In the appellate court the issue is merely whether there is sufficient evidence to support the judgment of the trial court. * * *"

[3, 4] In Adams v. Estate of Smith, 88 Cal.App.2d 910, 912, 199 P.2d 730, 731, it was said: "The rule which governs was stated in Pacific Gas & Electric Co. v. Crockett Land & Cattle Co., 70 Cal.App. 283, 291, 233 P. 370, 372, as follows: 'Accordingly, it has been held in this state

that where an open and uninterrupted use of an easement for a sufficient length of time to create the presumption of a grant is shown, the law will presume the elements of hostile intent and that the use is adverse and under a claim of right. Franz v. Mendonca, 131 Cal. 205, 63 P. 361; Fleming v. Howard, 150 Cal. 28, 87 P. 908; Clarke v. Clarke, 133 Cal. 667, 66 P. 10. If the other party relies upon the fact that these acts were permissive or in the nature of a license, or merely given as a matter of accommodation, it is incumbent upon him to rebut the presumption of a nonappearing grant. Otherwise the presumption stands as sufficient proof and establishes the right. Yuba Consolidated Goldfields v. Hilton, 16 Cal.App. 228, 116 P. 712, 715; Costello v. Sharp, 65 Cal.App. 152, 223 P. 567; Ricioli v. Lynch, 65 Cal.App. 53, 223 P. 88. If there is any evidence which throws any light upon the question as to whether the occupancy was under a license or a claim of right it presents a question of fact, and a finding thereon is here conclusive. Wells v. Dias, supra, [57 Cal. App. 670, 270 P. 913]; Ricioli v. Lynch, supra.' The several elements of the rule have been declared in many cases. See McMorris v. Pagano, 63 Cal.App.2d 446, 146 P.2d 944; Stevens v. Mostachetti, 73 Cal.App.2d 910, 167 P.2d 809."

In Murray v. Fuller, 82 Cal.App.2d 400, 406, 186 P.2d 157, it was held that the use of a driveway by plaintiffs and their predecessors and their tenants without express permission amounted to trespass and afforded grounds for legal redress in favor of defendant's predecessors and it was, therefore, sufficient to initiate a prescriptive title.

[5] In the instant case the evidence was sufficient to support the inference that the adverse user of the roadway by the plaintiff had ripened into a prescriptive right and had already been established before the defendants acquired the Hammond property in 1945. The record shows that the plaintiffs had no other roadway by which they could reach their property and the evidence is sufficient to support the conclusion of the trial court that plaintiffs' use of the road in question was sufficient to establish a prescriptive title.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

104 Cal.App.2d 716

ZELAYETA et al. v. PACIFIC GREYHOUND LINES, Inc., et al.

Civ. 14477.

District Court of Appeal, First District, Division 1, California.

June 14, 1951.

Rehearing Denied July 14, 1951.

Hearing Denied Aug. 9, 1951.

Elena Zelayeta and others, suing by and through their guardian ad litem, Elena Zelayeta, brought action against the Pacific Greyhound Lines, Inc., (a corporation) and Wallace Earl Albritton to recover for death of motorist in head-on collision of automobile and bus owned by Pacific Greyhound Lines, Inc., and driven by Wallace Earl Albritton. The Superior Court in and for the City and County of San Francisco, William F. Traverso, J., entered a judgment for the plaintiffs, and the defendants appeal. The District Court of Appeal, Peters, P. J., held that admission of opinion evidence as to point of collision was not error, that refusal to give defendants' requested instruction was not prejudicial error, and that trial court did not err in refusing to receive in evidence the claimed admissions made by plaintiffs' counsel in an affidavit.

Judgment affirmed.

1. Appeal and error ⇐1001(1)

In action against bus company and bus driver for death of motorist in head-on collision of automobile and bus, wherein plaintiffs contended that bus turned or skidded into automobile, and wherein bus company and bus driver contended that automobile turned or skidded into bus, evidence preponderated in favor of plaintiffs.

2. Appeal and error ⇐1170(6)

In action against bus company and bus driver for death of motorist in head-on collision of automobile and bus, alleged error in permitting state traffic officer, who arrived at scene of accident after accident occurred, and who was called as witness for plaintiffs, to give his opinion as to point of impact, was not prejudicial error, where two other officers, at least equally competent, gave contrary opinions based on the same facts, and eye witnesses testified as to point of impact. Const. art. 6, § 4½.

3. Evidence ⇐519

In action against bus company and bus driver for death of motorist in head-on collision of automobile and bus, it was within discretion of trial court to permit a state traffic officer, who arrived at the scene after the accident occurred, to give his opinion, based on what he then observed as to point of impact.

4. Evidence ⇐555

An expert witness can give his opinion whether he bases such opinion on facts presented in a hypothetical question, or on facts he observed for himself.

5. Evidence ⇐507

Expert testimony is admissible or not depending on whether the subject matter is within common experience or whether it is a special field where opinion of one of skill and experience will be of greater validity than that of the ordinary juryman.

6. Evidence ⇐519

A traffic officer, who has spent years investigating automobile accidents, and who has been required to render official reports not only as to the facts of the accidents but also as to his opinion of their causes, including his opinion, where necessary, as to point of impact of colliding automobiles, is an "expert".

See publication Words and Phrases, for other judicial constructions and definitions of "Expert".

7. Evidence ⇐219(2)
Witnesses ⇐370(1)

In action against bus company and bus driver for death of motorist in head-on collision of automobile and bus, evidence of settlement of claims of bus passengers by bus company was not admissible as an admission by bus company that it was liable for motorist's death, but such evidence might be admissible to show bias or prejudice of such bus passengers who testified for bus company.

8. Appeal and error ⇐1053(2)

Where court instructed jury to disregard the asking of certain questions and stated that answers were stricken out, and at conclusion of the trial, court instructed jury not to consider for any purpose any offer of evidence that was rejected, or any evidence that was set out by the court, and to treat the matter as though jury had never known of it any error, misconduct or prejudice in the asking of such questions was cured.

9. Appeal and error ⇐1067
Trial ⇐206

In action against bus company and bus driver for death of motorist in head-on collision of automobile and bus, wherein witnesses, who had been passengers on bus, and who had received insignificant amounts from bus company in settlements, were questioned by plaintiffs as to settlements, requested instruction of bus company that settlements should not be taken as an admission of liability on part of bus company, should have been given, but failure to give it was not prejudicial error.

10. Evidence ⇐210

Where chief counsel of plaintiffs seeking recovery from bus company and bus driver for death of motorist in head-on collision of automobile and bus, knew that bus company claimed to have an eye witness who was another bus driver, and plaintiffs' chief counsel prior to trial filed, in connection with motion to produce records, affidavit requesting records showing the name and address of the other bus driver who had "arrived at the scene of the accident" at or about the hour of the accident, was not admissible in the action as evidence of an admission by chief counsel that the other bus driver witnessed the collision.

11. Evidence ⇐207(2)

Statements of counsel made prior to trial, can constitute admissions, but, to be

such, court must be able to say that they were reasonably intended to be admissions or were reasonably construed by the other side as such.

Bronson, Bronson & McKinnon, and Dana, Bledsoe & Smith, all of San Francisco, for appellants.

Fitz-Gerald Ames, Sr., Richard M. Siegel, San Francisco, for respondents.

PETERS, Presiding Justice.

On the rainy afternoon of November 24, 1945, Lawrence Zelayeta was driving his automobile along the Bayshore Highway south of San Francisco when it collided with a bus owned by defendant and appellant Pacific Greyhound Lines, Inc., and then being operated by Wallace Albritton, also a defendant and appellant. Lawrence Zelayeta was killed. Elena Zelayeta, his wife, and the couple's two children, brought this action for the wrongful death of Lawrence. After a hard-fought lengthy trial the jury brought in a verdict of $75,000, and from the judgment entered on this verdict Pacific Greyhound and Albritton appeal.

Appellants do not challenge the sufficiency of the evidence, nor do they challenge the amount of the judgment. They do contend, however, that this was a very close case on the issues of negligence and contributory negligence and for that reason they urge that any substantial error undoubtedly was prejudicial.

Three points are urged for a reversal:

1. That the trial court erred in admitting opinion evidence as to the point of impact; that is, as to which of the two vehicles first crossed the center line of the highway. Appellants feel that this issue as to the point of impact was the ultimate and basic issue in the case, and that the admission of opinion evidence on this vital issue was not only error but necessarily prejudicial error;

2. That the trial court erred in failing to give a requested instruction to the effect that the compromise by appellants of other claims arising out of this accident was not an admission of liability;

3. That the trial court erred in refusing to receive into evidence a claimed admission made by plaintiffs' counsel in an affidavit.

The Basic Facts.

Lawrence Zelayeta, was employed in South San Francisco. At about 4:20 p. m. on November 24, 1945, he left his place of employment and started towards San Francisco on Bayshore Highway with O'Brien, a fellow employee, as a passenger. His car was in good operating condition and was equipped with good tires and brakes. It was raining, and the windshield wipers were operating. O'Brien testified that, after leaving Brisbane, Lawrence was driving on the inside fast lane of the highway at a speed of about 30 to 40 miles per hour. Just north of Brisbane, a little over three miles from South San Francisco, is a long hill. While proceeding up this hill Zelayeta's car collided with a Greyhound bus travelling south down the hill. The accident happened between 4:20 and 4:35 p. m.

The bus involved in the accident left Seventh and Mission Streets in San Francisco at 4 p. m. Its schedule called for a running time of fifteen minutes to Brisbane and twenty minutes to South San Francisco. Admittedly, at the time of the accident, it was ten to fifteen minutes behind schedule. It was equipped with a governor set at 57 miles per hour in high gear, and 35 miles per hour in third gear. Estimates of its speed just prior to the accident vary from 25 to 60 miles per hour. Just prior to the collision it was travelling in the fast inside southbound lane of the highway, down hill, with its windshield wipers operating. Traffic was heavy. The bus was eight feet in width, which would give a one-foot clearance on either side of the bus within the lane in which it was travelling.

The inspection report for this bus indicates that it was examined before it started on its trip and found to be in good mechanical condition. There is some conflict in the evidence as to the condition of its tires. The tires were owned by Firestone Tire & Rubber Co., leased to Greyhound, and serviced at Greyhound termin-

als by Firestone employees. One of these employees testified that all of the tires on the bus had good treads, except the right, rear, inside tire, which was smooth. Another witness, who saw the two cars immediately after the accident, testified that both rear tires on one side were smooth. Officer Edwards, a traffic policeman, examined the tires on both cars. Those on Zelayeta's car were practically new. The dual tires on one side of the bus both "were very smooth," While the other two rear tires "were getting pretty well down."

The portion of the Bayshore Highway here involved is a four-lane highway, with double white lines separating the north and southbound lanes, and the north and southbound lanes being, in turn, divided, by single white lines, into two lanes each. There is an asphalt shoulder on each side of the highway, and a guardrail outside each shoulder. Beyond the east guardrail is an embankment. Just before the highway goes over the top of the hill towards San Francisco it curves to the right. There has been skidding on that curve in the past.

Albritton, the driver of the bus, testified that at the time of the collision he was in the inner, fast, southbound lane. His story was that Zelayeta skidded toward the bus, and that, in an attempt to avoid the collision, he, Albritton, turned the bus to the left. The evidence is in hopeless conflict as to whether the bus turned or skidded into Zelayeta's car, or whether Zelayeta turned or skidded into the bus, as to the point of impact, that is, whether in the north or southbound lane, and whether the driver of the bus did or did not slam on his brakes just prior to the accident thus causing the bus to skid into Zelayeta's car.

After the accident there was a considerable quantity of debris scattered in the northbound lanes. There were certain marks on the highway in the northbound lanes, none in the southbound lanes. These scrape marks began near the single white line in the northbound lane and extended over to the shoulder on that side of the highway. There were, apparently, no skid marks. After the impact, both cars crashed through the east guardrail. The bus rolled down the embankment and ended up on its right side. Zelayeta's car was upside down, facing east, with most of it through the guardrail, the remainder on the shoulder. It caught fire immediately after the accident.

Several witnesses testified that the damage to Zelayeta's car on the left side was more extensive than on the right, but there was substantial damage on both sides. The bus was damaged on both sides.

[1] The evidence is obviously conflicting on the issues of negligence and contributory negligence. However, as we read the record, this conflict is not as great as appellants would have us believe. We think that the evidence is not only substantial to support the implied findings of the jury on these issues, but that it preponderates in favor of respondents.

Was opinion evidence admissible as to the point of impact?

One of appellants' major contentions is that is was serious and prejudicial error to permit Henry W. Edwards, Jr., a state traffic officer, who arrived at the scene, after the accident occurred, at about 4:55 p. m., to give his opinion, based upon what he then observed, as to the point of impact. This testimony came into the record under the following circumstances: Edwards testified that he had been a traffic officer for seven years, during which time he had investigated, officially, about one accident a day; that it was his duty to investigate accidents and to report to his superiors his conclusions and opinions as to what caused the accidents and how they happened. He described in detail what he saw at the scene of the accident. He observed the points of rest of the two cars and the nature of the damage to them, the extent, course, location, and nature of the debris, and the scrape marks, their course and nature. He was first asked a hypothetical question as to his opinion of the safety of operating a bus at 50 miles per hour under the circumstances described in the question. A defense objection was sustained, and, after argument in chambers, again sustained. Edwards was then asked

his opinion as to whether a bus would skid under certain assumed conditions. An objection to this question was sustained. Then he was asked if, based solely upon what he had observed at the scene, he had formed an opinion "as to the approximate point of impact in the highway between the two vehicles." An objection was made that "whether or not he has an opinion is irrelevant and immaterial." The court stated: "I think that perhaps he can state his opinion as to the point of impact from his observation, but not from having talked to other witnesses. If the question were reframed so as to contain only matters within his own observation, I think he could express an opinion." After a colloquy between court and counsel, in which counsel for respondents and the court agreed that the opinion must be based on what the witness observed, at the scene of the accident, the question was reframed, and the question asked: "Now, limiting yourself to what you saw yourself at the scene of the accident * * * have you an opinion as to approximately what point in the highway this impact occurred between the bus and the Zelayeta car?" The following then occurred:

"The Court: Let's make it specifically excepting any information that may have come to him from talking to others. Mr. Ames: That is right.

"The Court: In other words, we are confining ourselves to matters solely within your observation. Is that clear to you, sir? A. Yes.

"Q. Omitting from consideration here anything that may have been said to you by other people; is that clear? A. Yes.

"Mr. Smith: He is to state what the fact is as he determined it.

"The Court: The point of impact, yes. You have an opinion?

"Mr. Smith: Your Honor, I submit it is not the opinion which is admissible, but what he determined is the fact.

"The Court: Yes.

"Mr. Ames: No, I think opinion is the thing we are asking for.

"The Court: Q. Have you formed an opinion as to the place of impact, point of impact? Have you formed an opinion? A. Yes.

"Q. If the question isn't clear to you, please, in fairness to all of us, please say so. We want you to understand the question first of all, because that is very important. A. Yes, I understand what we are trying to do.

"Q. You understand the question, do you? A. Yes, sir; yes.

"Q. You have an opinion? A. Yes.

"Q. What is that opinion, sir?

"Mr. Smith: Your Honor, may my objection stand to the question then, on the ground that, in my humble opinion, it is calling for expert testimony, and it is incompetent, irrelevant, and immaterial; it is a pure question of fact for the jury to determine and not this gentleman to tell the Jury.

"The Court: As long as it is based on what he actually saw. In making my ruling I want to emphasize that. All right, you may state it.

"Mr. Ames: Q. Will you give us your opinion, Officer? A. Well, you want to know, now, my opinion as to where the point of impact was?

"Q. Yes. A. I would say it was in the northbound passing lane about two or three feet east of the dividing line."

The witness then indicated on a chart precisely where he believed the collision occurred, and then, over objection, gave as his reason for his belief the following: "I would base that reasoning on the location of the greater part of the debris, where the debris started, the direction of travel of the debris, upon the gouge marks in the roadway, upon the damage to the vehicles—on all of those."

It should be here pointed out that appellants produced Officer Porter, who arrived at the scene with Edwards, and also produced Sergeant Schram, Edwards' superior officer, and asked them if, from their observations at the scene of the accident, they had formed an opinion as to the point of impact. After receiving affirmative replies, both testified that, in their opinion, the impact occurred in the southbound lane.

[2] Appellants argue the question of the admissibility of Edwards' opinion as if it were the most vital evidence in the case. They greatly overemphasize and exaggerate its importance. Edwards had testified, as did several other witnesses, as to what he observed at the scene of the accident. On direct examination he gave the reasons upon which his opinion was predicated. Eye witnesses testified as to the point of impact. Two other officers, at least equally competent, gave contrary opinions based upon the same facts. The jury had all this evidence before it. Under these circumstances, assuming that it was error to permit Edwards to give his opinion as to the point of impact, such error cou'd not have been prejudicial. The transcript in this case covers some 1620 pages. A great deal of this record is devoted to the issue of where and how the collision occurred. The case was hotly contested and well tried on both sides. During such a trial it would be a rare occurrence indeed if some error in the admission or exclusion of evidence did not occur. It was to prevent reversals because of such errors, if they were not prejudicial, that Art. VI, § 4½ of the Constitution was adopted. Conner v. East Bay Municipal Utility Dist., 8 Cal.App.2d 613, 47 P.2d 774, 48 P.2d 982. After reading this record we are convinced that Edwards' testimony, whether rightfully or wrongfully admitted, played a very minor part in the ultimate determination of the case.

[3] Moreover, in our opinion, it was within the discretion of the trial court to admit this opinion evidence. Appellants assume that Edwards was permitted to give his opinion solely as a nonexpert, and contend that the exception to the rule that a nonexpert cannot give his opinion is limited to cases of necessity where the opinion is not only based on probabilities, but where the subject matter is so complex or subtle that, from a practical necessity, the ultimate fact can only be conveyed to a jury by means of an opinion. Appellants then urge that these conditions did not here exist. They seem to argue that the only time an expert can give an opinion is when he bases his opinion upon a hypothetical question. The expert is not permitted, so they seem to argue, to base his opinion upon facts which he himself observed.

[4] Such arguments are based upon a misconception of the nature of expert testimony. In a proper case, an expert can give his opinion whether or not he bases such opinion on facts presented in a hypothetical question, or upon facts he observed for himself. The key question is whether or not the subject under discussion is one permitting expert testimony, not the source of the facts upon which the opinion is predicated.

One of the leading cases on this subject is Manney v. Housing Authority, 79 Cal. App.2d 453, 180 P.2d 69, an able and well-reasoned opinion written by Justice Dooling of Division Two of this court. There, a fire chief, who arrived on the scene after a fire had started, was permitted to give his opinion as an expert as to the cause and starting place of the particular fire. The opinion was based upon what the fire chief observed at the scene of the fire, not upon facts given in a hypothetical question. The trial court's judgment was predicated upon this opinion evidence. The appellate court held that the fire chief could properly give his opinion as to the cause of the fire, and that, in so testifying, he was doing so as an expert and not as a nonexpert, even though his testimony was predicated upon facts he observed at the scene of the fire. The discussion of this point is so apt and so clear that we quote from it at some length. Starting 79 Cal.App.2d at p. 459, 180 P.2d at page 73, the opinion states:

"The two instances in which the opinions of witnesses are permitted in evidence are: 1. The opinions of experts are admitted in matters which are not within the common experience of men so that the special knowledge of a person of skill and experience in the particular field may enable him to form an opinion, where men of common experience would not be able to do so. [Citing authorities.] 2. The opinions of nonexpert witnesses are admitted as a matter of practical necessity when the matters which they have observed are too complex or too subtle to enable them accurately to convey

them to court or jury in any other manner. [Citing authorities.]

"For a nonexpert to be competent to give an opinion under the second exception he must be testifying about facts that he has personally observed; but the expert in any case proper for the reception of expert testimony may give his opinion, although he did not personally observe the facts, basing his opinion upon the facts testified to by other witnesses put to him in the form of hypothetical questions. 10 Cal.Jur., Evidence, sec. 222, p. 965. The ultimate question to be determined in every case in which expert testimony is tendered is whether the case is one outside of the common experience of men so that a person of training and experience by reason of his superior knowledge is better able to reach a conclusion from the facts. If the case is one for expert testimony this is so not because the expert has witnessed the facts, but because he is qualified by reason of his special knowledge to form an opinion on the facts while the ordinary juror is not. It is a confusion of the two exceptions to the rule excluding opinion evidence to make the reception of expert testimony dependent upon the fact that the expert has been a personal witness to the facts.

"Cases can be mustered to support the proposition that expert evidence is admissible to prove the cause of a fire. See cases collected in the note in 131 A.L.R., p. 1124, col. 1. Cases can be assembled to support the contrary proposition. See cases collected in the same note at p. 1124, col. 2. Such an approach is mechanical rather than logical. The cause of some fires may be so simple as to fall within the common experience of any juror. If that is true the evidence of experts is unnecessary to assist the jury. To give a simple illustration any juror knows from his own experience that the application of a lighted match to dry grass will cause a fire. The cause of other fires may be so foreign to the common experience of the ordinary juror that he cannot know without the aid of expert testimony whether a fire might be expected to result or not. For example whether the combination of two chemical products would result in combustion. In the latter case only the evidence of experienced and trained chemists might enable the jury to arrive at the correct conclusion. The matter was well put by Owen, J., in Baltimore & O. R. Co. v. Schultz, 43 Ohio St. 270, 1 N.E. 324, at page 332, 54 Am.St.Rep. 805: " 'It must not be supposed that there is any rule of evidence concerning the opinions of witnesses which is peculiar to fences, highways, bridges, or steam-boats, or to any other special subjects of investigation. Where the facts concerning their condition cannot be made palpable to the jurors so that their means of forming opinions are practically equal to those of the witnesses, opinions of such witnesses may be received, accompanied by such facts supporting them as they may be able to place intelligently before the jury.'

"Nor, may we add, should there be any rule of evidence concerning the opinions of witnesses which is peculiar to fire, flood or other catastrophe. The inquiry should not be is expert evidence admissible to prove the cause of fires generally, but rather is expert evidence admissible to prove the cause of this particular fire; and the answer to that question should depend on the answer to the further question: is the matter involved one which is not within the common experience of men so that the special knowledge of a person of skill and experience in the particular field may 'enable him to draw an inference, where men of common experience, after all the facts proved, would be left in doubt.' Vallejo [etc.] R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 571, 147 P. 238, 250.

"It is our conclusion that the question whether this fire originated in the hot-air ducts is a matter outside the ordinary experience of men and that expert testimony was properly admissible upon the subject. We therefore hold that it was not error to admit the opinion of the witness Cooper.

"Appellant complains that Cooper was permitted to express his opinion based partly on hearsay which he gathered from persons not called as witnesses. It is true that during the laying of the foundation for his expert opinion the witness testified that he had conducted an investigation after the fire and that he had formed an opinion

based partly upon what he had learned in that investigation; but before he gave his opinion he was admonished by the judge that his opinion must be based on his study and experience bringing them 'to focus on the conditions that you found there and not on what somebody else told you or what somebody else may have said was their opinion about the fire.' That the witness obeyed this admonition seems clear from the fact that after giving his opinion he testified that it was based on 'the condition of the ducts and the fire at the time of my immediate arrival.'"

[5, 6] Thus, expert testimony is admissible or not dependent upon whether the subject matter is within common experience or whether it is a special field where the opinion of one of skill and experience will be of greater validity than that of the ordinary juryman. It is quite obvious that the conclusion, based upon the facts of the particular case, as to just where a collision between two vehicles occurred, may be so obvious that any reasonable person, trained or not, can draw that inference from the facts. It is equally clear that cases may occur where the opinions of trained experts in the field on this subject will be of great assistance to the members of the jury in arriving at their conclusions. In such cases a traffic officer who has spent years investigating accidents in which he has been required to render official reports not only as to the facts of the accidents but also as to his opinion as to their causes, including his opinion, where necessary, as to the point of impact, is an expert. Necessarily, in this field, much must be left to the common sense and discretion of the trial court. Nolan v. Nolan, 155 Cal. 476, 101 P. 520; Lacy Mfg. Co. v. Gold Crown Mining Co., 52 Cal.App.2d 568, 126 P.2d 644.

There are many confusing cases discussing this subject. Thus it has been held that a garage mechanic cannot testify, based on facts set forth in a hypothetical question, as to the probable course of two colliding automobiles after the impact, Fishman v. Silva, 116 Cal.App. 1, 2 P.2d 473; or as to speed of two colliding cars, or which one was travelling fastest, Johnston v. Peairs, 117 Cal.App. 208, 3 P.2d 617; or as to whether an accident could have been avoided under certain circumstances, Moore v. Norwood, 41 Cal.App.2d 359, 106 P.2d 939. Cases are in conflict as to whether the cause or starting point of a fire may be the subject of expert testimony. St. Paul Fire & Marine Ins. Co. v. Southern Pac. Co., 30 Cal.App. 140, 157 P. 247; Gallichotte v. California etc. Ass'n, 23 Cal.App.2d 570, 74 P.2d 73, 535; Manney v. Housing Authority, 79 Cal. App.2d 453, 180 P.2d 69. In Mace v. Watanabe, 31 Cal.App.2d 321, 87 P.2d 893, a witness was permitted to testify that a certain mark on the highway appeared to have been made by a "free running wheel." (See many conflicting cases collected in annotations in 66 A.L.R. 1117; 70 A.L.R. 540; 94 A.L.R. 1190.)

Appellants place particular reliance on Stuart v. Dotts, an opinion of this court, 89 Cal.App.2d 683, 201 P.2d 820, in which a police officer was permitted at the trial to give his opinion as to whether a collision between an automobile and a pedestrian occurred within or without a certain crosswalk. It was held that the introduction of such testimony was error, not because the subject matter of the question was not a proper subject of expert testimony, but because the proper foundation was not laid. The police officer conceded that his opinion was predicated not only upon what he observed after the accident, but also upon an interview with the plaintiff, a written statement of defendant, and upon the results of conversations with certain unidentified people around the scene of the accident. In the instant case the opinion was predicated on facts already before the jury. The case is not in point.

Respondents urge that appellants, by later introducing into evidence the opinions of two police officers on the same subject, waived any error that may have occurred. In view of our conclusions that it was not error to admit this testimony, and that even if it were error such error was not prejudicial, we do not find it necessary to pass upon this question of waiver.

Was it error to refuse to give a requested instruction that evidence of compromise

of other claims by appellants was not an admission of liability?

Several of the passengers on the bus suffered injuries to their person or property in the collision. The bus company settled the claims of at least some of these passengers. A goodly number of these passengers were called as witnesses, some by respondents and some by appellants. In one way or another respondents tried to get before the jury the fact that the appellant bus company had settled the claims of these witnesses. In some cases objections were sustained to these questions, and the jury instructed to disregard them, while in other cases such evidence came in without objection. Under such circumstances the appellants offered, and the trial court failed to give, the following instruction: "I instruct you that the fact that the Pacific Greyhound Lines compromised and settled the claims of certain of the witnesses who have testified here in Court was permitted in evidence for the sole purpose of showing a fact from which an inference of interest or bias of the witnesses may be drawn The law favors compromises and settlements and the compromise and settlement of any claim between Pacific Greyhound Lines and any of its passengers arising out of the accident in this case shall not in any wise be taken as an admission or inference of liability of the Pacific Greyhound Lines as to the plaintiffs in this case. I further instruct you that the duty of care and the responsibility owed by the Pacific Greyhound Lines to its passengers was entirely different than the duty of care owed by the Pacific Greyhound Lines to persons using the highway, including Lawrence Zelayeta, the deceased."

[7] Evidence of the settlement of the claims of the bus passengers was not admissible as an admission that the Greyhound was liable for Zelayeta's death. Curtis v. McAuliffe, 106 Cal.App. 1, 288 P. 675; Brown v. Pacific Electric Ry. Co., 79 Cal. App.2d 613, 180 P.2d 424. But such evidence may be admissible to show bias or prejudice of an adverse witness, or, in a proper case, may be used to rehabilitate a witness. For these reasons the proffered instruction undoubtedly states correct principles of law and could have been given to the jury. The question is, under the facts, was it error to fail to give it, and, if so, was such error prejudicial?

The issue arose during the examination of five witnesses, two of whom were produced by respondents and three by appellants. Reference will be made to the circumstances of each case.

Mrs. Hunter, one of the bus passengers, was called by respondents. She testified that the bus was travelling 45 miles per hour prior to the collision, and that just before the accident the operator of the bus slammed on his brakes and the bus skidded to its left, and then the accident occurred. At the very close of her direct examination she was asked if the Sunday after the accident a representative of the bus company had called at her home. An objection was sustained. She was then asked if, on that day of the trial, she had a "claim or suit pending" against Greyhound. She replied that she did not. On cross-examination counsel for appellants confronted the witness with a statement she had given to a representative of Greyhound in which she said that she was asleep at the time of the accident. On redirect, in attempting to rehabilitate his witness and to explain these contradictory statements, counsel for respondents asked the witness several questions which implied that the statement had been given as part of a settlement of her claim, and that the giving of such statement was a condition precedent to such settlement. The witness answered that she had signed the statement but did not know for what reason it had been requested. Then she was directly asked "Well, did you settle the claim with the company at that time?" An objection was sustained to this question, the court stating: "I will sustain the objection. You needn't answer the question. The jury is instructed to disregard the asking of that last question." Thereafter, appellants moved for a mistrial based on the asking of these questions, the matter was argued in chambers, and the motion denied.

The other witness called by respondents was Mrs. March, also a passenger in the bus, who was called as a rebuttal witness. On her cross-examination counsel for ap-

pellants sought to impeach her by using a part of a deposition the witness had given in an action growing out of this accident, but other than the one then being tried. On redirect, counsel for respondents offered the entire deposition with the statement that it had been taken in June of 1947 in an action entitled March v. Greyhound. No objection was made to this statement, the deposition was admitted, and the redirect examination of the witness continued. She was then asked, and no objection was made, who her attorney was "in connection with this suit you had pending at that time, when your deposition was taken." After she had identified her then attorney she was asked "Have you a claim now pending against them?" She answered that she did not, whereupon the following occurred:

"Mr. Smith: I assign that as misconduct on the part of counsel. There isn't a claim pending now.

"The Court: I will sustain the objection and instruct the jury to disregard it. I won't take any further step, because I think, inasmuch as that was mentioned to the jury on some occasion, I think that you probably conveyed that information to the jury.

"Mr. Ames: He brought it out.

"The Court: Any statement just before the witness testified is stricken out and the jury is instructed to disregard the asking of that question and erase it from your mind.

"Mr. Ames: Then I move to strike out counsel's remark of when he implied that she hasn't a claim pending now.

"The Court: That may go out too. Statements of counsel in that connection are to be disregarded; the jury is to pay no attention to them."

The other three witnesses who mentioned this subject were produced by appellants, and the subject came up on their cross-examination. Thus, the witness Faraoli, on cross-examination, volunteered, in a non-responsive answer, that he had put in a claim with Greyhound for damage to his clothing. He was then asked: "And before you settled that claim, didn't you have to give them a statement?" The witness replied "Yes, they took a statement, naturally." No objection was made to this question and answer.

Passenger Luce, on cross-examination by respondents' counsel, without objection, was permitted to testify she had received a check from Greyhound for her injuries after she had signed a statement for Greyhound. On redirect, appellants brought out that this check was for $35.00.

Osenko, another passenger, on cross-examination in response to questions by respondents' counsel, testified, without objection, that a Greyhound representative, after he gave a statement, settled his claim for damages. On redirect, appellants' counsel brought out that the claim was simply for clothing torn in the accident.

Appellants concede that the questions asked its three witnesses—Faraoli, Luce and Osenko—having been asked on cross-examination, were proper for the purpose of showing bias and prejudice, but urge that it was highly improper to ask these questions of respondents' own witnesses. Respondents reply that the purpose of these questions asked their own witnesses was to rehabilitate them after they had been impeached. Moreover, respondents correctly point out that the witness Hunter never did answer the question as to whether she settled her claim, while as to the witness March it was appellants who first produced the deposition showing that at one time she had a claim pending. Of even more importance, in the case of these two witnesses the trial judge struck out the evidence and instructed the jury to disregard the questions and comments. Moreover, the court, in its regular instructions to the jury at the conclusion of the trial, instructed:

"You shall not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of a fact or facts.

"You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the court; such matter is to be treated as though you never had known of it."

[8] Any error, misconduct, or prejudice in the asking of these questions was thus

cured. Holder v. Key System, 88 Cal.App. 2d 925, 200 P.2d 98; Downey v. Bay Cities Transit Co., 94 Cal.App.2d 373, 210 P.2d 713.

[9] So far as the two witnesses produced by respondents are concerned, their testimony was stricken and the jury instructed to disregard their testimony. The only remaining question is whether the jury should have been instructed, in view of the cross-examination of the three witnesses produced by appellants, that evidence as to settlement of the claims merely went to the issue of possible bias or prejudice of the witnesses and was not an admission of liability. We think that the instruction should have been given, but we are of the opinion that the failure to give it was not prejudicial error. The instruction, if given, would have affected, at most, only the evidence of Faraoli, Luce and Osenko. Faraoli volunteered the statement that he had put in a claim for damages to his clothing, and that that claim had been settled before he gave a statement. Luce testified that she had received a check from Greyhound before giving a statement, which check, appellants brought out, was for $35.00. Osenko testified that he had settled a claim for damages to his clothing before giving a statement. In view of the prompt and unequivocal action of the trial court in striking out such testimony of the witnesses Hunter and March, and, in view of the minor nature of the claims settled by Greyhound, it is inconceivable that any reasonable member of the jury could have believed that the settlement of such claims amounted to an admission of liability for the death of Zelayeta. The jury was not instructed that such settlement amounted to an admission, nor is any contention made that such was argued to the jury. We conclude, therefore, that the error to give the proffered instruction was not prejudicial.

Was it error to refuse admission into evidence as a claimed admission an affidavit of respondents' counsel?

The background of this point is as follows: Dixon, a bus driver employed by Greyhound, testified that he had witnessed the collision from a bus he was driving which he claimed was northbound, and which he claimed was stopped at a bus stop near the scene of the accident. He testified that he saw Zelayeta go over the double white line into the path of the oncoming bus. This was strong testimony indeed in support of appellants' position. Respondents tried to discredit and to impeach this testimony. They contended that the testimony was fabricated, and produced evidence that no such bus was observed at the scene of the accident. Appellants produced witnesses who testified that they saw Dixon and his bus where he stated he had been. Respondents made much of the fact that appellants were unable to produce any records covering Dixon's schedule for the day of the accident. Thus, there was a direct conflict on this issue. To strengthen its position, appellants offered into evidence an affidavit of respondents' counsel. This affidavit had been made by the chief counsel for respondents prior to trial and filed in connection with a motion to produce records. This affidavit recites that the attorney is familiar with the facts set forth in the affidavit and requests an order permitting the inspection and furnishing of copies of certain records of Greyhound. Among the documents requested is: "The original or an exact copy of those certain books, records and reports showing the name and address of the driver of that certain northbound Greyhound bus owned, operated and maintained by the defendant, Pacific Greyhound Lines, Inc., whose destination was the Greyhound bus station in San Francisco, California, which approached and arrived at the scene of the accident set forth and described in plaintiffs' complaint on file herein on the 24th day of November, 1945, at or about the hour of 4:30 o'clock P.M. of said day on the Bayshore Highway * * *."

The appellants urge that this averment amounts to an admission that a Greyhound bus driver had "approached and arrived at the scene of the accident * * * at or about the hour of 4:30 o'clock P. M." of said day, and should have been admitted into evidence as such. The trial court excluded it on the authority of Adelstein v. Greenberg, 77 Cal.App. 548, 247 P. 520.

In that case one of the counsel, in an argument on a demurrer, made the statement that there had been an assignment of the lease involved. On the trial, opposing counsel sought to introduce this statement as an admission. The trial court excluded it, first, because it was a mere conclusion, and second, "even if it could be regarded as a matter of fact, [it] was not binding on respondents because it was not made during the trial of the action on the merits as an admission or stipulation of fact." 77 Cal.App. at page 552, 247 P. at page 521.

[10] In the instant case it is apparent that the statement in the affidavit was never intended to have effect as an admission, nor could appellants have assumed, reasonably, that it was intended to have that effect. When the motion to produce records was filed, respondents' counsel then apparently knew that the Greyhound claimed to have an eyewitness who was a bus driver, and was trying to find out before trial who that driver was and what the company's records showed as to his activities on that day. Perhaps respondents' counsel believed in October of 1948, when the motion to produce was made, that such a driver had been present, but by June of 1949, when the case proceeded to trial, he had discovered evidence that caused him to doubt that assumption. The statement in the affidavit was merely an incidental statement that, from its very nature, indicates that it was never intended to constitute an admission. In Coats v. General Motors Corp., 3 Cal.App.2d 340, 39 P.2d 838, the court was considering a remark made by one of the counsel during the trial made on cross-examination of a witness. In holding that it did not constitute an admission, the court stated 3 Cal.App.2d at page 350, 39 P.2d at page 842: "Mere incidental or ambiguous statements by counsel will not bind or be admissible against the client where there is no such formality in the making of the statements as to indicate an intention that they should be taken as admissions. Obviously such was not the purpose here, and the remark lacked the force or effect of an admission."

[11] Of course, statements of counsel made prior to the trial, Bell v. Staake, 159 Cal. 193, 115 P. 221, or in argument at the trial, Scafidi v. Western Loan & Bldg. Co., 72 Cal.App.2d 550, 165 P.2d 260, can constitute admissions, but, to be such, the court must be able to say that it was reasonably intended to be an admission or reasonably construed by the other side as such. In addition to the cases cited, see Sichterman v. R. M. Hollingshead Co., 117 Cal.App. 504, 4 P.2d 181, where statements in a brief in a previous trial were held not to constitute admissions. The affidavit here involved was not so intended and reasonably cannot be so construed.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; EDMONDS, J., dissenting.

104 Cal.App.2d 759

SASO v. FURTADO et al.

No. 14684.

District Court of Appeal, First District, Division 1, California.

June 14, 1951.

Hearing Denied Aug. 9, 1951.

Proceeding by Michael Saso, Jr., against Joseph A. Furtado and Inez R. Furtado for an order to show cause why Inez R. Furtado should not be punished for contempt for failure to sign an application for the transfer of a liquor license. The Superior Court in and for the County of Santa Clara, William F. James, J., entered an order requiring Inez R. Furtado to execute application for transfer to plaintiff and this defendant appealed. The District Court of Appeal, Bray, J., held that an agreement to retransfer a liquor license to the lessor upon the termination of a lease was not contrary to public policy, since the agreement must be viewed in the light which makes the transfer subject to the discretion of the State Board of Equalization.

Affirmed.

1. Judgment ⇐303

Where judgment in restitution action determined that a particular liquor license be returned to plaintiff pursuant to a written lease, a subsequent order of the court that the license pending in defendant's name was a mere evolution of the license mentioned in the lease and that defendant should turn over the license, was not an amendment of the original judgment, since the renewed liquor license was the same license originally set out in the lease between the parties.

2. Intoxicating liquors ⇐99

A liquor license is a privilege rather than a strict right, such as a right to deal in ordinary commodities.

3. Constitutional law ⇐287

The revocation of a liquor license does not violate the due process clause and the revocation may be made without notice or hearing and without invading any constitutional guaranties.

4. Statutes ⇐263

Statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intention or that such an intent clearly appears from the statute itself.

5. Intoxicating liquors ⇐45

Where defendant entered into a binding and legal agreement to retransfer a liquor license upon the termination of a lease but on termination defendant refused to retransfer the license and defendant was ordered to transfer by order of court and all this took place before effective date of amendment to Alcoholic Beverage Control Act prohibiting an agreement to retransfer a liquor license, the amendment to statute had no retroactive effect. Gen.Laws, Act 3796, § 7.3.

6. Administrative law and procedure ⇐330
Statutes ⇐223.5(1)

An erroneous administrative construction does not govern the interpretation of a statute, even though the statute is subsequently reenacted without change.

7. Intoxicating liquors ⇐103

An agreement between a lessor and lessee to retransfer a liquor license upon termination of a lease was not void or contrary to public policy, since it was to be implied that the transfer was subject to approval of the Board of Equalization. Gen.Laws, Act 3796, §§ 2, 7, 21.1.

Arvin O. Robb, San Jose, for appellant.

Harry Gottesfeld, San Francisco, amicus curiæ in support of appellants.

Edmund G. Brown, Atty. Gen., J. Albert Hutchinson, Deputy Atty. Gen., San Francisco, for State Board of Equalization as amicus curiæ in support of appellants.

O. H. Speciale, San Jose, for respondent.

BRAY, Justice.

Appeal by defendant Inez Furtado from an order requiring her to execute an application for a transfer to plaintiff of a certain liquor license. The attorney general filed an amicus curiæ brief on behalf of the State Board of Equalization. An additional amicus curiæ brief was filed on behalf of appellant.

Questions Presented.

1. Is the order void as being a judicial amendment of a prior judgment?

2. Is section 7.3 of the California Alcoholic Beverage Control Act, Gen.Laws, Act 3796, retrospective as to rights accrued prior to its enactment?

3. Was the agreement void as being contrary to public policy?

Facts.

January 24, 1945, plaintiff as lessor and defendants as lessees entered into a written lease of the "Cheerio Club" premises. As a part of the lease plaintiff transferred to defendants on-sale beer and wine licenses "and it was stipulated in said lease that said licenses were to be used upon the premises and were not to be transferred to any other location and that at the expiration of the lease they were to be re-transferred back to Lessor without consideration. That Lessees' right to the licenses was to be only the right to use the same while Lessees of the premises." When the term of the lease expired defendants refus-

ed to surrender the premises or to retransfer the license[1] to plaintiff. Plaintiff sued for restitution of the premises and retransfer of the license. Judgment in his favor was entered against defendant Inez R. Furtado, as defendant Joe A. Furtado had transferred all his interest in the lease and license to her. She refused to retransfer the license, and published a notice of intended sale of the license to third parties. A hearing was had on an order to show cause why she should not be punished for contempt for failure to sign an application for the transfer of the license. The court found that the on-sale general liquor license then held by her "is the evolution" of the licenses held by plaintiff at the time of making the lease and the subsequent yearly renewals thereof in the name of defendants. Defendant Inez was ordered to execute an "Application by Transferor" of said license to plaintiff; she was forbidden to attempt to transfer said license to anyone other than plaintiff; and a commissioner was appointed to execute said application in the event of the failure of defendant Inez so to do.

1. Is the Order an Amendment of the Judgment?

Defendant contends that the statement in the order that the license then standing in her name is an evolution of the license mentioned in the lease and the order for the transfer of that license, constitutes an amendment of the judgment, and that as the judgment had become final, the court had no power to make such amendment. The judgment provided: "3. That the liquor licenses described in said lease, to-wit: 'On Sale Distilled Spirits License' and 'On Sale Beer and Wine License' be returned to the said plaintiff; * * *."

[1] The order is not an amendment of the judgment. The statement in the order that the present license is an evolution of the first one was not necessary to the order. In Roodvoets v. Anscer, 1944, 308 Mich. 360, 13 N.W.2d 850, this very question was answered. There it was agreed that a liquor license located at the "House of Stein" would be transferred to the seller or person designated by him in the event of default in a chattel mortgage given to secure the purchase price. As in California, a new license had to be obtained each year. After renewal the holder moved the license to "Cliff's Tavern." He then defaulted. In an action to compel the transfer of the license in accordance with the agreement, the defendant made the same contention as defendant does here, that when the new license was issued the right to enforce a transfer ended. He also contended that this was particularly true after he moved the license from the House of Stein to Cliff's Tavern. As to these contentions the court said, 13 N.W.2d at page 851: " 'The present license was issued when the one expired that was mentioned in the contract. It cannot be imagined that in view of the chattel mortgage that the parties intended that the language of the contract would only apply to the license then in force and not to subsequent renewals thereof during the life of the mortgage. What the plaintiff contracted to pay $1,000 for was a contingency and is a contingency. What the defendant agreed to do was to make application in the manner and form as required by the liquor control commission of the State to transfer the license to the plaintiff. He did the same thing in transferring the license that he held to Cliff's Tavern that this plaintiff is now requesting him to do in relation to the license held at the House of Stein. There is no reason why he should not or cannot do this. He has defaulted in his mortgage and has breached the terms of his contract.' "

While a liquor license must be renewed yearly and the license issued is a separate document from that issued the year before, it is considered the same license. The parties so treated it in the lease and the court so treated it in its judgment. The order, therefore, was not void.

2. Section 7.3 of the Alcoholic Beverage Control Act is Not Retroactive.

This section became effective October 1, 1949. The exact date when plaintiff's right to a retransfer of the license accrued

1. The two original licenses were merged into one.

is not set forth in the record. However, it is not important as the judgment ordering it was entered May 18, 1949, more than four months prior to the effective date of the statute. Prior to its enactment there was no express provision in the Alcoholic Beverage Control Act prohibiting an agreement to retransfer a liquor license. Section 7.3 provides: "No licensee shall enter into any agreement wherein he pledges the transfer of his license as security for a loan or as security for the fulfillment of any agreement. Each application for the transfer of a license must be accompanied by or contain a statement verified by both the transferor and transferee specifically stating that the transfer application or proposed transfer is not made to satisfy the payment of a loan or to fulfill an agreement entered into more than ninety (90) days preceding the day on which the transfer application is filed with the board or to gain or establish a preference to or for any creditor or transferor or to defraud or injure any creditor of transferor. Said statement shall become part of the transfer application and any misrepresentation contained in said statement shall be considered the misrepresentation of a material fact."

It is the position of the defendant as well as the attorney general, that section 7.3 affects all agreements concerning liquor licenses whether entered into before or after the act took effect. However, we are not concerned with that question. The right of plaintiff to a transfer to him of the license accrued long prior to that time. Moreover, the adjudication of his right also took place prior to that time. So the question we have to determine is whether the Legislature intended by the enactment of section 7.3 to affect rights accrued prior thereto.

[2, 3] In referring to rights which accrued under the lease we have in mind that a liquor license is a privilege rather than a strict right, such as a right to deal in ordinary commodities, State Bd. of Equalization v. Superior Court, 5 Cal. App.2d 374, 42 P.2d 1076; nor is it a contract, Id., 5 Cal.App.2d page 377, 42 P.2d page 1076; see also Rosenblatt v. Cal. St. Bd. of Pharmacy, 69 Cal.App. 2d 69, 158 P.2d 199; its revocation does not violate the due process clause, and such revocation may be made without notice or hearing and without invading any constitutional guarantees State Bd. of Equalization v. Superior Court, supra, 5 Cal. App.2d at page 377, 42 P.2d at page 1076. We are using the word "rights" in the sense of the rights or obligations in a license as between parties to a contract, which rights have not been affected by a statute although such rights could be so affected if the Legislature intended to affect them. "* * * there is no inherent right in a citizen to sell intoxicants [citations]; and a license to do so is not a proprietary right within the meaning of the due process clause of the Constitution (Const., art. I, § 13), nor is it a contract [citation]; it is but a permit to do what would otherwise be unlawful, and consequently a statute authorizing its revocation does not violate the due process clause, and it may be revoked without notice or hearing without invading any constitutional guaranties." State Bd. of Equalization v. Superior Court, supra, 5 Cal.App.2d at page 377, 42 P.2d at page 1077.

[4] Assuming, therefore, that the Legislature had the right to make section 7.3 retroactive, did it do so to rights already accrued and adjudicated? There is nothing in the Alcoholic Beverage Control Act as a whole nor in section 7.3 which indicates that such was the legislative intent, other than, possibly, the requirement in that section that the application for transfer must contain a verified statement that the application or the proposed transfer is not made to fulfill an agreement entered into more than ninety days preceding the date of filing the application. It is interesting to note that there is no direct inhibition against an agreement to transfer which is more than ninety days old. The only direct inhibition is that no licensee shall enter into any agreement wherein he pledges the transfer of his license for a loan or as security for the fulfillment of any agreement. There is no inhibition against an agreement to transfer. How-

ever, in the procedural portion of the section, there is a requirement that the application for transfer state that any agreement on the subject is not more than ninety days old. This provision is not sufficient to indicate any intent on the part of the Legislature to deny a transfer to a person whose right to a transfer, at least as between him and the other party to the agreement, has already accrued. "It is a canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intention." In re Cate, 207 Cal. 443, 448, 279 P. 131–133. "It is also an established rule that a statute is not to be construed so as to have a retroactive effect unless the intent that it is to be retroactive clearly appears from the statute itself." Estate of Potter, 188 Cal. 55, 65, 204 P. 826, 830. To so hold, in the absence of evidence of a direct legislative intent to do so, would make the courts a party to a fraud. Here defendant entered into a then binding and legal agreement to retransfer the license upon the termination of the lease. The lease terminated and she was immediately under the duty of retransferring the license. She did not do so. Court proceedings resulted and she was ordered by the court to do so. She disobeyed the court order. For us to hold that she can retain the license and refuse to do as ordered would reward her for her failure to keep her agreement and for disobedience of a court order. Certainly the ninety day statement required in the application is not sufficient evidence of a legislative intent to bring about such an absurd result.

[5] Castleman v. Scudder, 81 Cal.App. 2d 737, 185 P.2d 35, cited by the attorney general, is distinguishable from our case. There appellants were business opportunity brokers who had secured certain broker's ageny contracts which did not have termination dates. After these contracts were obtained the Legislature adopted section 10301(f) of the Business and Professions Code which prohibited the practice of demanding or claiming a fee under such a type of contract. The Real Estate Commissioner revoked appellants' brokers' licenses because they demanded fees under these contracts. In a proceeding brought to mandamus the commissioner to restore the licenses the court held that the section applied to contracts executed before its adoption, pointing out that the mere holding of such an agreement was not grounds for revocation of licenses, but it was the practice of demanding or receiving fees under such agreements after the effective date of the act which supplied such grounds. It differs thereby from the statute in question here. The section obviously did not affect fees earned and accrued prior to its adoption. Again there the agreements were still in effect, and rights thereunder were to accrue in the future; whereas in our case the lease terminated, the rights accrued, and a judgment established those rights, all before the effective date of the act.

3. The Agreement Was Not Void.

The attorney general, appellant and amicus curiae on behalf of appellant contend that the agreement to retransfer the lease was void and contrary to public policy. They are able, however, to point out no provision of the Alcoholic Beverage Control Act which makes such agreement void nor any authority that it is contrary to public policy. Of course, the transfer is subject to the approval of the Board of Equalization. In all the arguments made by the above-mentioned parties they disregard this fact and attempt to construe the agreement and the judgment as an absolute right to a transfer of the license, rather than such a right subject to the exercise of the discretion of the board as in all other cases. The contention that agreements to transfer are in violation of the act is refuted by its very terms. Thus section 7 provides: "Each license issued under this act is separate and distinct and *shall be transferable* from the person to whom issued or *by whom renewed* to another person *upon the approval of the board* * * *." (Emphasis added.) Thus the license or its renewal may be transferred (always, of course, upon the approval of the board). Section 21.1 provides for an investigation of the proposed transferee. The attorney general's position seems to be that the

license privileges granted by the act are not transferable by the independent act of the licensee. We agree with that position. The person to whom the licensee desires to transfer the license must make an independent application and must be qualified in every respect. The attorney general contends that the act always proscribed executory agreements to transfer, and hence the Legislature in adopting section 7.3 did not change the rule However, he is unable to point out any provision of the act supporting his position. The wording of section 7.3 does not bear out the contention that the Legislature by its adoption was not changing the act as it previously stood, but merely accepting the administrative interpretation of it. The wording indicates that the Legislature was damming a hole which had heretofore been left open in the dyke. The attorney general refers to three opinions rendered by him which he contends constitute an administrative interpretation of the act which the Legislature adopted by the enactment of section 7.3. The first opinion, N.S. 3183, is dated January 8, 1941. It referred to a situation in which the widow of a deceased licensee contended that she was entitled to a transfer of the license to her as it was the community property of herself and the licensee. It pointed out that section 7 of the act provides that each license "shall be issued to a specific person"; therefore the issuance of such license to the husband was not an issuance to the wife. It concluded that the surviving wife "may secure a transfer to her of a license only in the event she could secure such license for the premises in question from a stranger." There is nothing in this opinion that supports the position taken here. It is interesting to note this language in the opinion: "Recent amendments to section 7 of the Act permitting transfers of licenses did not change the personal nature of the license, but rather extended to the licensee an additional privilege—*that of designating his successor,* who, if acceptable to the Board and eligible to a license, may have all privileges of the license transferred to himself upon making such application as required by the rules of the Board." (Emphasis added.)

The second opinion, N.S.3405, dated April 3, 1941, is likewise not in point. There the attorney general merely advised that the determination of the court as to who was entitled to request a transfer of the liquor license was binding on the board. There Besaw leased to Kileys certain property. Evidently the lease provided that on a failure to renew the lease the license should be retransferred to Besaw. However, there was a provision which stated that if the lessor sold the property the license would remain the property of the lessee. Besaw sold the property, and thereby the license vested in Kileys. Later Kileys applied for a transfer of the license to one Reese. The board made such transfer. Besaw attempted to transfer the license to a Mrs. Piper, who sued in the Tuolumne superior court to compel a transfer of the license to her. The court held that by the sale, the license vested in Kileys and that Mrs. Piper had no interest in the license as Besaw had nothing to transfer. Mrs. Piper applied to the board for a transfer to her. The attorney general advised the board that the board was warranted in disregarding the protests of Mrs. Piper and issuing the license to Reese because of the court's conclusion that under the terms of the lease she was not entitled to it. Actually the attorney general's opinion on this point supports our conclusion here.

[6] The third opinion, 287 (47/103), dated June 9, 1947, deals with the question of whether, where certain premises were leased and the lessee obtained a transfer of the liquor license from the lessor to himself, the Board of Equalization was required to recognize an agreement of the lessee to retransfer the license to the lessor. The attorney general concluded (1) executory agreements for the transfer of alcoholic beverage licenses are not binding on the board (we agree with this interpretation to the extent that the Board of Equalization may use its discretion as in all other applications for transfer of license); (2) the board may act only upon an adequate, formal application for

license by the proposed transferee-licensee (we agree with this interpretation); (3) agreements to retransfer such licenses or for the hypothecation thereof which purport to provide for any control by the person in whose favor such contract is made over the license or the licensee's licensed activities are contrary to the Alcoholic Beverage Control Act (we do not agree with this interpretation so far as it may affect agreements to transfer or retransfer licenses [2]). An examination of the reasoning in this opinion shows that it is based upon the theory that the agreement to retransfer or the hypothecation attempts to disregard the right of the board to use its discretion as in other cases. We agree that an agreement which purports to do that would be violative of the Alcoholic Beverage Control Act. But there must be read into these agreements the condition that the transfers must be subject to the approval of the board and subject to its rules. As said in Leboire v. Black, 84 Cal.App.2d 260, 262, 190 P.2d 634, 635, "We are satisfied that the agreement with regard to transfer of a liquor license should be construed in connection with sec. 7 of the Alcoholic Beverage Control Act [Statutes 1935, page 1123, 2] Deering's Gen.L., 1944, Act 3796, as intended to be subject to the approval of the Board of Equalization as therein provided. So construed the agreement is a legal one." Another case in which a transfer of liquor licenses under the Alcoholic Beverage Control Act was held legal is Fong v. Rossi, 87 Cal.App.2d 20, 22, 195 P.2d 854, 856. "Appellants argue that these provisions of the lease contain no promise to transfer the liquor licenses. We are satisfied that while no express promise to transfer the licenses is contained therein the plain tenor of the whole agreement is that the liquor licenses are to be transferred. It is agreed that the 'principal income * * * will be obtained * * under the liquor licenses now possessed by the lessor * * *.' Unless the transfer of the licenses was intended by the parties this agreement would be illegal. Teachout v. Bogy, 175 Cal. 481, 166 P. 319. Under section 7 of the Alcoholic Beverage Control Act, Statutes 1935, p. 1123, 2 Deering's Gen.L.1944, Act 3796, a liquor license may be transferred with the approval of the Board of Equalization. Since a contract must be construed so as to give it a legal effect if possible (Civ. Code sec. 1643) this lease must be construed to provide for the transfer of the licenses in the manner authorized by law." There is nothing in any of the attorney general's opinions which attempts to set forth the rights under these agreements as between the parties themselves. The opinions are directed to the situation between the parties and the board only. If there is anything in the attorney general's opinions to the effect that prior to the enactment of section 7.3 an agreement of the kind in question here was prohibited by the Alcoholic Beverage Control Act, such construction of the statute is not warranted by the statute itself. "* * an erroneous administrative construction does not govern the interpretation of a statute, even though the statute is subsequently reenacted without change." Whitcomb Hotel, Inc. v. California Employment Comm., 24 Cal.2d 753, 757, 151 P.2d 233, 236, 155 A.L.R. 405.

[7] As the agreement to retransfer as between the parties is not prohibited by the act, and as such agreements must be viewed in the light of the act which makes the transfer of all licenses subject to the discretion of the board, there is nothing illegal in such an agreement, nor is it in any way contrary to public policy.

Teachout v. Bogy, 175 Cal. 481, 166 P. 319, has no application here. In that case the licensee agreed to sell to Bogy Bros. a certain lease and a saloon license issued by the city of Los Angeles. The lease and license were to be signed in blank and left in escrow until the purchase price of $16,500 was paid at the rate of $200 per month. Bogy Bros., in the meantime, were to carry on a saloon business on the premises under the license without any

2. We are, of course, discussing the situation as it existed prior to the adoption of section 7.3.

transfer thereof. The court held that as a saloon license is personal to the licensee and authorizes him alone to carry on the business, the agreement to allow the purchaser to conduct the business under that license was really an agreement to carry on the saloon business in violation of the law and hence void. In our case there is no agreement to carry on the liquor business with someone else's license. Here it is simply an agreement to retransfer the license, subject, of course, to the board's rules. Nor does the case of Hooper v. Barranti, 81 Cal.App.2d 570, 184 P.2d 688, apply. There the agreement provided for the conduct of a partnership liquor business under the license of one of the individual partners. This court properly held that such an agreement was contrary to public policy as the Alcoholic Beverage Control Act prohibits any person from conducting a liquor business without a license issued to such person and "person" is defined in section 2 of the act to include a partnership.

While decisions from other states are not always determinative due to the difference in their license laws from ours, the Michigan case of Roodvoets v. Anscer, supra, 308 Mich. 360, 13 N.W.2d 850, is pertinent, as the Michigan law was similar to our Alcoholic Beverage Control Act before the adoption of section 7.3. There, as here, the liquor control act provided that licenses could be transferred with the consent of the commission. As in our case there was no other provision on the subject of transfer. One of the provisions of an agreement for the sale of a beer tavern provided that in the event of default upon a chattel mortgage note, the buyer agreed to transfer to the chattel mortgage holder or person selected by him the liquor license of the "House of Stein." Upon default, an action was brought to compel such transfer. As here, the defense raised was that an agreement to transfer the license is contrary to public policy and void. The court held that the statute providing that licenses might be transferred implied and carried with it the making of an agreement to transfer. Thus it was not illegal to agree to make a transfer. It was simply subject to the consent of the commission.

Defendant cites several cases in New Jersey to the effect that liquor licenses are not transferable. However, the New Jersey statute expressly prohibits such transfers.

Prior to the filing of suit herein defendant signed an application to transfer the license to Mitchell and Raffanti. The attorney general states that there is pending in the Superior Court of Sacramento County a proceeding brought by said Mitchell and Raffanti against the commissioner appointed in our case to sign the application to tranfer, and the State Board of Equalization to compel a transfer of the license to them. The attorney general is concerned, in view of that litigation, whether the board is required to recognize the status of plaintiff in this case. The attorney general's opinion N.S.3405 above mentioned answers his concern. There he advised the board to accept the court's determination as to who was the proper person to consider as transferee. The board is required to recognize plaintiff as the transferee-applicant for a license, and the commissioner as the transferor. (Apparently defendant has refused to sign the application.)

The order is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

104 Cal.App.2d 740

CAMPBELL et al. v. BAUER et al.

No. 14547.

District Court of Appeal, First District, Division 1, California.

June 14, 1951.

Action by Ralph D. Campbell and another, copartners doing business as The Higbee Company, against Rita Bauer and another for specific performance of an agreement to transfer an on-sale general liquor license, pursuant to the terms of a limited partnership agreement. The Superior Court in and for the County of Santa Clara, M. G. Del

Mutolo, J., entered judgment for plaintiff and defendants appealed. The District Court of Appeal, Bray, J., held that an agreement by which a liquor license became security for a loan was not against public policy.

Affirmed.

1. Intoxicating liquors ⇐45

Where the right to a liquor license had accrued prior to enactment of the amendment to the Alcoholic Beverage Control Act making the reservation of an interest in a liquor license illegal and unenforceable, the amendment to act had no retroactive effect. Gen.Laws, Act 3796, § 7.3.

2. Appeal and error ⇐854(1)

If a judgment is right upon any theory of law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.

3. Specific performance ⇐62

Where plaintiffs' right to have the application made by the defendant to transfer a liquor license had accrued prior to the effective date of the amendment to the Alcoholic Beverage Control Act making the reservation of an interest in a liquor license illegal and unenforceable, there was no need that the provisions of the amendment be complied with before the court could order specific performance of the transfer of the liquor license. Gen.Laws, Act 3796, §§ 7.3, 10; Civ.Code, § 3529.

4. Intoxicating liquors ⇐99

An agreement by which a liquor license became the security for a loan to the licensee was not against public policy.

5. Specific performance ⇐121(3)

In action for specific performance of an agreement to transfer a liquor license, the evidence supported finding of trial court that the transfer of plaintiffs' interest in the license at the time of making the loan was adequate consideration, and that the agreement of limited partnership was additional security for the loan.

6. Intoxicating liquors ⇐45

Where plaintiffs' right to have the application for liquor license made by defendant had accrued prior to effective date of amendment to Alcoholic Beverage Control Act making the reservation of an interest in liquor license illegal and unenforceable, the court had power to enforce agreement after the adoption of the amendment, since the act of making the application was deemed to have been made prior to enactment of the statute. Gen.Laws, Act 3796, § 7.3.

Hardy, Carley & Brenner, Palo Alto, for appellants.

Crist, Stafford & Peters, and John M. Donegan, all of Palo Alto, for respondents.

Defendants[1] appeal from a judgment granting specific performance of an agreement to transfer an on-sale general liquor license, pursuant to the terms of a limited partnership agreement.

Questions Presented.

They are practically the same as those this day decided in Saso v. Furtado, Cal. App., 232 P.2d 583. The main difference between the facts of this case and those of the Saso case is that here the license was pledged as security for the payment of a loan, while in the Saso case the agreement was to retransfer the license to the lessor upon the termination of a lease.

Facts.

The facts are not in dispute. March 31, 1948, plaintiffs loaned $13,322.07 to Barbershoppers' Redwood Lodge, Inc. Defendants as general partners operated a restaurant and bar in Palo Alto known as the Circus Room. Barbershoppers "went broke" and made an assignment for the benefit of creditors. Defendants bought its assets for $26,750. From this sum plaintiffs received $4,322.07 of the indebtedness due from Barbershoppers, leaving a balance of $9000 owing. In order to enable defendants to

1. The members of the State Board of Equalization were joined as defendants. Apparently they were never served. The record shows no further proceedings as to them, and hence "defendants" herein refer to Rita Bauer and Nell Tussing only.

pay off all Barbershoppers creditors, plaintiffs agreed to lend defendants certain moneys on the same terms and conditions as its original loan to Barbershoppers, namely, a limited partnership agreement on the liquor license, a chattel mortgage on the fixtures, and a deed of trust on real property owned by a third party. As the Barbershoppers had defaulted, plaintiffs were entitled to a transfer of the liquor license to them. But to save having the license transferred by Barbershoppers to plaintiffs and then a transfer from plaintiffs to defendants, which would have cost an additional fee, Barbershoppers' assignee for the benefit of creditors transferred the license directly to defendants. Defendants executed a promissory note to plaintiffs for $10,944. Plaintiffs took the same security as they held from Barbershoppers. Thus plaintiffs appeared as limited partners on the liquor license of both the Barbershoppers and defendants. Defendants were the general partners and plaintiffs the limited partners. This limited partnership was merely to secure the payment of the loan. The agreement provided that plaintiffs transferred to defendants their interest in the license and that a limited partnership should exist until all sums payable under the promissory note were paid. In the event of default defendants' interest in the license should cease, and defendants "would execute and transfer all of their interest" in said license to the plaintiffs upon demand. In July, 1949, defendants defaulted. There is a conflict in the evidence as to when demand for a transfer was made. The court found that plaintiffs made demand by filing this action. The complaint was filed September 16, 1949, and the amended complaint on September 22. (The effective date of section 7.3 of the Alcoholic Beverage Control Act, Gen.Laws, Act 3796, hereafter discussed was October 1.) On June 20, 1949, defendant Tussing signed an application for transfer of the license to plaintiffs. Defendant Bauer refused to sign it.

Findings and Judgment.

The court found, among other matters, that the signing of the application for transfer by defendant Tussing, one of the general partners, constituted a valid transfer of the license to plaintiff; that the limited partnership agreement was not illegal or unenforceable when entered into, and that the 1949 amendment to the Alcoholic Beverage Control Act making the reservation of an interest in a liquor license illegal and unenforceable is unconstitutional as impairing the obligation of a contract insofar as the amendment applied to the agreement. The court then entered judgment that defendants have no interest in the license, restrained them from transferring the license to others than plaintiffs, and ordered defendants to execute such applications and instruments as might be necessary to effectively transfer the license to plaintiff. It appointed a commissioner to execute the same in the event defendants refused to do so.

1. Is Section 7.3 Retroactive?

[1] Defendants contend that it is and that, therefore, an agreement giving the holder of a promissory note an interest in a liquor license cannot be specifically enforced after the effective date of the act. Plaintiff's right, as between the parties, to a transfer of the license accrued at the time of filing the action herein, if not before. That was prior to the effective date of the act. We held in the Saso case, supra, that the act did not affect agreements where the right to a liquor license had accrued prior to the enactment of the section. In using the word "accrued" we are not referring to it in the strict sense as used in contracts not subject to regulation under the police power. See Gregory v. Hecke, 73 Cal.App. 268, 238 P. 787. We are merely referring to a change of rights as between the parties. Section 7.3 does not apply here.

2. Constitutionality of the Act.

[2] The court assumed that the act was retroactive and then held that it was unconstitutional as impairing the obligation of the contract theretofore entered into. As the court erred in its assumption, the constitutionality of the act need not be determined here. While the reasons upon which the court upheld the right to transfer were wrong, the result was correct. "If the judgment * * * is right upon any theory of law applicable to the case, it

must be sustained regardless of the considerations which may have moved the trial court to its conclusion." (2 Cal.Jur. 808–809, § 476, citing numerous authorities.) This rule is well established. See Sears v. Rule, 27 Cal.2d 131, 140, 163 P.2d 443.

Contentions of Defendants.

[3] Practically all the contentions made by defendants here were made and considered in the Saso case, supra. Defendants here contend that the court cannot order specific performance of the transfer agreement because defendants cannot make, as required by section 7.3, a sworn statement that the application was not made (1) to satisfy the payment of a loan and (2) to fulfill an agreement entered into more than ninety days prior to the application, or (3) to establish a preference for a creditor. In view of the fact that plaintiffs' right to have the application made by defendants had accrued (it actually was made by one of the partners; however, it was not sufficient, as section 10 of the Alcoholic Beverage Control Act requires the signature of all partners) prior to the effective date of section 7.3, such a sworn statement is not necessary, first, because the application is made under the order of court, and secondly, because equity regards that as done which ought to be done. "That which ought to have been done is to be regarded as done, in favor of him to whom, and against him from whom, performance is due." Civ.Code, § 3529. Thirdly, to permit defendants to retain the advantage of their own wrong would be unconscionable.

While the signing of the application to transfer does not of itself constitute a transfer as the consent of the Board of Equalization must be obtained, such signing by the transferor constitutes a compliance with the transferor's agreement to transfer. It should have been done in this case and it must therefore be regarded as done. It is then up to the Board of Equalization to determine as it would in any other case whether the transfer will be permitted.

[4] While defendants' main defense is the claim of the application of section 7.3 to the agreement, they also contend that the agreement by which the license became security for the loan was against public policy. This contention is answered in the Saso case. While the agreement in that case did not pledge the license as security for a loan, we find nothing in the Alcoholic Beverage Control Act prior to the adoption of section 7.3 which in anywise prohibited the use of a license as security. So far as public policy is concerned, there is no substantial difference between an agreement making a liquor license security and an agreement of the type approved in Fong v. Rossi, 87 Cal.App.2d 20, 195 P.2d 854.

[5] Defendants contend that there was no consideration for the agreement here. The court found that the transfer of plaintiffs' interest in the license at the time of making the loan was adequate consideration, and that the agreement of limited partnership was additional security for the loan. The evidence well supports this finding.

[6] Supporting their contention that the court has no power to enforce the agreement after the adoption of section 7.3, defendants refer to three cases. The first is V. & S. Bottle Co. v. Mountain Gas Co., 1918, 261 Pa. 523, 104 A. 667. There the gas company had agreed to furnish plaintiff natural gas at a certain price for ten years. Before the expiration of the term certain provisions of the Public Service Act were enacted which prohibited the special privileges which this contract gave. The court held that thereby the agreement was rendered inoperative from the time the act took effect. The reasoning is not given. However, the case does not hold, as claimed, that a court cannot enforce the rights actually accrued prior to the act, such as the right to recover at the contract rate for gas theretofore delivered. In fact the decision refers only to the agreement becoming inoperative after the act went into effect. The second case is Dorr v. Chesapeake & O. Ry. Co., 1916, 78 W.Va. 150, 88 S.E. 666, L.R.A.1916E, 622. There in 1900 Dorr, for certain considerations expressed in the deed, conveyed certain land to the railroad in settlement of a condemnation action. He claimed also an oral agreement by which the railroad agreed to give him an annual pass for life. In 1906 Congress

enacted a statute prohibiting the giving of free passes, and providing penalties for the giving or acceptance of such a pass. The railroad thereafter refused to give Dorr a pass. He brought suit for specific performance of the oral agreement. In denying the relief the court held that equity would not lend its aid to enforce an agreement, the result of which would be a violation of an act of Congress. The third case, similar to the Dorr case, is Louisville & Nashville R. R. v. Mottley, 219 U.S. 467, 31 S.Ct. 265, 55 L.Ed. 297. In 1871 Mottley released all claims he had against the railroad for injuries received due to its negligence in exchange for its agreement to give him an annual pass for life. As in the Dorr case, the court refused specific performance of the agreement after the passage of the act of Congress of 1906, because the issuance and acceptance of passes thereafter would be a violation of that act. All of these cases differ from ours in this, that there the agreements attempted to be performed were continuing and there were acts to be done thereunder which would be in violation of the then law. In the Mountain Gas company case, gas was still to be supplied at a rate in violation of the act. In the Dorr and Mottley cases, annual passes were still to be supplied in violation of the act. In our case there is nothing further to be performed, as the only act, that of making the application, is deemed to have been done prior to the enactment of the statute.

The judgment is affirmed.

PETERS, P. J., and AGEE, J. pro tem., concur.

104 Cal.App.2d 777

HADDEN et al. v. MORAN et al.

Civ. 7864.

District Court of Appeal,
Third District, California.

June 15, 1951.

Action by Bertha Hadden and others against Pete J. Moran and others involving the issue whether a compromise settlement effected by plaintiffs with the defendants, Pete J. Moran and his wife, Leola, operated to release the defendants Betty Jane Requa and Carl S. Requa from liability for damages for injuries sustained in an automobile accident. From an adverse judgment of the Superior Court for Solano County, Harlow V. Greenwood, J., the plaintiffs appealed. The District Court of Appeal, Adams, P. J., held that the evidence sustained a finding that codefendant, Betty Jane Requa was a joint tort feasor and that as such she was released from liability by compromise agreements releasing the defendants Pete J. Moran and his wife, Leola, from liability.

Judgment affirmed.

1. Pleading ⇐381(2)
Stipulations ⇐14(1)

On issue of validity of a release, contention of plaintiffs that defendants were not joint tort-feasors but were independent concurrent tort-feasors could not be sustained where such contention was inconsistent with repeated allegations in the complaint of plaintiffs and they stipulated that if the court found that defendants were joint tort-feasors, the release of the defendants amounted to a release of the co-defendants.

2. Release ⇐57(1)

In action for injuries sustained when automobile of defendant attempted to pass the plaintiffs' and approaching automobile of codefendant, to avert collision swerved to the right and went out of control and skidded back and collided with the automobile of plaintiff, finding that if negligent, the codefendant was a joint tort-feasor, so that instruments releasing and discharging the defendants from liability on payment of a consideration operated to release and discharge the codefendant, was justified by the evidence.

Donald E. Wheeler, Sacramento, for appellants.

Brown, Rosson & Berry, Oakland, for respondents.

ADAMS, Presiding Justice.

The sole question presented on this appeal is whether a compromise settlement

effected by plaintiffs with defendants Pete J. Moran and his wife, Leola, operated, as matter of law, to release defendants Betty Jane Requa and Carl S. Requa from liability for damages for injuries sustained by plaintiffs Bertha Hadden and Peggy Metzler in an automobile collision, and for expenses incurred by Charles Hadden due to the injuries to his wife, Bertha.

Plaintiffs' complaint alleged that at the time of the accident, Peggy Metzler was driving west on Highway No. 40 in Solano County in a De Soto coupe in which plaintiff Bertha Hadden was a passenger; that defendants Pete J. Moran and his wife, Leola, were the owners of a De Soto coupe being operated by Pete in the same direction, in which plaintiffs' car was operated, namely, in a westerly direction; that defendants Betty Jane Requa and Carl Requa were the owners of a Packard coupe being operated by Betty and driven easterly on said highway; that Moran and Requa operated their respective vehicles in such a careless and negligent manner as to cause the Requa car to run into the car occupied by plaintiffs; that said careless and negligent manner in which defendants Pete J. Moran and Betty Jane Requa did operate their said automobiles jointly and concurrently resulted in the collision of the Requa automobile with the automobile operated by plaintiff Peggy Metzler; and that said accident was the result of said joint and concurrent negligent manner in which said defendants did operate, manage and control their said automobiles at said time and place. Elsewhere in the complaint it was repeated some fourteen or fifteen times that the accident was the proximate result of the *joint and concurrent* negligence of defendants Moran and Requa, and in no place was it alleged that the accident was caused by reason of the sole negligence of either of the operators of defendants' cars.

Some months after the filing of plaintiffs' complaint plaintiffs Hadden entered into an agreement with defendants Moran which provided:

"For and in consideration of the sum of Four Thousand Five Hundred Dollars ($4,500.00) to us in hand paid by Peter J. Morand, receipt of which is hereby acknowledge, we Bertha Hadden and Charles Hadden * * * do hereby release, acquit and forever discharge said Peter J. Morand and Leola F. Morand, of and from any and all claims, demands, actions or causes of action which we or either of us now have or may have in the future for injuries to person or damage to property arising or to arise out of that certain accident which occurred on or about April 2, 1947 near the City of Fairfield, County of Solano, State of California, at which time an automobile operated by said Peter J. Morand *caused an automobile owned by Carl S. Requa to come into collision with an automobile owned and operated by one Peggy Metzler* in which said Bertha Hadden was riding, causing said Bertha Hadden to sustain certain personal injuries and damage to property and causing us to sustain certain expenses, following which we filed suit against said Peter J. Morand and said Leola F. Morand, named in said suit as Pete J. Moran and Leole F. Moran, in the Superior Court of the State of California, in and for the County of Solano, said suit bearing number 20458, which we now authorize our attorneys, Messrs. Hoey & Hoey, to dismiss with prejudice.

"It is distinctly understood and agreed by and between all parties hereto that this release includes claims of every kind or character for personal injuries which the said Bertha Hadden has had, now has or may have in the future arising or to arise out of said accident, whether said injuries are known or unknown, suspected or unsuspected, anticipated or unanticipated or within the contemplation of any of the parties hereto or of any other person." (Italics added.)

A like agreement was executed by plaintiff Metzler These agreements were set forth in a special defense filed by defendants Requa, and it was stipulated between the plaintiffs and defendants that the court should try the issues presented by the separate defense, and an agreed statement of facts, and if it should find that said agreements determined the rights of the parties, it might enter judgment finally adjudicating the rights of the parties.

The facts agreed upon are as follows: The car in which plaintiffs were riding was traveling west followed by the Moran car. The Moran car attempted to pass the plaintiffs' car. To do so it went over onto the left side of the highway. The Requa car, traveling east on its right-hand side of the highway, was suddenly faced with a head-on collision with the Moran car, and to avert such a collision the Requa car swerved to its right onto the south shoulder of the highway and there went out of control due in part to rainy weather, and then skidded back across the highway and collided with plaintiffs' car.

The court made the following finding: "That on the 17th day of March, 1948, Bertha Hadden and Charles Hadden, plaintiffs above named, for the monetary consideration of $4,500.00 * * *, and Peggy Metzler, plaintiff above named, for the monetary consideration of a further sum of $4,500.00 * * *, paid to said plaintiffs by defendants Pete J. Moran * * * and Leola F. Moran * * *, by instruments in writing fully and finally released and discharged the above named defendants Pete J. Moran * * * and Leola F. Moran * * * from any and all liability for damages arising from the accident of April 2, 1947 described in plaintiffs' complaint; that said defendants, Pete J. Moran * * * and Leola F. Moran * * * were joint tort feasors in the proximate cause of said accident along with defendants Betty Jane Requa and Carl S. Requa, Sr., sued herein as Carl Requa; that in this connection the court expressly finds that the allegations of plaintiffs' complaint describing said defendants Pete J. Moran * * * and Betty Jane Requa as joint tort feasors, and alleging that said accident was the result of their joint and concurrent negligent acts, are true; that following said release and discharge of said defendants, plaintiffs, and each of them, dismissed the above entitled action, with prejudice, as to said defendants Pete J. Moran * * * and Leola F. Moran * * * by written dismissal duly filed of record herein; that said release and discharge of said defendants Pete J. Moran * * * and Leola F. Moran * * *, and said dismissal of said action as to said defendants, operates as a matter of law to release said defendants Betty Jane Requa and Carl S. Requa, Sr., * * * from any and all liability to plaintiffs arising from said accident, and operates as a bar to their further prosecution of this action against said latter defendants."

[1, 2] Appellants now insist that the judgment must be reversed, because, as they say, defendants were not joint tort-feasors but were "independent concurrent tort feasors." Such contention is inconsistent with the repeated allegations in their complaint, and they stipulated that if the court found that they were joint tort-feasors the release of the Morans amounted to a release of the codefendants. As set forth above the court made such a finding, and we cannot say that the finding is without support in the evidence; it conforms to the pleading of the plaintiffs, and it is in conformity with the allegation contained in the settlement agreements with Moran that Moran "caused an automobile owned by Carl S. Requa to come into collision with an automobile owned and operated by one Peggy Metzler." It may well be said that the court would have been justified in finding that there was no negligence on the part of the driver of the Requa car. But we are satisfied that the finding that, if negligent at all, Betty Jane Requa was a joint tort-feasor, and that as such she was released from liability by the compromise agreements, has support in the evidence. The same result follows, to wit: that the Requas are not now liable to plaintiffs. Cases comparable on the facts are Commercial Trans. v. Daigh & Stewart, 33 Cal.App.2d 370, 373, 91 P.2d 951; Cummings v. Kendall, 34 Cal.App.2d 379, 381, 93 P.2d 633; Sawdey v. Producers' Milk Co., 107 Cal.App. 467, 290 P. 684.

We conclude that the trial court was correct in concluding that the instruments releasing and discharging the defendants Mr. and Mrs. Moran operated to release and discharge the defendants Betty Jane Requa and Carl S. Requa, Sr. Tompkins v. Clay Street R. R. Co., 66 Cal. 163, 4 P.

1165; Chetwood v. California Nat. Bank, 113 Cal. 414, 427, 45 P. 704; Flynn v. Manson, 19 Cal.App. 400, 402, 126 P. 181; Merrill v. Los Angeles Cotton Mills, Inc., 120 Cal.App. 149, 161, 7 P.2d 329; Hawber v. Raley, 92 Cal.App. 701, 705, 268 P. 943; 22 Cal.Jur. 763, sec. 12. Many other decisions to the same effect might be cited, but the foregoing will suffice.

The judgment is affirmed.

VAN DYKE and PEEK, JJ., concur.

104 Cal.App.2d 850

CARR et ux. v. SCHOMBERG et al.

Civ. 14643.

District Court of Appeal, First District, Division 1, California.

June 21, 1951.

Alvin V. Carr and wife brought a quiet title action against R. F. Schomberg, and others. The Superior Court in and for the County of Santa Clara, Leonard R. Avilla, J., entered judgment determining that defendants were the owners of the strip of land in dispute and the plaintiffs appealed. The District Court of Appeal, Peters, P. J., held that the evidence supported findings of trial court that the parties had agreed upon a certain tree line as constituting the proper north and south dividing line, and that the defendants had title by adverse possession.

Affirmed.

1. Boundaries ⇐37(1)

In disputed boundary case, the evidence supported finding that the plaintiffs had not established their title to the disputed property.

2. Boundaries ⇐37(3)

In disputed boundary case, the evidence justified trial court in finding that a certain tree line had been agreed upon by the parties as marking the proper north and south dividing line between the two adjoining parcels of property.

3. Boundaries ⇐46(3)

If there is an uncertainty or dispute regarding the boundary line of contiguous tracts of land, the owners thereof may agree that a certain line shall be the true division line, and such agreement, when executed, establishes the boundary line and estops the parties from afterwards contesting it.

4. Boundaries ⇐46(3)

An agreed boundary line must be accepted as the true line, regardless of the accuracy of such location as shown by subsequent measurements.

5. Boundaries ⇐46(1)

In determining validity of an oral agreement to establish a boundary, the test is whether the parties have agreed upon a dividing line that is clear to them and that can be made clear to others.

6. Boundaries ⇐46(1)

Where two adjoining land owners fixed a certain tree as a point on the dividing line between their properties, and the parties knew that the dividing line ran due north and south through the tree, there was a sufficient fixing of the boundary and there was no need to have the exact boundary line marked upon the entire line.

7. Adverse possession ⇐114(1)

In disputed boundary case, evidence supported finding that for more than 20 years prior to the commencement of the action the plaintiffs had not been seized of or possessed of the disputed area.

Atkinson & Farasyn, Mountain View, for appellants.

Rankin, Oneal, Luckhardt, Center & Hall, San Jose, for respondents.

PETERS, Presiding Justice.

This is a disputed boundary case. The land involved is located in a mountainous area of Santa Clara County. The plaintiffs admittedly own the northwest quarter of the northeast quarter of section 31, township 7 south, range 2 west, M.D.B. & M.

The defendants admittedly own the northeast quarter of the northwest quarter of the same section. These two parcels adjoin each other, so that the westerly line of the plaintiffs' parcel is the easterly line of the defendants' parcel. Defendants claim that the questioned boundary runs north and south through a certain sycamore tree, while plaintiffs claim that it runs from and through a certain two-inch pipe and old hub. The area in dispute between the old hub and the sycamore tree is 575 feet wide. Plaintiffs brought this action to quiet their title to their parcel, including the disputed strip, which runs the length of their west boundary. Defendants denied the material allegations of the complaint, pleaded adverse possession, and cross-complained for an adjudication of their rights in the property. The trial court determined that the proper boundary ran through the sycamore tree, and established that line as the true boundary between the parties. The court found that for more than twenty years prior to the commencement of this action the true dividing boundary between the two parcels was unknown to the respective parties; that the true boundary runs through the sycamore tree; that the respective owners agreed that the boundary should run through the sycamore tree; that since such agreement was entered into more than twenty years ago the defendants and their predecessors in interest have occupied all of the disputed area west of the sycamore tree line and have constructed buildings thereon and have exercised complete and exclusive use, possession and enjoyment of the disputed area; that they have, in addition, paid all taxes thereon and have had actual, notorious, exclusive, peaceable and uninterrupted adverse possession of the area west of the sycamore tree line; that for more than twenty years prior to the commencement of this action plaintiffs have not been seized or possessed of the disputed area. Based on these findings the trial court entered its judgment determining that defendants are the owners of the strip in dispute. Plaintiffs appeal.

Although the evidence is conflicting, the finding that the true boundary between the two parcels runs through the sycamore tree is supported by the evidence. Likewise, the findings that the parties had agreed upon the sycamore tree line as constituting the true boundary, and that defendants have title by adverse possession are amply supported.

The two adjoining parcels are located in a mountainous area of Santa Clara County. The only useable portion of either parcel is the area included within a canyon through which runs Stevens Creek, which also runs through the disputed strip. This useable area is principally adapted for summer cabins. Defendants or their predecessors, with full knowledge of the plaintiffs or their predecessors, in the disputed area have constructed several houses and sheds, and a swimming pool, all assessed at $1,070.

The respective chains of title of the parties are not in dispute. The Carrs' title is predicated upon a United States patent to N. Ehrhorn, recorded in 1890. In 1943, the property was distributed to Ehrhorn's widow, and her estate sold it to the Carrs in 1946.

The defendants' title evolves from a title in Mason, Sr., dating back to 1913. Mason, Sr., sold to Mason, Jr., in 1929. Mason, Jr., sold to Schomberg in 1942.

After the Carrs purchased their parcel in 1946 the present dispute arose. In 1947, the Carrs employed one James, a civil engineer, to make a survey of their parcel. James made a study of a previous private survey made for Ehrhorn in 1890. James also studied the county records, various maps on file with the county surveyor, official maps of the Department of Interior, and the official notes appertaining thereto. James also hired a surveyor, Nolte by name, to make a field survey. Nolte examined the same documentary material above referred to, and then made a field survey. He testified at great length and quite technically as to his findings. Plaintiffs place their main reliance on his testimony and contend that it is uncontradicted, and urge that it compels a reversal. In substance, Nolte testified that he tried to locate old survey markers; that he found old brushed lines and other survey points from previous surveys; that he found various hubs which

he assumed were corner markers; and that, among other things, he discovered, at what he claimed was the northwest corner of the plaintiffs' property, a 2" pipe behind an old hub inscribed "¼S." In this general area were found witness and bearing trees as shown on the Ehrhorn private survey of 1890. Some blazed trees and stumps were found, but on some there were no references, so that they could not be tied in with the survey. Nolte could not testify as to who had set the various hubs found by him. He testified that the brushed lines were about 10 or 15 years old, so that they were more recent than any government survey and more recent than the Ehrhorn survey, and that he did not know who had made them. He admitted that the official government survey did not contain any description of the bearing trees, but some of them appeared in the Ehrhorn survey. He located the hub for the northwest corner of plaintiffs' property within inches of the spot fixed for the same corner in the Ehrhorn survey. Nolte's survey seems to be based primarily on the references in Ehrhorn's map, the result of a private survey.

The main witness for defendants was Williams, a civil engineer and land surveyor. He did not make an actual survey, but he had a crew go out and locate the sycamore tree and make various ties to it. He gave quite a lecture on the proper method of making resurveys, and commented at length on the various maps and notes in evidence. He testified that there had been two government surveys, one in 1868, and one in 1882, and that, as between two government surveys, the later survey is the established one. He put the field notes of the 1882 survey into evidence. He then pointed out that, in its township, section 31 is a "marginal," "closing" or "long" section. A government surveyor, according to this witness, first lays out the township lines, and then subdivides this area into sections. The last section laid out is called a "marginal," "closing" or "long" section, which means that it may be larger or smaller than the standard section, dependent upon how accurate the township lines and the other section lines were laid out. If the Government Rules of Survey were followed, section 31 is such a closing section. This section had a surplus. According to the government rules normally followed, this excess would be put in the westerly half of the section, which would put the disputed strip in defendants' parcel, with the boundary along the line of the sycamore tree. Admittedly, however, the government manual recognizes another method of dividing up this surplus known as the "direct proportional method," which would divide the surplus up among the various quarter sections.

The sycamore tree was blazed with the letters "B.T." and "S.E." These marks looked like they had been on the tree for a long time, probably since 1910 or 1911.

The government map of 1882 was made from the field notes of the surveyor. There is a discrepancy in description between the map and the notes which might explain the different interpretations of Nolte and James on one side, and Williams on the other. Admittedly, James did not know of this discrepancy when he made his survey.

Plaintiffs argue that the testimony and map of Nolte established the boundary they claim, emphasizing the fact that his testimony is based upon a survey made by him, while Williams made no survey. They argue that Williams' testimony did not create a conflict, but amounted simply to a lecture on how to make a government survey. It must be conceded that Nolte's testimony would have supported a finding that the disputed strip was within plaintiffs' lands. But the Nolte survey was based primarily upon the Ehrhorn survey of 1890, a private survey. Nolte did not testify that any of the monuments relied upon by him had been fixed by the government resurvey of 1882. Under such circumstances, his evidence was by no means conclusive.

[1] Moreover, Nolte's testimony does not stand uncontradicted. Williams' analysis of the government field notes places the disputed strip within defendants' lands. Under such circumstances, the trial court was justified in finding that the plaintiffs, who must recover, if at all, on the strength of their own title and not upon the weakness of defendants', had not sustained the burden imposed upon them.

Moreover, there is ample evidence to show that the sycamore tree line was an agreed boundary. Mason, Jr., acquired the property now owned by defendants from his father in 1929. His father had owned the property since 1913. Schomberg acquired the property from Mason, Jr., in 1942. When Mason, Jr., acquired the property, Ehrhorn owned the parcel now owned by plaintiffs. Mason, Jr., testified that, sometime in about 1928, he talked to Ehrhorn about the boundary between the two parcels; that Ehrhorn stated that he did not know exactly where his corners were and asked Mason, Jr., if he knew; that the witness told Ehrhorn that he thought the sycamore tree was on the line; that the two parties went down and looked at the tree, and Ehrhorn stated that the sycamore tree was a "line" or "bearing" tree and that it "suited" him, that it was "satisfactory to him" to treat the sycamore tree as indicating the boundary; that Mason, Jr., suggested that a survey be made, but Ehrhorn refused to pay his share of the expense, stating that the sycamore tree line was satisfactory to him; that at this time the property was owned by his father, but he, Mason, Jr., then had a verbal agreement with his father to secure an interest in it; that he communicated Ehrhorn's agreement as to the boundary to his father; that both before and after 1929 both of the then owners of the adjoining parcels treated the sycamore tree line as the boundary; that after he purchased the property in 1929 he erected a "no trespass" sign, signed by himself, on the road near the sycamore tree, and a gate was placed in that road. The sign and gate have remained there for over twenty years. He also testified that both adjoining owners always treated the sycamore tree line as the boundary, and that since 1910 the adjoining owners have cut timber on their respective parcels, and each has cut up to the sycamore tree line.

There was evidence that in 1913, when Mason, Sr., brought the property, he pointed out to a witness the sycamore tree as constituting the boundary. In addition, Schomberg testified that he has been familiar with the property since 1915; that beginning in that year Mason, Sr., the then owner, permitted him to go upon the property; that he did so every few weeks; that at that time there were no buildings on this disputed strip; that with Mason, Sr.'s consent he built a house on the disputed strip in 1925, and put in the swimming pool several years later. The hayshed was constructed by Schomberg's daughter and son-in-law about 1944. Since 1925, Schomberg and his family have visited the property nearly every week end. He also testified that when he started to construct the first building in 1925 he had a verbal arrangement with the Masons for the eventual purchase of the parcel.

Plaintiffs and defendants and their predecessors have paid the taxes assessed on their respective parcels, and admittedly the taxes on the improvements on the disputed area have been assessed to and paid by defendants.

[2–4] On this evidence the court was justified in finding that the sycamore tree line had been agreed upon as the dividing line between the two parcels. The general theory of the establishment of boundaries by agreement is stated as follows in 4 Cal. Jur. p. 427, § 53: "If there is an uncertainty or dispute regarding the boundary line of contiguous tracts of land, the owners thereof may agree that a certain line shall be the true division line between their respective tracts; and such agreement, when executed, establishes the boundary line, and estops the parties from afterwards contesting it. It is the policy of the law to give stability to such an agreement, as being the most satisfactory way of determining the true boundary, and tending to prevent litigation. An agreed boundary line must be accepted as the true line, regardless of the accuracy of such location as shown by subsequent measurements."

The same doctrine, supported by many cases, is also stated as follows in 4 Cal. Jur. p. 432, § 56: "When coterminous owners, being uncertain of the true position of the boundary of their lands, agree upon its true location, mark it upon the ground, or built up to it, occupy on each side up to the place thus fixed and acquiesce in such location for a period equal to the statute of limitations, or under such circumstances that substantial loss would be caused by a change of its position, such line becomes, in law, the

true line called for by the respective descriptions, regardless of the accuracy of the agreed location as it may appear by subsequent measurements."

The doctrine has been discussed and amplified in several recent cases. In Crook v. Leinenweaver, 100 Cal.App.2d 790, 224 P.2d 891, 892, the court discussed the rule as follows: "The doctrine of an agreed boundary line is well settled and such agreements are favored by the courts. An actual argument or dispute is not necessary in such cases. The essential elements are an uncertainty as to the true position of the boundary and an agreement to accept a location as fixed by the parties. The fact of an agreement may be inferred from acts of the parties. Acquiescence and use of the property, while not controlling, may be considered under some circumstances for their evidentiary value. [Citing cases.]"

In the recent case of Mello v. Weaver, 36 Cal.2d 456, 224 P.2d 691, 692, the Supreme Court had the following to say on the subject:

"The requirements of proof necessary to establish a boundary by agreement are well settled by the decisions in this state. [Citing cases.] Mere agreement to locate a boundary known to be different from that called for by the deeds is insufficient, since such an agreement would be tantamount to a conveyance by parol, an unrecognized method of transfer of real property. [Citing cases.] But as early as Sneed v. Osborn, 25 Cal. 619, where the position of the initial point in the description was uncertain, a division of land between coterminous owners as in accordance with the deed description, and mutual acquiescence in their practical location of the common boundary over a long period of time, was held to constitute the location of the true boundary as called for by the deed. The doctrine grew out of the need for stability and repose in the matter of titles to real property. [Citing a case.]

"The agreement need not be express, but may be implied from long acquiescence. [Citing cases.] But since it is valid only for the purpose of settling an uncertainty in a common boundary, the implied agreement must have been based on a doubtful boundary line. [Citing cases.] A dispute or controversy is not essential [citing cases], but it may be evidence of the existence of a doubt or uncertainty. Nor is it a requirement that the uncertainty should appear from the deed or from an attempt to make an accurate survey from the calls in the deed. The fact that an accurate survey is possible is not conclusive of the question whether a doubt existed as to the location of a common boundary. Thus the doubt may arise from a believed uncertainty which may be proved by direct evidence or inferred from the circumstances surrounding the parties at the time when the agreement is deemed to have been made [citing cases]; and if in good faith the parties resolved their doubt by the practical location of the common boundary it will be considered the boundary called for by the deed. [Citing cases.]"

Plaintiffs point out that the only agreement here shown to exist was between Ehrhorn and Mason, Jr., and also point out that such agreement was made in 1928, before Mason, Jr., purchased the property, and contend that such an agreement, made with one not an owner, is of no legal consequence. The evidence shows that Mason, Jr., conveyed the terms of the agreement to his father, and that his father acquiesced in it. The inference is well nigh irresistible that Mason, Sr., ratified the agreement made by his son. Moreover, the evidence is without substantial conflict that both before and after 1928 both of the then owners treated the sycamore tree line as the true boundary. The improvements were constructed on the disputed strip as early as 1925, and Ehrhorn made no objections. The "no trespass" sign clearly delineated the boundary and was in existence for over twenty years. A gate was constructed on the road passing the sycamore tree about 1930, clearly indicating that the disputed strip was claimed by Mason, Jr., and Ehrhorn made no complaint. Under these circumstances, the evidence is sufficient to sustain the finding that the then adjoining owners agreed upon the boundary.

Plaintiffs contend that even if there were an agreement, it was far too indefinite to be

enforceable. In this connection they point out that the agreement merely fixed the sycamore tree as the boundary, and that there was a complete absence of direction or length of the line. They urge that before an agreement fixing the boundary will be enforced, it must fix the line with certainty and mark it upon the ground. They rely on statements appearing in some of the cases that the agreed line must be "marked upon the ground," or that there must be "an actual designation of the line upon the ground." See Muchenberger v. City of Santa Monica, 206 Cal. 635, 275 P. 803; Roberts v. Brae, 5 Cal.2d 356, 54 P.2d 698; Martin v. Lopes, 28 Cal.2d 618, 170 P.2d 881; Talmadge v. Moore, 98 Cal.App.2d 481, 220 P.2d 588.

[5, 6] While it is undoubtedly true that in most of the cases the parties made a more substantial designation of the agreed boundary than was done here, there is no rigid requirement that the boundary must be physically marked on the surface of the ground. The test is whether the parties have agreed upon a dividing line that is clear to them, and that can be made clear to others. The sycamore tree fixed a point on the dividing line between the two parcels. The parties knew that the dividing line ran due north and south. So far as this dispute is concerned, they were not interested in the north and south boundaries of their land, and were not adjoining owners as to the north and south boundaries. Once the sycamore tree was agreed upon as marking the division of the two parcels, the dividing boundary simply ran north and south from that point along the line where the two parcels were contiguous. This is sufficient to establish the disputed boundary. The correct rule is stated as follows in Needham v. Collamer, 94 Cal.App.2d 609, 612, 211 P.2d 308, 310, as follows: "Defendants further contend that the agreed boundary line cannot be upheld because it is not 'marked upon the ground by a dividing fence or similar monument'. While the actual erection of a fence or like monument along an agreed boundary would have great weight in the fixing of such a boundary such means are not exclusive, since the primary question is one of fact going to the question of whether there was an agreed boundary, and if so by what visible thing was it delineated. Here the evidence shows and the court found that the line was fixed by the plaintiffs and the Moys as running from an iron stake, which had been in position for more than eighteen years, to two willow trees on the lake shore; that said line ran thirty inches to the west side of plaintiffs' garage, which garage had been built by Moy while he occupied the premises and in accordance with his understanding as to the boundary line."

[7] The findings in reference to adverse possession, contrary to plaintiffs' contentions, are amply supported. The main attack made on these findings is that there is no evidence that defendants or their predecessors paid taxes on the disputed strip for the statutory period. It was stipulated that each owner paid taxes on his specific lands, and that the assessments on the improvements were taxed to defendants. Once it is found that the parties agreed upon a boundary, the payment of taxes according to deed descriptions amounts to payment of taxes on the area up to the agreed-upon boundary. The proper rule was stated as follows in Price v. De Reyes, 161 Cal. 484, 489, 119 P. 893, 895: "It is conceded that both parties paid taxes each year assessed according to the descriptions in the respective deeds. As we have seen, a division line thus established 'attaches itself to the deeds of the respective parties,' and defines the lands described in each deed, so that the one in the possession of the overlap holds the title thereto by the same tenure as he holds the lands technically embraced in the description. [Citing cases.] The consequence is that under such circumstances the payment of taxes assessed in this manner is a payment on the land in the possession of the parties. Furthermore, the natural inference would be that the assessor put the value on the land and improvements of each party as disclosed by the visible possession, rather than that he ascertained the true line by a careful survey and assessed to one a part of the possessions of the other."

The judgment appealed from is affirmed.

BRAY, J., and AGEE, J. pro tem, concur.

37 Cal.2d 412

STATE v. BROTHERHOOD OF RAILROAD TRAINMEN et al.

S. F. 18003.

Supreme Court of California, in Bank.

June 20, 1951.

As Modified on Denial of Rehearing July 19, 1951.

Action by the State of California against the Brotherhood of Railroad Trainmen, an unincorporated association and another for declaratory relief to determine the validity of a contract entered into by the respondent brotherhoods and the Board of State Harbor Commissioners respecting rates of pay and working conditions of the employees of the State Belt Railroad. David T. Lock intervened. From a judgment in favor of respondents declaring the contract valid, entered in the Superior Court for San Francisco County, Andrew R. Schottky, J., the plaintiff and the intervenor appeals. The Supreme Court, Gibson, C. J., held that inasmuch as Congress did not intend the Railway Labor Act to apply to the state owned and operated carrier such as the State Belt Railroad the contract was invalid and that even assuming that the contract could have been entered into properly, it was unenforcible where its salary provisions had never been approved by the state Department of Finance as required by the statute.

Judgment reversed.

Carter, J., dissented.

Prior opinion, 222 P.2d 27.

1. Commerce ⇐27(2)

The Belt Railroad owned and operated by the state, which parallels the waterfront of San Francisco harbor, and has track or freight-car ferry connections with three interstate railways and serves as a link in the through transportation of interstate freight is engaged in "interstate commerce".

See publication Words and Phrases, for other judicial constructions and definitions of "Interstate Commerce".

2. Statutes ⇐233

Statutes which in general terms divest pre-existing rights or privileges will not be applied to a sovereign, in the absence of express words to that effect, unless there are extraneous and affirmative reasons for believing that the sovereign was intended to be affected.

3. Labor relations ⇐177

In determining whether the Railway Labor Act applies to the Belt Railroad owned and operated by the state, court must look to the subject matter of the statute and to the terms of the enactment in its total environment in order to determine legislative intent. Railway Labor Act, §§ 1, 2, as amended, 45 U.S.C.A. §§ 151, 152.

4. Labor relations ⇐176
Officers ⇐91

While one of the major purposes of the Railway Labor Act is to secure the right of employees to bargain collectively with their employer with respect to rates of pay, rules, and working conditions, the terms and conditions of government employment are traditionally fixed by legislation and administrative regulation, not by contract. Railway Labor Act, §§ 1, 2, as amended, 45 U.S.C.A. §§ 151, 152.

5. Labor relations ⇐176
Officers ⇐91, 94

Wages, hours and working conditions of government employees must be fixed by statute or ordinance and state laws which, in general terms, secure the right of employees to enter into collective bargaining agreements with respect to such matters are not intended to apply to public employment.

6. Constitutional law ⇐238(2)
Labor relations ⇐173

That the Labor Relations Acts expressly exclude public employees from their provisions relating to collective bargaining does not constitute a violation of equal protection of the law.

7. Labor relations ⇐175, 1102
War and national defense ⇐402

The National Labor Relations Act and subsequent Labor Management Relations Act and the Fair Labor Standards Act and War Disputes Act manifest a uniform congressional policy that relationship between a state and its employees is not to be controlled by the federal government even where those employees are engaged in interstate commerce. National Labor Relations Act §§ 1 et seq., 2(2), as amended by Labor Management Relations Act of 1947; 29 U.S.C.A. §§ 141 et seq., 151 et seq.,

152(2); Fair Labor Standards Act of 1938 §§ 1, 3(d), 29 U.S.C.A. §§ 201, 203(d); War Labor Disputes Act §§ 1, 2(d), 50 U.S.C.A.Appendix §§ 1501, 1502(d).

8. Commerce ⇐27(2)
States ⇐53

Fact that operation of the Belt Railroad along the waterfront of San Francisco by the state may be described as a proprietary activity is immaterial in considering the characteristics of public employment or the intended scope of congressional legislation regulating interstate commerce.

9. Labor relations ⇐176

The Railway Labor Act providing for collective bargaining between railroad employees and management and setting up procedure for settlement of industrial disputes does not apply to the Belt Railroad which is owned and operated by the state of California and whose employees are under the state constitution declared to be members of state civil service. Railway Labor Act, §§ 1, 2, as amended, 45 U.S.C.A. §§ 151, 152; Harbors and Navigation Code, §§ 3150–3165; Government Code, §§ 18500–19765, 18004; Const. art. 24, § 4.

10. States ⇐121

The purpose of the statute giving the Department of Finance general powers of supervision over financial and business policies of the state is to conserve the financial interests of the state, to prevent improvidence, and to control expenditure of state money by the several departments of the state. Government Code, § 13070.

11. Statutes ⇐223.2(28)

The statute respecting approval of the Department of Finance of the salaries payable in whole or in part out of state funds and the statute authorizing the Board of State Harbor Commissioners to fix the salaries of its employees should be construed together and with reference to the whole system of which they form a part. Harbors and Navigation Code, § 1705; Government Code, § 18004.

12. Labor relations ⇐249

A contract entered into by brotherhoods and the Board of State Harbor Commissions respecting pay and working conditions of the employees of the State Belt Railroad was unenforceable where its salary provisions had never been approved by the state Department of Finance as required by the statute. Harbors and Navigation Code, § 1705; Government Code, § 18004.

13. States ⇐59

The statute providing that when any state agency or court fixes the salary of an employee or officer whose salary is payable out of state funds the salary is subject to the approval of the Department of Finance must be regarded as modifying all earlier legislation authorizing specific state agencies to fix the salaries of their employees, including the right of the Board of State Harbor Commissioners to contract with brotherhoods respecting rates of pay and working conditions of employees of the State Belt Railroad. Government Code, §§ 13070a, 18004; Harbors and Navigation Code, § 1705.

Fred N. Howser, Atty. Gen., and Herbert E. Wenig, Deputy Atty. Gen., for plaintiff and appellant.

James H. Phillips, Sacramento, for intervener and appellant.

Clifton Hildebrand, Oakland, for respondents.

GIBSON, Chief Justice.

The State of California brought this action for declaratory relief to determine the validity of a contract entered into by respondent brotherhoods and the Board of State Harbor Commissioners respecting the rates of pay and working conditions of employees of the State Belt Railroad. This appeal was taken from a judgment in favor of respondents declaring the contract valid.

[1] The Belt Railroad is owned and operated by the state, and its management and control is committed by statute to the Board of State Harbor Commissioners. Harb. & Nav. Code §§ 3150–3165. The railroad parallels the waterfront of San Francisco harbor, extending to some 45 wharves and directly serving approximately

175 industrial plants, and it has track or freight-car ferry connections with three interstate railways. The Belt line facilitates the freight traffic of the harbor by moving freight cars between the various steamship companies, industrial plants and railroad carriers with which it has connections, and it serves as a link in the through transportation of interstate freight shipped to or from points in San Francisco over the connecting carriers. It is settled that the Belt Railroad is engaged in interstate commerce. United States v. State of California, 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567; State of California v. Anglim, 9 Cir., 129 F.2d 455; Maurice v. State of California, 43 Cal.App.2d 270, 110 P.2d 706.

The railroad employs between 125 and 225 persons, the number depending upon the volume of business. The Constitution of California provides that these employees are members of the state civil service, and under the Civil Service Act the appointment, classification, promotion, salary ranges, hours and general working conditions of all members of the civil service are governed by provisions of that act and by regulations of the State Personnel Board. Calif.Const. art. XXIV, § 4; Govt.Code §§ 18500–19765. Compensation of employees within the ranges set by the State Personnel Board may be fixed by the Harbor Board, Harb. & Nav.Code, § 1705, subject to approval by the state Department of Finance. Gov.Code, § 18004.

On September 1, 1942, the Board of State Harbor Commissioners and respondent brotherhoods, representing the railroad employees, entered into the contract here involved. In general, the contract fixes matters relating to pay and working conditions which are normally governed by civil service statutes and regulations, and certain of its provisions conflict in substance with civil service laws on the subjects of promotions, lay-offs, leaves of absence, accumulation of sick leave and procedures for dismissal, demotion and suspension. The contract was the result of collective bargaining between respondent brotherhoods and the Harbor Board, and the parties concede that it has never been approved by the Department of Finance.

The state contends that the contract is invalid because the employees affected are members of the state civil service and that their pay and working conditions are to be governed exclusively by legislation or administrative rules and not by collective bargaining contract. A similar contention is made by the intervenor, a Belt Railroad employee, who claims that his benefits and privileges are less under the provisions of the contract than under the state Civil Service Act, and that he is entitled to protection of the laws governing state employment. It is respondents' position, however, that the state, as owner of the Belt Railroad, is subject to the federal Railway Labor Act which secures to employees of railroads engaged in interstate commerce the right to enter into collective bargaining agreements with their employer concerning rates of pay, rules and working conditions. 45 U.S.C.A. §§ 151, 152. Accordingly, respondents argue, the contract is valid and supersedes all provisions of the state Constitution, the Civil Service Act, and rules and regulations of the State Personnel Board which are inconsistent therewith.

The Railway Labor Act requires all common carriers by railroad, their officers, agents, and employees "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether rising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce * * *." 45 U.S.C.A. § 152. It provides that employees shall have the right to organize and bargain collectively through representatives of their own choosing, and it sets up a procedure for the settlement of disputes by conference of representatives of employer and employees and, failing solution there, by reference to the National Railroad Adjustment Board, the National Mediation Board, or arbitration. 45 U.S.C.A. §§ 152–155, 157. Orders of the National Railroad Adjustment Board may be enforced by action in United States District Courts, and judgment may be entered on awards which are the result of arbitration. 45 U.S.C.A. §§ 153 subd. 1(p), 159.

The act fixes the procedure employers must follow in changing rates of pay, rules or working conditions, requiring thirty days' notice and conference with employee representatives; it further provides that no such changes shall be effective until final action by the National Mediation Board, if the board offers its services or either party requests them. 45 U.S.C.A. § 156. Punishment in the form of fines and imprisonment is prescribed for employers who fail to obey provisions of the act. 45 U.S.C.A. § 152, tenth.

[2, 3] The Railway Labor Act does not expressly apply to state-owned railroads, 45 U.S.C.A. § 151, and it is well settled that statutes which in general terms divest pre-existing rights or privileges will not be applied to a sovereign, in the absence of express words to that effect, unless there are extraneous and affirmative reasons for believing that the sovereign was intended to be affected. United States v. United Mine Workers, 330 U.S. 258, 272–273, 67 S.Ct. 677, 686, 706, 91 L.Ed. 884; United States v. Wittek, 337 U.S. 346, 359, 69 S.Ct. 1108, 1115, 93 L.Ed. 1406; Parker v. Brown, 317 U.S. 341, 350–351, 63 S.Ct. 307, 313, 87 L.Ed. 315; Balthasar v. Pacific Elec. R. Co., 187 Cal. 302, 305–306, 202 P. 37, 19 A.L.R. 452; cf. United States v. State of California, 297 U.S. 175, 186, 56 S.Ct. 421, 425, 80 L.Ed. 567. In United States v. State of California, supra, 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567, which also involved the Belt Railroad, the Supreme Court found reasons for believing that Congress intended to include states within the operation of the federal Safety Appliance Act, 45 U.S.C.A. § 1 et seq. The court stated that the purpose of the statute there involved was to protect employees, the public and commerce from injury because of defective appliances on interstate carriers and that no convincing reason had been advanced why it should not apply to all carriers, whether private or state owned. The Belt Railroad has also been held subject to the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. and the federal Carriers Taxing Act, 45 U.S.C.A. § 261 et seq. Maurice v. State of California, 43 Cal.App.2d 270, 110 P.2d 706; State of California v. Anglim, 9 Cir., 129 F.2d 455. However, considerations which may justify the application of general safety and taxing measures to state-owned carriers are not controlling in determining the intended scope of a statute which purports to regulate and supervise employer-employee relationships. We must look to the subject matter of a particular statute and to the terms of the enactment in its total environment in order to determine legislative intent, and there are, we believe, affirmative reasons which indicate that Congress did not intend the Railway Labor Act to apply to state-owned carriers.

[4] It is most significant that, while one of the major purposes of the Railway Labor Act is to secure the right of employees to bargain collectively with their employer with respect to rates of pay, rules and working conditions, the terms and conditions of government employment are traditionally fixed by legislation and administrative regulation, not by contract. See Railway Mail Ass'n v. Corsi, 326 U.S. 88, 95, 65 S.Ct. 1483, 1488, 89 L.Ed. 2072; Nutter v. City of Santa Monica, 74 Cal.App.2d 292, 298, 168 P.2d 741; City of Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539, 542–544. A concise statement of the characteristics distinguishing public from private employment in this regard appears in a letter from President Roosevelt to the National Federation of Federal Employees, dated August 16, 1937: "All Government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employe organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employes alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel mat-

ters." Quoted in City of Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539, 542–543; C. I. O. v. City of Dallas, Tex. Civ.App., 198 S.W.2d 143, 144–145.

[5, 6] Recent authorities hold uniformly that the wages, hours and working conditions of government employees must be fixed by statute or ordinance and that state laws which, in general terms, secure the right of employees to enter into collective bargaining agreements with respect to those matters are not intended to apply to public employment.[1] Nutter v. City of Santa Monica, 74 Cal.App.2d 292, 168 P.2d 741; City of Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539, 545; Miami Water Works Local No. 654 v. City of Miami, 157 Fla. 445, 26 So.2d 194, 195, 165 A.L.R. 967; see Mugford v. Mayor and City Council of Baltimore, 185 Md. 266, 44 A.2d 745, 746–747, 162 A.L.R. 1101; Hagerman v. City of Dayton, 147 Ohio St. 313, 71 N.E.2d 246, 253, 254, 170 A.L.R. 199; 1 Teller, Labor Disputes and Collective Bargaining [1940 ed., 1947 Supp.], § 171. The Labor Relations Acts of several states expressly exclude public employees from their provisions relating to collective bargaining,[2] and it has been held that such discrimination does not constitute a violation of equal protection. Railway Mail Ass'n v. Corsi, 326 U.S. 88, 95, 65 S.Ct. 1483, 1488, 89 L.Ed. 2072.

[7] Congress itself has consistently excluded state employment from the operation of other labor relations statutes enacted under the commerce or war power. The National Labor Relations Act of 1935 and the subsequent Labor Management Relations Act of 1947 which secure the right of collective bargaining to employees of employers engaged in interstate commerce, expressly provide that the term employer as used in the acts does not include the United States or any state or political subdivision. 29 U.S.C.A. §§ 141 et seq., 152 (2). The Fair Labor Standards Act of 1938 likewise expressly excludes governmental employers from its provisions, 29 U.S.C.A. §§ 201, 203(d), as does the War Labor Disputes Act of 1943. 50 U.S.C.A. §§ 1501, 1502(d). These statutes indicate a uniform congressional policy that the relationship between a state and its employees is not to be controlled by the federal government even where those employees are engaged in interstate commerce, and so closely related in purpose is such labor legislation with the Railway Labor Act that the Supreme Court has characterized collective bargaining provisions of the Railway Act as the "analogue" of similar provisions in the National Labor Relations Act and has given parallel interpretation to sections of the two acts. National Labor Relations Board v. Jones & Laughlin S. Corp., 301 U.S. 1, 44–45, 57 S.Ct. 615, 627–628, 81 L.Ed. 893.

Under all the circumstances, it is obvious that application of the collective bargaining requirements of the Railway Labor Act to state employment would constitute an unprecedented interference with a state's traditional method of fixing the working conditions of its employees, and it seems doubtful that Congress had such an intent. As stated in Parker v. Brown, 317 U.S. 341, 351, 63 S.Ct. 307, 313, 87 L. Ed. 315, "In a dual system of government

1. It should be noted that we are not here concerned with the right of public employees to join or form labor organizations or to urge the proper exercise of discretionary authority by executive and administrative officers. See City of Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539, 542–543; City of Los Angeles v. Los Angeles etc. Council, 94 Cal.App.2d 36, 45, 210 P.2d 305; 1 Teller, Labor Disputes and Collective Bargaining [1940 ed., 1947 Supp.] § 171, pp. 113–119; Rhyne, Labor Unions and Municipal Employe Law [1946 ed.] § 1, pp. 21–33; Rhyne, id., Supp.Rep. [1949] § 1, p. 8–15; 54 Harvard Law Rev. 1360 [1941]; cf. C. I. O. v. City of Dallas, Tex.Civ.App., 198 S.W.2d 143, 145–147; Seattle High School Chap. No. 200 v. Sharples, 159 Wash. 424, 293 P. 994, 72 A.L.R. 1215.

2. Fla.Stat.Ann. ch. 453, § 453.17; Mass. Ann.Laws, Ch. 150B, § 2; Minn.Stat. Ann. Ch. 179, § 179.01, subd. 3; N.Y. Labor Law, McKinney's Consol.Laws, Ch. 31, art. 20, § 715; Penn.Stat.Ann. Title 43, § 211.3; R.I.Laws 1941, Ch. 1066, § 16; Tex. 15 Civ.St. Art. 5154c; Utah Code Ann.1943, 49–1–10(2); Wis. Stats.1939, c. 57.

in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."

The legislative history of the act gives no indication that it was intended to affect any but private carriers. Prior to its enactment in 1926, Congress had passed a series of laws designed to bring about peaceful settlement of railroad disputes, but none had the full support of both the carriers and their employees, and arbitration machinery set up under provisions of the 1920 Transportation Act, 49 U.S.C.A. § 1 et seq., had proven particularly ineffective. See 67 Cong.Rec. 4509–4513, 4516; Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515, 542, 57 S.Ct. 592, 597, 81 L.Ed. 789; Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks, 281 U.S. 548, 562–563, 50 S.Ct. 427, 431, 74 L. Ed. 1034. In 1925 representatives of some 58 major private railroads and 20 labor organizations met and entered into prolonged negotiations over legislation which would be satisfactory to all interests, and the Railway Labor Bill was the product of these conferences. See 67 Cong.Rec. 4504–4505, 4522–4524, 4583, 4652, 8807; Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks, supra, 281 U.S. 548, 563, 50 S.Ct. 427, 431, 74 L.Ed. 1034. Identical bills embodying the proposals of the unions and the railroads were introduced in each House of Congress by the chairman of its committee on interstate commerce, and, after public hearings, the Railway Labor Bill was passed without substantial amendment. (See 67 Cong.Rec. 4504–4505; Chamberlain, The Railway Labor Act (1926) 12 A.B.A. Jour. 633.) Thus the Railway Labor Act basically represented the agreement of labor organizations with private carriers. We have been cited to no instance in the course of passage of the bill, and have discovered none, in which the question was raised as to whether state-owned railroads were intended to be affected.

Many of the purposes stated in the Railway Labor Act are similar to some of the purposes of the Norris-La Guardia Act, 29 U.S.C.A. § 101 et seq., which were discussed in United States v. United Mine Workers, 330 U.S. 258, 274, 67 S.Ct. 677, 687, 91 L.Ed. 884. It was there held that the United States as an employer was not intended to be affected by statutes limiting the use of injunctions in labor disputes, and the opinion of the court, delivered by Chief Justice Vinson, states, "The purpose of the [Norris-La Guardia] Act is said to be to contribute to the worker's 'full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives * * * for the purpose of collective bargaining * * *'." The court then observed, "These considerations, on their face, obviously do not apply to the Government as an employer or to relations between the Government and its employees." In a separate concurring opinion Justices Black and Douglas added the following, "Congress had never in its history provided a program for fixing wages, hours, and working conditions of its employees by collective bargaining. Working conditions of Government employees had not been the subject of collective bargaining, nor been settled as a result of labor disputes. It would require specific congressional language to pursuade us that Congress intended to embark upon such a novel program or to treat the Government employer-employee relationship as giving rise to a 'labor dispute' in the industrial sense." 330 U.S. at page 328–329, 67 S.Ct. at page 713, 91 L.Ed. 884.

Those provisions of the Railway Labor Act which fix a method for the settlement of disputes by conference of employer and employee representatives, and, thereafter, by reference to federal adjustment or mediation boards or to arbitration, are equally inappropriate to the relationship between a state and its employees. Normally, a state provides methods for the settlement of disputes and grievances of its employees within the framework of its own government,[3] and a general Congressional provision for the handling of

disputes between employers and employees would, we think, be intended to apply only to private individuals or corporations, and not to a sovereign state.

[8] We can find no legitimate reason for making any distinction in the present case between governmental and proprietary functions of the state. The fact that operation of the Belt Railroad may be described as a proprietary activity (see People v. Superior Court, 29 Cal.2d 754, 763, 178 P.2d 1) is immaterial in considering the characteristics of public employment or the intended scope of congressional legislation regulating interstate commerce. United States v. State of California, 297 U.S. 175, 183, 56 S.Ct. 421, 424, 80 L.Ed. 567; City of Los Angeles v. Los Angeles etc. Council, 94 Cal.App.2d 36, 45–46, 210 P.2d 305; Nutter v. City of Santa Monica, 74 Cal.App.2d 292, 302, 168 P.2d 741; see Rhyne, Labor Unions and Municipal Employe Law [1946 ed.] § 7, p. 53–56; Rhyne, id., Supp.Rep. [1949] § 7, p. 31–32; 1 Teller, Labor Disputes and Collective Bargaining [1940 ed., 1947 Supp.] § 171, pp. 117, 118.)

[9] In view of our conclusion that Congress did not intend the Railway Labor Act to apply to state owned and operated carriers, we need not consider whether Congress could constitutionally undertake to regulate the relationship between a state and its employees, and we likewise need not determine whether application to a state of provisions for enforcement of orders of the Railroad Adjustment Board and arbitration awards in federal courts would constitute a violation of the Eleventh Amendment to the federal Constitution.

[10–13] The judgment in the present case must be reversed for the further reason that, assuming the state is subject to the Railway Labor Act and that state civil service regulations are superseded by provisions of that act, the Harbor Board could not properly enter into the contract with the brotherhoods and bind the state without the approval of the Department of Finance, as required by section 18004 of the Government Code.[4] There is no inconsistency between section 18004 and the provision in section 1705 of the Harbors and Navigation Code authorizing the Board of State Harbor Commissioners to fix the salary of its employees. [5] The Department of Finance is given general powers of supervision over all matters concerning the financial and business policies of the state. Govt.Code § 13070, based on former Pol. Code § 654. The purpose of such legislation is to conserve the financial interests of the state, to prevent improvidence, and to control the expenditure of state money by any of the several departments of the state. Ireland v. Riley, 11 Cal.App.2d 70, 72, 52 P.2d 1021. Since sections 18004 and 1705 may be harmonized, they should be construed together and with reference to the whole system of which they form a part. See Cohn v. Isensee, 45 Cal.App. 531, 536–537, 188 P. 279; Ireland v. Riley, supra, 11 Cal.App.2d 70, 74–76, 52 P.2d 1021; Chilson v. Jerome, 102 Cal.App. 635, 641, 283 P. 862. Moreover, even if we were to accept the argument that the requirement of approval of salaries by the

3. The California Civil Service Act provides for investigations or hearings by the State Personnel Board of disputes and other matters arising under the Civil Service Act and administrative rules. Govt.Code §§ 18670–18681, 18714, 18803, 18851, 19578–19587, 19541, 19576, 19583.5.

4. Section 18004 provides: "Unless the Legislature specifically provides that approval of the Department of Finance is not required, whenever any State agency or court fixes the salary or compensation of an employee or officer, which salary is payable in whole or in part out of State funds, the salary is subject to the approval of the Department of Finance before it becomes effective and payable." As added in 1945, based on former Pol.Code § 675.1.

5. Section 1705 provides, "* * * The board shall fix the compensation of its officers and employees other than the commissioners. * * *" As amended in 1945. Prior to 1945 the section read as follows: "* * * The salaries of [certain specified officers] shall be fixed by the board, with the approval of the Director of Finance. The board shall fix the compensation of other employees. * * *"

Department of Finance is tantamount to transferring to the department the power to "fix" compensation of Harbor Board employees, the legislative intent to create supervisory powers in the department is so clear and unmistakable that section 18004 must be regarded as modifying all earlier legislation authorizing specific state agencies to fix the salaries of their employees.

The judgment is reversed.

SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

The majority opinion holds that employees of the state engaged in the operation of the State Belt Railroad, a state operated carrier engaged in interstate commerce, do not have the protection afforded by federal Railway Labor Act. 45 U.S. C.A. §§ 151–152. Under that act working conditions and rates of pay are fixed by a collective bargaining agreement between the employer and the union representing the employees. The majority holds that it was not intended by Congress to include the state as a carrier-employer; that the employees are subject to the state civil service laws, and that the Board of Harbor Commissioners are authorized to fix the salary of such employees with the approval of the Director of Finance. That result is reached on the following bases: (1) The rule of statutory construction that a statute does not apply to the government unless it is named; (2) The rates of pay and working conditions of public employees are traditionally fixed by statute and administrative regulation and must be so established; (3) Congress has "consistently" excluded the state from labor laws; (4) The history of the act. None of those grounds is valid and the conclusion is squarely contrary to the previous determinations on the subject.

In United States v. State of California, 297 U.S. 175, 56 S.Ct. 421, 423, 80 L.Ed. 421, the *same* Belt Railroad was involved and the court was concerned with the federal Safety Appliance Act. 45 U.S. C.A. § 1 et seq. That act has to do with standards of safety in train equipment. The particular problem presented was whether California was subject to the *penal* provision of the act for failing to comply with the safety standard. The court held that it was, and in so holding, stated principles which make it a binding precedent in the instant case. It found that the Belt Line is engaged in interstate commerce. A unanimous court said:

"The state urges that it is not subject to the Federal Safety Appliance Act. * * * it is said that as the state is operating the railroad without profit, for the purpose of facilitating the commerce of the port, and is using the net proceeds of operation for harbor improvement, * * * it is engaged in performing a public function in its sovereign capacity and for that reason cannot constitutionally be subjected to the provisions of the federal act. In any case *it is argued that the statute is not to be construed as applying to the state acting in that capacity.*

"* * * The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. *The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution.* * * *

"California, by engaging in interstate commerce by rail, has subjected itself to the commerce power, and is liable for a violation of the Safety Appliance Act, as are other carriers, unless the statute is to be deemed inapplicable to state-owned railroads because it does not specifically mention them. The Federal Safety Appliance Act is remedial, to protect employees and the public from injury because of defective railway appliances, * * * and to *safeguard interstate commerce itself from obstruction* and injury due to defective appliances upon locomotives and cars used on the highways of interstate commerce, even though their individual use is wholly intrastate. * * *

"In [State of] Ohio v. Helvering, supra [292 U.S. 360, 54 S.Ct. 725, 78 L.Ed. 1307],

it was held that a state, upon engaging in the business, became subject to a federal statute imposing a tax on those dealing in intoxicating liquors, although states were not specifically mentioned in the statute. The same conclusion was reached in [State of] South Carolina v. United States, supra [199 U.S. 437, 26 S.Ct. 110, 50 L.Ed. 261]; and see Helvering v. Powers, supra [293 U.S. 214, 55 S.Ct. 171, 79 L.Ed. 291]. Similarly the Interstate Commerce Commission has regarded this and other state-owned interstate rail carriers as subject to its jurisdiction, although the Interstate Commerce Act [49 U.S.C.A. § 1 et seq.] does not in terms apply to state-owned rail carriers. * * *

"Respondent invokes the canon of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it, * * * The presumption is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated. * * * *We can perceive no reason for extending it so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose,* which is as capable of being obstructed by state as by individual action. Language and objectives so plain are not to be thwarted by resort to a rule of construction whose purpose is but to resolve doubts, and whose application in the circumstances would be highly artificial. It was disregarded in [State of] Ohio v. Helvering, supra, and [State of] South Carolina v. United States, supra. See Heiner v. Colonial Trust Co., 275 U.S. 232, 234, 235, 48 S.Ct. 65, 72 L.Ed. 256." (Italics added.)

The foregoing is precisely pertinent in the instant case. The purpose of the Railway Labor Act, like the Safety Appliance Act, is to safeguard commerce from obstruction. 45 U.S.C.A. § 151a; Slocum v. Delaware L. & W. R. Co., 339 U.S. 239, 70 S.Ct. 577, 94 L.Ed. 795. The purpose being the same the application of the acts should be the same. To achieve that purpose Congress has provided means of assuring peaceable labor relations which are clearly applicable when the state is a carrier. It has declared the policy that the purpose may be attained by collective bargaining and the mediation board rather than the State Personnel Board. If by federal mandate the state must keep its inanimate equipment safe, it must also deal with its employees according to the manner set forth in the Labor Act—a federal mandate.

It has been held that the state is subject to the federal Carriers' Taxing Act in operating the Belt Line, which act is for the purpose of raising revenue to pay for *retirement of railroad employees;* that the federal statutory right to receive retirement pay is binding upon the state. In State of California v. Anglim, 9 Cir., 129 F.2d 455, that issue was presented. There is no possible basis to distinguish that case from the one at bar and the majority opinion makes no attempt to do so. If payment of retirement to state employees of a state carrier is controlled by the federal law although the state is not named in the statute, certainly federal statutory provisions for collective bargaining which embrace wages and working conditions are binding on the state. Retirement or pension payments have always been considered as deferred compensation or wages. Moreover, under the majority holding an anomalous situation is created. The payment of wages before retirement would be controlled by state law while subsequent wages (pension payments) would not. The analogy between the cases compels the same result. Hence the majority opinion violates the fundamental rule that a state court is bound by the construction of a federal statute by a federal court. Stoll v. Gottlieb, 305 U.S. 165, 59 S.Ct. 134, 83 L. Ed. 104.

In discussing a federal statute requiring consent of Congress for the construction of a dam on navigable streams, the court said in United States v. State of Arizona, 295 U.S. 174, 184, 55 S.Ct. 666, 669, 79 L. Ed. 1371: "These provisions unmistakably disclose definite intention on the part of Congress effectively to safeguard rivers

and other navigable waters against the unauthorized erection therein of dams or other structures for any purpose whatsoever. The plaintiff maintains that the restrictions so imposed apply *only to work undertaken by private parties.* But no such intention is expressed, and we are of opinion that none is implied. The measures adopted for the enforcement of the prescribed rule are in general terms and purport to be applicable to all. No valid reason has been or can be suggested why they should apply to private persons and not to federal and *state officers.*" (Italics added.)

In State of California v. United States, 320 U.S. 577, 64 S.Ct. 352, 88 L.Ed. 322, the court held that the United States Maritime Commission could regulate the rates of the Oakland city harbor, and in answer to the claim that the Congressional Act did not apply to the city, stated that the issue was no longer open at this late date, citing United States v. State of California, supra, 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567. Certainly what the city shall charge is as much a matter peculiarly within its power as the relations with its employees.

It has been held that the Federal Employers' Liability Act which provides for the recovery of damages by railroad employees for injuries suffered in the course of their employment, applies to the Belt Line here involved. Maurice v. State of California, 43 Cal.App.2d 270, 110 P.2d 706. No attempt is made to distinguish that case and it cannot be done. The act in question deals with the rights and duties as between employer and employee the same as the Railway Labor Act.

Finally, the identical question here presented has been decided. In National Council of Railway Patrolmen's Union, A. F. of L. v. Sealy, D.C., 56 F.Supp. 720, 722, the court dealt with whether patrolmen, hired by the city to patrol the harbor where the city operated a carrier, were subject to the Railway Labor Act. The court held they were not because they were not employees of the city as a carrier, but said, citing the cases heretofore discussed: "Most of the cases cited by Plaintiffs throw some light on the question of coverage, but are not controlling. United States v. California, 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567; State of California v. Latimer, 305 U.S. [255], 257, 59 S.Ct. 166, 83 L.Ed. 159, and State of California v. Anglim, 9 Cir., 129 F. 2d 455, of course, *settle it that a railroad, etc., owned by the State or as here by a City which is an agency of the State is, under certain circumstances* and perhaps generally speaking, within the coverage of the [Railway Labor] Act." (Italics added.) That case was affirmed on appeal, 5 Cir., 152 F.2d 500, the court not discussing the instant point but deciding that whether the patrolmen were under the act must be decided by the Interstate Commerce Commission. It should be noted that there had been no determination here by that commission.

As above seen, we have three unqualified instances in which *federal* statutes dealing with the relationship between the *employer and employee in the railroad field* have been held to be applicable to the state with reference to the *same* Belt Line Railroad. Yet, in face of this wealth of authority, the majority advances nebulous and negative grounds for concluding that the Railway Labor Act, which deals with the *same* relationship in the *same* field does not apply. No effort is made to distinguish those cases.

The first ground advanced is that a statute does not apply to the government unless it so states. That proposition as presently involved was disposed of in United States v. State of California, supra, Maurice v. California, supra, and State of California v. Anglim, supra. The act itself, Railway Labor Act, is comprehensive and inclusive. It must be liberally construed, Nashville C. & St. L. Ry. v. Railway Employees' Dept., etc., 6 Cir., 93 F.2d 340, certiorari denied, 303 U.S. 649, 58 S.Ct. 746, 82 L.Ed. 1110, and it has been held that it applies to the receiver of a railroad, Burke v. Morphy, 2 Cir., 109 F.2d 572, although the receiver is subject to the control of the appointing court.

The second argument of the majority that rates of pay and working conditions of public employees are traditionally a matter of state statutory and administrative regulation does not shed any light on the sub-

ject. That argument applies with equal force to rights arising under provisions for retirement, for injuries in the course of employment, and the safety requirements. They are no less traditionally regulated, as to public employees, by statute and administrative regulation. Nevertheless the cases hold, as above shown, that the federal railroad laws control because of their effect upon interstate commerce.

That Congress has "consistently" excluded the state from labor laws—the third ground—is equally untenable. If that is true, then it supports my position, for Congress thought it must use language excluding the state when it desired to do so, and it did. But it did not employ such language in the Railway Labor Act and in the field of employer-employee relations in the railroad industry, and the courts have consistently held that the federal legislation includes the state.

In speaking of the history of the act—the fourth ground—the majority approach is wholly negative. It is said that it gives no indication that the state as a carrier was to be included. But it gives no indication to the contrary. True, the act probably arose out of cooperation between the unions and private carriers, but no doubt the other federal railroad laws were similarly initiated.

The majority opinion sets forth the additional ground for invalidating the contract that it was not approved by the Department of Finance of the State. There has been a substantial, although informal, approval by the state of the contract. It has been in force since 1942, and wages have been paid according to the rates provided for therein since that time. The Department of Finance knew of such payments and gave implicit approval of them, for it "may require from all such agencies of the State financial and statistical reports, duly verified, covering the period of each fiscal year." Govt.Code, § 13291. And "may examine all records, files, documents, accounts and all financial affairs of every agency mentioned in Section 13290." Govt.Code, § 13293. And it "*shall* examine and expert the books of the several State agencies, at least once in each year, and as often as the director deems necessary." Govt.Code, § 13294. Hence it has examined the books and records of the Harbor Board, which would include the collective bargaining contract and the payments to employees and has found them proper.

It is apparent that the last mentioned issue should not be so lightly brushed aside. The majority holds that the Harbor Board has the right to fix the pay of the employees subject to the approval of the Department of Finance and also that such employees are under civil service. If they are under civil service it is very doubtful that the Legislature may provide that their rate of pay be fixed by the Harbor Board or be subject to the approval of the Department of Finance. The rates of pay certainly relate to civil service for the Personnel Board is empowered by statute to fix the rate of pay. Govt.Code, §§ 18500(c) (1) (6), 18850 et seq. The Constitution vests civil service matters exclusively in the State Personnel Board. "Said board shall administer and enforce, and is vested with all of the powers, duties, purposes, functions, and jurisdiction which are now or hereafter may be vested in any other State officer or agency under Chapter 590 of the California Statutes of 1913 as amended or any and all other laws relating to the State civil service as said laws may now exist or may hereafter be enacted, amended or repealed by the Legislature." Cal.Const., art. XXIV, § 3(a).

Irreconcilable conflicts in state and federal law will necessarily result from the holding of the majority in this case. Under its holding, State Belt Railroad employees are under civil service, but their salary must be fixed by the Harbor Board with the approval of the Department of Finance. This holding is in conflict with both the Constitution of California and the Government Code, see Cal.Const., art. XXIV, § 3(a) and Govt.Code, § 20000 et seq., which provide that the qualifications, rates of pay, dismissals and the like are all within the jurisdiction of the State Personnel Board, and that there is a state retirement system which embraces all civil service employees. All such employees automatically become members of the retirement system, Govt.Code, § 20303, and,

therefore, must contribute to it. Id. 20600 et seq. Hence, if, as is held by the majority, the instant employees are civil service employees, they must be members of the state retirement system and contribute to it, but the majority opinion concedes that they are subject to the federal Railroad Employees' Retirement Act, 45 U.S.C.A. § 228a et seq., see State of California v. Anglim, 9 Cir., 129 F.2d 455. There is no basis for splitting the complete system of employer-employee relations between the state and its employees into parts, some of which are controlled by state law and others by federal law. The majority holding leads to absurd results. This would be avoided by a holding that *all* of the federal statutes relating to railroad employer-employee relations apply to State Belt Railroad employees. The trial court and the District Court of Appeal so held in this case, State v. Brotherhood of Railroad Trainmen, Cal. App., *222* P.2d *27*. That holding is eminently sound.

I would, therefore, affirm the judgment.

105 Cal.App.2d 1

BROWN et al. v. COPP et al.

Civ. 18055.

District Court of Appeal, Second District, Division 3, California.

June 21, 1951.

Action by Leonard H. Brown and Ida R. Brown against Andrew J. Copp, Jr., and another to determine adverse claims to royalty interests in community oil and gas lease. The Superior Court of Los Angeles County, Ellsworth Meyer, J., entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Vallée, J., held that when landowner's deed of trust under which plaintiffs claimed as purchaser at trustee's sale contained reference to unrecorded contract whereby only 80% of landowners reserved royalty interest in community oil and gas lease was assigned to trustee, and assignment by landowner of other 20% was of record, facts were such as to put plaintiffs on inquiry and charge them with notice of what inquiry would have disclosed if duly prosecuted and plaintiff acquired only 80% held by trustee at time of purchase.

Judgment affirmed.

1. Mines and minerals ⇐74

Fee owner who leased realty for oil and gas purposes with reservation of royalty was vested with separate interests of fee-simple title to surface estate, reserved royalty interest; and possibility of reverter of minerals, each of which was interest in real property, alienable, and subject to being conveyed separately and independently of the others.

2. Mines and minerals ⇐74

Community lease, whereby each of several landowners conveyed to his colessors a percentage interest in all oil produced on his land by lessee during life of lease, was conveyance of estate in real property which did not follow conveyance of one of colessor's land, but which could only be conveyed by specific conveyance of that interest.

3. Mines and minerals ⇐74

A deed granting a general estate in land conveys all oil rights in such land to grantee as incident to conveyance, except such rights as have previously been assigned by instruments of which such grantee had actual or constructive notice, or which are reserved by deed itself.

4. Mortgages ⇐372(1)

Trustee's deed pursuant to sale under deed of trust conveys absolute legal title to purchaser as to claims subordinate to deed of trust, but title conveyed is subject to all prior rights, interests and titles.

5. Vendor and purchaser ⇐231(4)

Rule that recordation of instrument is constructive notice of its contents to subsequent purchaser contemplates only conveyances by one having record title to property conveyed. Civ.Code, § 1213.

6. Notice ⇐6

Whenever party has information or knowledge of extraneous facts which of

themselves do not amount to actual notice but which are sufficient to put reasonably prudent man upon inquiry respecting conflicting interest, claim or right, and circumstances are such that inquiry, if made and followed up with reasonable care and diligence, would lead to knowledge of interest, claim or right which really exists, then such party is absolutely charged with constructive notice of such interest, claim or right.

7. Mines and minerals ⇐54½

Where deed of trust to secure payment of note conveyed all of owner's estate in realty including his interest in percentage of royalty reserved by him in accordance with oil and gas lease but did not specifically convey interest of owner as colessor in community lease in oil produced from lands of other colessors, purchaser at trustee's sale who received trustee's deed did not acquire interest of owner in oil produced from lands of colessor under community lease.

8. Mines and minerals ⇐54½

Where landowner executed deed of trust which referred to unrecorded contract by which 80% of landowner's reserved royalty in community oil lease was assigned to trustee and landowner assigned other 20% to predecessors of defendant, and assignments were recorded, facts were such as to put purchasers at trustee's sale on inquiry and charge them with notice prior to trustee's sale of what inquiry would have disclosed if duly prosecuted and purchaser acquired merely 80% interest held by trustee.

9. Appeal and error ⇐671(3)

Under rule that when parties have been notified that appeal has been set for hearing, each party shall file with clerk notice specifying such original exhibits or affidavits for inclusion in record as he desires transmitted to reviewing court, party who fails to comply with rule stands in jeopardy of having contentions based upon exhibits deemed to have been abandoned or of having decision by appellate court upon record without exhibits. Rules on Appeal, rule 10(b).

Rex B. Goodcell, Gilbert E. Harris and Lawrence L. Otis, all of Los Angeles, for appellants.

Andrew J. Copp, Jr., H. Dexter McKay, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiffs from a judgment for defendants Bancroft and Copp in an action for a declaration of plaintiffs' rights in landowner's royalties under a community oil and gas lease. Plaintiffs, as owners of the fee by virtue of a trustee's deed, claim the entire landowner's royalty interest. Defendants claim to be the owners of 20% of the royalty interests.

September 2, 1936, one Moody executed a community oil and gas lease embracing several parcels of realty which he owned. The lease was for 18 months and "so long as oil or gas or other hydrocarbon substances are produced therefrom in paying quantities." Oil has been and is produced in commercially paying quantities. Moody's royalty interest was 61.714% of the whole. The lease was recorded August 12, 1937.

December 13, 1938, Moody and wife executed a deed of trust of the realty to secure the payment of a note for $11,400 in favor of Salvation Army. In the note (set out in the deed of trust), Moody agreed to pay the $11,400 "in accordance with the terms and provisions of a certain contract dated December 13, 1938 by and between said Salvation Army and Gene S. Moody and others, which contract is hereby referred to and by this reference made a part of this note * * *. The payment of said indebtedness is to be made at the time and in the manner and from the sources set out and referred to in the agreement above described." The deed of trust was recorded December 15, 1938.

The contract of December 13, 1938, stated that "The fund or source referred to in said non-negotiable note is 80% of the 61.714% landowner royalty interest belonging to Gene S. Moody in that certain Community Oil and Gas Lease dated September 2, 1936, made and entered into by and between Gene S. Moody, herein, and others as Lessors * * * which Lease has

been assigned to the Superior Oil Company, a corporation, all as more particularly set forth in that certain assignment of royalties dated December 13, 1938, wherein Gene S. Moody is named as assignor and the Salvation Army as assignee. It is mutually agreed that the remaining 20% of such royalties shall continue to be paid to G. A. Smith, also known as Gene S. Moody, or his heirs, executors, administrators or assigns." The contract was not recorded.

December 13, 1938, Moody assigned to Salvation Army 80% of 61.714% of the landowner's royalty interest in the lease of September 2, 1936. This assignment was recorded December 16, 1938.

December 13, 1938, Moody assigned to Herbert Freston and J. R. Files 20% of 61.714% of the landowner's royalty interest in the lease of September 2, 1936. This assignment was recorded December 20, 1938.

The instruments dated December 13, 1938, were executed concurrently and as a part of one transaction.

May 10, 1941, Moody authorized Herbert Freston and J. R. Files to transfer to Laura Bancroft the 20%. The instrument recited that the assignment to Freston and Files was "as security for the payment of attorney's fees." This instrument was not recorded.

October 20, 1941, Herbert Freston and J. R. Files executed a quitclaim deed to defendant Bancroft in which they quitclaimed to her "all of their right, title, interest, and estate in and to 20% of 61.714% landowner's royalty interest" previously assigned to them. This quitclaim deed was not recorded.

March 21, 1942, Herbert Freston and J. R. Files executed a "release" which recited the assignment by Moody to them of 20% of 61.714% of the landowner's royalty interest in the lease; that "while said assignment appears to be absolute in form, it was in fact accepted by the undersigned only as security for an obligation and was only a mortgage"; that the obligation had been fully satisfied; and declared that they "hereby release that certain mortgage, designated assignment, dated December 13, 1938." This release was not recorded.

March 20, 1942, defendant Bancroft assigned to defendant Copp 5% of 61.714% of the landowner's royalty interest in the lease of September 2, 1936. This assignment was recorded March 20, 1942.

January 16, 1947, Salvation Army assigned to plaintiffs the beneficial interest in the deed of trust of December 13, 1938. This assignment was recorded February 19, 1947.

January 16, 1947, Salvation Army assigned to plaintiffs "all right, title and interest under that certain Assignment of Landowners Royalty dated December 13, 1938, executed by Gene S. Moody, Assignor, to Salvation Army." This assignment was recorded February 19, 1947.

Default was made under the terms of the deed of trust, a trustee's sale was had, and the property sold to plaintiffs. October 28, 1947, the trustee issued its deed by which it granted and conveyed the realty to plaintiffs. This deed was recorded October 29, 1947.

Each conveyance to which we have referred was made for a valuable consideration.

On direct examination plaintiff Leonard H. Brown testified that prior to the time he purchased the beneficial interest in the deed of trust of December 13, 1938, he had no knowledge of any transfers of royalty interests other than to Salvation Army and other than as disclosed by the official records of the county of Los Angeles. On cross-examination he testified as follows: I read the deed of trust before I purchased it from Salvation Army. I noted the reference in the deed of trust to another contract according to which payments were to be made for the satisfaction of the obligation of the deed of trust and note. I noticed that it referred to a contract dated December 13, 1938. I looked that up, "[a]fter I got the assignment The Salvation Army told me that was the assignment of the landowner's royalty to them." I noticed that the document itself stated it was 80% of 61.714% of the landowner's royal-

ty. I did not make any inquiry at that time as to who were the owners of the other 20%. To the best of my knowledge, I first ascertained who held the other 20% after I foreclosed the property. I bought without investigation in that respect. After I purchased the property at the trustee's sale, I made a demand upon the bank to pay the 20%, and the bank told me who had been receiving the 20%

The court found, concluded, and adjudged that plaintiffs are the owners of 80% of 61.714% of the landowner's royalty interest; that they have no right, title, or interest in the 20%; and that the respondents are the owners thereof. Plaintiffs appeal.

Plaintiffs claim that the finding that they have no right, title, or interest in the 20% is not supported by the evidence. They argue that the trustee's deed of October 28, 1947, conveyed to them 61.714% of the landowner's royalty interest in the lease. We do not agree.

[1, 2] The oil lease was executed by Moody on September 2, 1936. Having leased the realty for oil and gas purposes he was then vested with three distinct and separate interests—1) the fee simple title to the surface estate, 2) the reserved royalty interest, and 3) the possibility of a reverter of the minerals. 8 Cal.Jur. 10–Yr. Supp. 732, § 122, and cases there cited. Each of these interests is an interest in real property, alienable, and may be conveyed separately and independently of the others. La Laguna Ranch Co. v. Dodge, 18 Cal.2d 132, 135, 114 P.2d 351, 135 A.L.R. 546; Standard Oil Co. v. John P. Mills Organization, 3 Cal.2d 128, 132, 43 P.2d 797. As the lease was a community lease, Moody, and each of the other landowners, conveyed to his colessors a percentage interest in all oil produced on his land by the lessee during the life of the lease, which is an estate in real property. This estate does not follow the conveyance of the lessor's land but can only be conveyed by a specific conveyance of that interest. Tanner v. Title Ins. & Trust Co., 20 Cal.2d 814, 820, 129 P.2d 383; Friedrich v. Roland, 95 Cal.App.2d 543, 549, § 213 P.2d 423.

[3, 4] A deed granting a general estate in land conveys all oil rights in the land to the grantee as an incident to the conveyance, except as such rights have previously been assigned by instruments of which such grantee had actual or constructive notice, or are reserved by the deed. Callahan v. Martin, 3 Cal.2d 110, 113, 114, 43 P.2d 788, 101 A.L.R. 871; Standard Oil Co. v. John P. Mills Organization, 3 Cal. 2d 128, 132, 43 P.2d 797. Generally, a valid deed of trust vests the whole estate in the trustee, subject to the execution of the trust. Civ.Code, § 863. However, every estate not embraced in an express trust, and not otherwise disposed of, is left in the author of the trust or his successors. Civ. Code, § 866. A trustee's deed conveys the absolute legal title to the purchaser, as against all claims subordinate to the deed of trust, but subject to all prior rights, interests, and titles. Streiff v. Darlington, 9 Cal.2d 42, 45, 68 P.2d 728. A trustee's deed does not carry to the grantee any better right or title than the trustors had when they executed the deed of trust. Roberts v. Colyear, 179 Cal. 669, 672, 180 P. 937.

[5, 6] The record of an instrument is constructive notice of its contents to subsequent purchasers. Civ.Code, § 1213. The rule contemplates only conveyances by one having the record title to the property conveyed. Dobbins v. Economic Gas Co., 182 Cal. 616, 620, 189 P. 1073. Recordation of an assignment of an interest in the minerals "imparts constructive notice to a subsequent grantee of the fee in the general estate." Callahan v. Martin, 3 Cal. 2d 110, 113, 43 P.2d 788, 790, 101 A.L.R. 871. Whenever a party has information or knowledge of extraneous facts which of themselves do not amount to or tend to show actual notice but which are sufficient to put a reasonably prudent man upon inquiry respecting a conflicting interest, claim or right, and the circumstances are such that the inquiry, if made and followed up with reasonable care and diligence, would lead to knowledge of the interest, claim or right which really exists, then the party is absolutely charged with constructive notice of such interest, claim or right. Ol-

son v. Cornwell, 134 Cal.App. 419, 428, 25 P.2d 879

[7] When plaintiffs purchased the realty at the trustee's sale, they took the whole estate vested in the trustee, subject to all prior rights, interests, and titles. They did not take any such right, title or interest of which they had notice, either actual or constructive. On the face of the deed of trust, recorded December 15, 1938, Moody conveyed to the trustee all of his estate in the realty, including his interest in the percentage of the royalty reserved by him in oil produced from that realty. The deed of trust did not convey to the trustee Moody's interest as a colessor in oil produced from the lands of other colessors. Gillis v. Royal Service Corp., 91 Cal.App. 2d 365, 368, 204 P.2d 968. Plaintiffs did not, therefore, acquire that interest from the trustee.

[8] Prior to purchasing from Salvation Army plaintiffs had actual notice that a contract, dated December 13, 1938, was a part of the deed of trust. Prudent inquiry concerning that contract would have disclosed that Moody had retained 20% when he executed the deed of trust. The record at that time also told plaintiffs that on the day the deed of trust was executed Moody had assigned the 20% to Herbert Freston and J. R. Files. Plaintiffs had notice that Herbert Freston and J. R. Files were the record owners of the 20% for neither the quitclaim deed from Herbert Freston and J. R. Files to defendant Bancroft nor the release executed by them was of record. Plaintiffs made no inquiry of Freston and Files. The assignment from Moody to Salvation Army, recorded December 16, 1938, and the assignment to Herbert Freston and J. R. Files, recorded December 20, 1938, conveyed 80% and 20%, respectively, of Moody's interest in the percentage of the royalty reserved by him in oil produced from the realty owned by him and the interest which he owned as a colessor in oil produced from the lands of other colessors. When plaintiffs purchased from Salvation Army on January 16, 1947, they acquired the royalty interest theretofore assigned by Moody to Salvation Army—80% of 61.714%. Plaintiffs knew at that time that they had purchased 80%. This assignment included 80% of the interest which Moody owned as a colessor in oil produced from lands of colessors. After purchasing from Salvation Army, plaintiffs "looked up" the contract of December 13, 1938, and learned therefrom as a fact that the documents dated December 13, 1938, had been executed concurrently and as a part of the same transaction, that the 20% had been retained by Moody, and that it was not vested in the trustee. Plaintiffs had all of the foregoing notice and knowledge when they purchased at the trustee's sale. They made no inquiry to learn who owned the 20% until after the trustee's sale. The facts were such as to put plaintiffs on inquiry and charge them with notice, prior to the trustee's sale, of what the inquiry would have disclosed if duly prosecuted, to-wit, that the 20% was not vested in the trustee. Cf. National Hardware Co. v. Sherwood, 165 Cal. 1, 8, 130 P. 881; Leonard v. Osburn, 169 Cal. 157, 160, 146 P. 530, 532; Dobbins v. Economic Gas Co., 182 Cal. 616, 621, 189 P. 1073; McCreery v. Charlton, 185 Cal. 37, 40–41, 195 P. 670; Union Trust & Savings Bk. v. Ishkanian, 45 Cal. App. 347, 350, 187 P. 757; Wilson v. Coffey, 92 Cal.App. 343, 348–349, 268 P. 408; Dreifus v. Marx, 40 Cal.App.2d 461, 468, 104 P.2d 1080. As the record stood the assignment from defendant Bancroft to defendant Copp was from a stranger to the record chain of title and therefore was not constructive notice to plaintiffs. Garber v. Gianella, 98 Cal. 527, 529, 33 P. 458; Ludy v. Zumwalt, 85 Cal.App. 119, 125, 259 P. 52. However, under the circumstances that fact is not material.

We conclude that the findings are supported by the evidence and that the court did not err in concluding that plaintiffs have no right, title, or interest in the 20% of 61.714% of the landowner's royalty interest in the lease. The judgment must therefore be affirmed.

[9] We are constrained to again call the attention of the profession to Rule 10 (b) of the Rules on Appeal which provides that "When the parties shall have been notified by the clerk of the reviewing court

that an appeal has been set for hearing, each party shall file with the clerk of the superior court a notice specifying such of the original exhibits or affidavits designated by any party for inclusion in the record, as he desires transmitted to the reviewing court, and the clerk shall immediately transmit them to the reviewing court." 36 Cal.2d 12. As is evident, the decision of this appeal rests largely on the exhibits. Counsel for appellants in their notice to the clerk designated the exhibits to be included in the record on appeal and to be transmitted to this court. When the clerk of this court notified counsel that the appeal had been set for hearing, he included the following in the notice: "Cause ordered on Calendar of Division Three for argument at 10 A. M. May 16, 1951. If exhibits are desired, arrangement should be made at once for their transfer (Rule 10b)." When we began work on the case the exhibits were not in the office of the clerk of this court. In order to decide the appeal on its merits and not on a technicality, we ordered the exhibits transmitted to this court. A delay of several days then ensued. The result was great inconvenience, unnecessary delay, and loss of the time of the members of the court. We cannot too strongly emphasize what was said by Mr. Presiding Justice Barnard in Kipp v. Warriner, 86 Cal.App.2d 814, 815, 195 P.2d 888, 889: "While certain contentions based upon these exhibits are made in appellant's briefs, it may be assumed that he has abandoned these contentions since he has not desired to arrange to have these exhibits sent here as a part of the record. Rule 10(b) of the Rules on Appeal requires a party to arrange for the transmission to the reviewing court of desired exhibits when he receives notice that the appeal is set for hearing. While it would seem that this rule is both clear and one easily complied with, we have had considerable difficulty with it in this district. * * * No great difficulty or hardship is involved in requesting the transfer of exhibits if a party relies on them as an essential part of his record. On the other hand, much inconvenience and extra work has been caused in this court by the discovery, during the study of a case, that an important and much relied on exhibit has not been transferred. While the rule permits the court to then order the exhibit sent up this involves a delay, sometimes for many days. In a complicated case, where the materiality of the absent exhibit is discovered after working a number of days, this delay not infrequently causes considerable extra work upon later returning to that case. Moreover, the point affected by the exhibit may have been abandoned by the party who, after having the matter directly called to his attention, has expressed no desire to have the exhibit transferred." The rule has been in effect for eight years and should be well known now to all members of the profession. The frequency with which Rule 10(b) is overlooked prompts us to warn counsel that failure to have the exhibits relied on transmitted to this court may result in decision of the appeal upon the record before us without the exhibits.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

WEST KEY NUMBER SYSTEM

105 Cal.App.2d 81

DEI TOS v. DEI TOS.

Civ. 14600.

District Court of Appeal, First District, Division 2, California.

June 25, 1951.

Amabile Dei Tos sued Joaquin Dei Tos for divorce. On February 26, defendant's default in the divorce case was entered and an interlocutory divorce decree was entered and filed following day. On March 4, 1947, a final decree was entered in favor of plaintiff. In the meantime proceedings under a criminal charge of assault to commit murder were taken against defendant and he was committed to a state insane asylum as of the 18th day of February, 1946. He was released on January 27, 1950, and filed a motion to vacate and set aside both the in-

terlocutory and final decree of divorce. The Superior Court in and for the county of San Mateo, A. R. Cotton, J., denied defendant's motions to vacate the two decrees and he appealed. The District Court of Appeal, Nourse, P. J., held that since through no fault of his, defendant was not permitted to participate in the divorce proceeding, defendant was not given his day in court and the decrees should have been vacated.

Orders reversed.

1. Divorce ⇐179

Where defendant requested that his motion to vacate both interlocutory and final decree of divorce awarded his wife be considered as one of a writ of error coram nobis but defendant did not apply for writ of error coram nobis in trial court, defendant could not claim error for first time on appeal.

2. Divorce ⇐165(4)

Where a divorce has been procured by extrinsic fraud trial court has inherent power, notwithstanding lapse of time, to purge its records of fraud by setting aside former decree. Code Civ.Proc. § 473.

3. Judgment ⇐443(1)

Relief from a judgment obtained by extrinsic fraud may be had in a separate action in equity.

4. Divorce ⇐161

Where subsequent to commencement of divorce proceedings by wife, defendant husband was committed to a state insane asylum and during pendency of sanity proceedings a final decree was entered in favor of plaintiff wife and through no fault of his defendant was not permitted to participate in proceedings, defendant was not given his day in court and both interlocutory and final decree of divorce entered in favor of wife would be set aside, although application was made more than six months after entry of decrees. Code Civ.Proc. §§ 473, 663.

George P. Larrouy, Jerome F. Macdonald, Redwood City, for appellant.

Bullock, Wagstaffe & Daba, Redwood City, for respondent.

NOURSE, Presiding Justice.

On February 13, 1946, plaintiff sued for a divorce, and service of the summons and complaint was made on the defendant on February 15th. Three days later the defendant was charged with an assault to commit murder upon his wife. On February 26 his default in the divorce case was entered and an interlocutory decree was entered and filed on the following day. On March 4, 1947, a final decree was entered in favor of plaintiff. In the meantime proceedings under the criminal charge were taken and on May 16, 1946, the defendant herein was committed to a state insane asylum on a finding that he was insane as of the 18th day of February, 1946. On February 18, 1949, the defendant was released from the asylum and on January 27, 1950, he filed in the superior court his motion to vacate and set aside both the interlocutory and the final decree of divorce.

At the hearing of this motion the testimony of the resident physician of the asylum was taken to the effect that the defendant had been insane at the time of the assault upon his wife on February 18, 1946, and for some unspecified time prior thereto and for approximately three years thereafter.

The appellant appeals from the orders denying his motion to vacate the two decrees. He argues that though his motion was made more than six months after the entry of the order attacked, section 473, Code Civ.Proc. should not be applied because the acts of the respondent in procuring the interlocutory and the final decree, knowing that he was mentally incompetent, was a fraud upon the court. For this he cites McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A.L.R. 1110. See Raps v. Raps, 20 Cal.2d 382, 125 P.2d 826 and Britton v. Bryson, 216 Cal. 362, 14 P.2d 502

[1] Appellant also argues, but not too seriously, that we should consider his motion to set aside the orders as one of a writ of error coram nobis. A sufficient answer is that he did not apply for a writ

of error coram nobis and that since that issue was not presented to the trial court he cannot claim error for the first time on appeal.

[2] The McGuinness case set the rule in this state that where a divorce has been procured by extrinsic fraud the trial court has "inherent" power, notwithstanding the lapse of time, to purge its records of the fraud by setting aside the former decree. The ruling rested on United States v. Throckmorton, 98 U.S. 61, 65, 66, 25 L.Ed. 93, where the court, illustrating what may be instances of extrinsic fraud justifying such relief, said: "Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practised on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing."

However, the whole theory of the McGuinness case is that the trial court had the "inherent power and jurisdiction" [196 Cal. 222, 237 P. 48.] to purge its own record of the fraud on that court. Here the question whether an extrinsic fraud was committed is not easily answered. It would be more accurate to say that mistake, rather than fraud occurred, when the plaintiff failed to have a guardian appointed to appear and defend the action. The charge against the defendant of a criminal assault upon his wife was pending in the same court. He was represented by the same counsel appearing for him in this proceeding, and was examined and committed by the same trial judge. The facts do not present the usual case of extrinsic fraud where the basis of relief is that the offending party has done some act which deceived the trial court, or which prevented a true adversary hearing.

[3] The rule is fairly well settled that such relief may be had in a separate action in equity, but some doubt has been expressed where the relief is sought by motion where a limited time has been fixed by statute. The cases are fully reviewed in Olivera v. Grace, 19 Cal.2d 570, 573, 122 P.2d 564, 565, 140 A.L.R. 1328, where the court said: "Courts frequently set aside judgments rendered against incompetent defendants where it is probable that injustice has resulted. 34 A.L.R. 221, et seq.; Spurlock v. Noe, 19 Ky.Law Rep. 1321, 43 S.W. 231, 39 L.R.A. 775; Cooper v. Greenleaf, 84 Kan. 499, 114 P. 1086, 35 L.R.A.,N.S., 1090. In determining the applicability of these cases to the present situation, however, it is necessary to consider the source of the authority under which relief was granted. In many states, including California, the general common law power that courts had to control their own judgments during the term at which they were rendered has been continued in the form of statutory authority. Wiggin v. Superior Court, 68 Cal. 398, 400, 9 P. 646; 31 Am.Jur. 268; 14 Cal.Jur. 1009. Under such statutes the court which rendered the judgment has power, in its discretion (O'Brien v. Leach, 139 Cal. 220, 72 Pac. 1004; 31 Am.Jur. 267; 14 Cal.Jur. 1072), for a definite period of time and upon specified grounds to open, vacate or modify its own final judgment. Code Civ.Proc., sec. 473; Code Civ.Proc., sec. 663; 31 Am.Jur. 277." And again 19 Cal.2d at page 575, 576, 122 P.2d at page 567. "One who has been prevented by extrinsic factors from presenting his case to the court may bring an independent action in equity to secure relief from the judgment entered against him. Caldwell v. Taylor, supra [218 Cal. 471, 23 P.2d 758, 88 A.L.R. 1194]; Purinton v. Dyson, 8 Cal.2d 322, 65 P.2d 777,

113 A.L.R. 1230; Dunlap v. Steere, 92 Cal. 344, 28 P. 563, 16 L.R.A. 361, 27 Am.St.Rep. 143. Where the court that rendered the judgment possesses a general jurisdiction in law and in equity, the jurisdiction of equity may be invoked by means of a motion addressed to that court. McGuinness v. Superior Court, supra; Crescent Canal Co. v. Montgomery, 124 Cal. 134, 144, 56 P. 797; Estate of Estram [Estrem] 16 Cal.2d 563, 571, 107 P.2d 36; Ex-Mission L. & W. Co. v. Flash, 97 Cal. 610, 631, 32 P. 600; Cohen v. Home Life Ins. Co., 273 Mich. 469, 263 N.W. 857; Home Life Ins. Co. v. Cohen, 278 Mich. 169, 270 N.W. 256; Jarman v. Saunders, 64 N.C. 367; Demilt [Demelt] v. Leonard, 11 Abb.Prac., N.Y. 252." In accord Key System Transit Lines v. Superior Court, 36 Cal.2d 184, 222 P.2d 867; Estate of Costa, 37 Cal.2d 154, 231 P.2d 17.

The Olivera case cites Estate of Estrem, 16 Cal.2d 563, at page 571, 107 P.2d 36, at page 40, where the court said: "In addition, a judgment could be attacked at any time either by motion or in an independent action in equity on the grounds that it was secured by extrinsic fraud. McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A.L.R. 1110; McKeever v. Superior Court, 85 Cal.App. 381, 259 P. 373; Kasparian v. Kasparian, 132 Cal. App. 773, 23 P.2d 802; Tomb v. Tomb, 120 Cal.App. 438, 7 P.2d 1104; Kronman v. Kronman, 129 Cal.App. 10, 18 P.2d 712."

[4] On these authorities a reversal must follow since it is manifest that the defendant was not given his day in court. Whether this was by fraudulent design or by mere mistake or inadvertence on the part of the plaintiff makes no difference. The principle of law involved is that, through no fault of his, the defendant was not permitted to participate in the proceedings.

Orders reversed.

GOODELL and DOOLING, JJ., concur.

GOODSON v. GOODSON et al.

Civ. 17915.

District Court of Appeal, Second District, Division 1, California.

June 28, 1951.

Rehearing Denied July 23, 1951.

Hearing Granted Aug. 23, 1951. *

Blaine Arlington Goodson sued Willie Lee Goodson and others for partition of real property held in joint tenancy by plaintiff and Willie Lee Goodson. The Superior Court, Los Angeles County, Joseph M. Malthy, J., entered an order refusing permission to the named defendant to amend her answer so as to set up as an absolute defense the filing of a declaration of homestead, and Willie Lee Goodson appealed. The District Court of Appeal, Hanson, J. Pro Tem., held that since the defendant had failed to exercise due diligence in seeking her alleged prospective homestead rights in the property the trial judge had not abused his discretion in refusing her request to amend.

Affirmed.

1. Appeal and error ⇐959(4)
Pleading ⇐261

Ruling on request to amend answer so as to set up entirely new defense is wholly within discretion of trial judge and may not be reviewed on appeal except for abuse of discretion.

2. Homestead ⇐55

Where husband and wife held real property in joint tenancy and wife was granted interlocutory decree of divorce, on December 31, 1948, wherein child was entrusted to her custody, and thereafter on January 13, 1950, wife filed of record a declaration of homestead against property, wife failed to exercise due diligence in seeking her alleged prospective homestead right in property, and therefore, in suit by husband for partition, trial judge did not err in refusing to permit wife to file amendment to her answer so as to set up as absolute defense filing of declaration of homestead.

* Dismissed Dec. 10, 1951.

Hiram T. Kellogg, Los Angeles, for appellant.

Arthur C. Webb, Los Angeles, for respondent.

HANSON, Justice pro tem.

This action below to partition real property held in joint tenancy by respondent and appellant was instituted by the husband-respondent after his wife had procured an interlocutory decree of divorce, but prior to the entry of the final decree.

The basic and controlling question presented by the appeal of the ex-wife is whether the trial judge erred at the trial in refusing to permit appellant to file an amendment to her answer setting up an entirely new defense to the complaint.

[1] The rule has long been established in this state that a ruling on such a question is wholly within the discretion of the trial judge and so may not be reviewed on appeal except for an abuse of discretion. Schalich v. Bell, 173 Cal. 773, 161 P. 983. In an endeavor to show the court abused its discretion appellant relies on certain facts which will now be stated.

An interlocutory decree of divorce was granted to appellant on December 31, 1948, upon her cross-complaint filed against respondent. This decree expressly found, as was alleged in the cross-complaint, that the real property here involved was held in joint tenancy by the parties to that action who are likewise the parties to this action, and that the property was not community property, but held by them in joint tenancy. In her cross-complaint appellant made no allegation as to any vested or future right of homestead nor did she request that any such issue should be deferred for disposition in the final decree. The decree additionally granted the custody of a minor child to appellant and ordered respondent to pay support money to appellant for her own benefit and that of the minor child. On February 23, 1949, less than two months after the interlocutory decree had been entered, respondent instituted the instant action to partition the joint-tenancy property and duly recorded at the same time a *lis pendens*. By her answer to the complaint in partition appellant admitted the property was held in joint tenancy, as respondent alleged, but set up as an affirmative defense that partition thereof should not be decreed as occupancy of the property was essential to the needs of appellant and her minor son. Upon motion of respondent the law and motion department of the court as early as April 6, 1949, struck out this affirmative defense. No appeal was taken from the ruling although the order was appealable. Dupont v. Dupont, 4 Cal.2d 227, 48 P.2d 677. In that connection we observe that in Barba v. Barba, 103 Cal.App.2d 395, 229 P.2d 465, it was held that a trial court may not even enter such an order as a part of an interlocutory decree of divorce where the property is held by the parties in joint tenancy. After December 31, 1949, one year after the interlocutory decree of divorce had been entered, either of the parties was entitled to a final decree, but neither requested it until on January 18, 1950, when the respondent caused such a decree to be entered on January 19, 1950, but not *nunc pro tunc* as he might have done. The instant action for partition came on for trial on January 13, 1950. On that date, shortly before the case was actually called for trial appellant, without knowledge of respondent, had filed of record with the recorder of deeds a declaration of homestead against the property involved which purportedly was made (1) in behalf of herself and respondent and (2) in behalf of herself, and her minor child, in her capacity as head of the family. Thereupon at the opening of the trial appellant requested permission to amend her answer so as to set up as an absolute defense the filing of the declaration of homestead. The trial court denied the request. Thereupon, appellant made an offer to prove the fact as just narrated but, over objection, the proof was ruled inadmissible.

[2] From the facts so far recited it is apparent that appellant utterly failed to exercise due diligence in seeking her alleged prospective homestead right in the property, if she had any such right after the filing of the divorce action or after the interlocutory decree was granted to her therein.

Accordingly, it seems plain to us that the trial judge did not abuse his discretion.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

105 Cal.App.2d 76

LANNIN et al. v. SARGEANT et al.
FORD v. SARGEANT et al.
CAGLIA v. SARGEANT.

Civ. 14583.

District Court of Appeal, First District, Division 2, California.

June 25, 1951.

Action by Charles W. Lannin, and others, against Dudley V. Sargeant, and others, action by Roy F. Ford against Dudley V. Sargeant, and others, and action by Anthony Caglia against D. V. Sargeant, etc., to foreclose three mechanics' liens. The Superior Court, in and for the County of Santa Clara, M. G. Del Mutolo, J., consolidated the actions for trial and entered separate judgments in favor of defendants, and plaintiffs appealed. The District Court of Appeal, Nourse, P. J., held that plaintiffs' error in naming the person to whom labor and materials were furnished could not be disregarded.

Judgments affirmed.

1. Mechanics' liens ⇐141

In actions to foreclose three mechanics' liens for materials and labor furnished to contractor to be used in building constructed for defendants under express contract, where liens filed named defendants as persons to whom labor and materials were furnished rather than contractor, but claimants failed to state that labor was performed for and materials furnished to builder under the contract without any privity with owners, error in naming defendants could not be disregarded on ground that they had actual notice of the claims. Code Civ.Proc. § 1203.

2. Mechanics' liens ⇐281(3)

In actions to foreclose three mechanics' liens for labor and materials furnished to contractor to be used in building constructed for defendants under express contract, evidence supported findings that allegations that labor was performed or materials furnished under contracts with defendants at their request were not true. Code Civ.Proc. § 1203.

3. Mechanics' liens ⇐134, 154(1)

Party who desires to avail himself of provisions of mechanics' lien law so as to charge land or buildings of third party with debt incurred by another and not by owner must comply substantially with statutory requirements as to making out in writing and verifying claim of lien. Code Civ.Proc. § 1203.

Kirby, Pasquinelli & O'Connor and Timothy A. O'Connor, all of San Jose, for appellants.

John H. Machado, San Jose, for respondents.

NOURSE, Presiding Justice.

Three appeals were taken by the three plaintiffs from judgments in favor of defendants in actions to foreclose three mechanic's liens. The three actions were consolidated for trial but separate judgments were entered. The three plaintiffs furnished materials and labor to one Arnott to be used in a building which he constructed for the defendants Sargeant under an express contract.

The three liens filed by plaintiffs all named the Sargeants as the persons to whom the labor and materials were furnished rather than the contractor. The trial court gave judgments against all three plaintiffs holding that the liens did not conform to the provisions of section 1203, Code of Civil Procedure.

[1] The appellants contend that since the action to foreclose the liens is one in equity their error in naming the persons to whom the labor and materials were furnished should be disregarded inasmuch

as the owners had actual notice of the claims and that a substantial compliance with the provisions of the code section is all that should be required. But we are not convinced that actual notice of the filing of some claim is all that the statute requires. The owners knew that claims had been filed against them, but they also knew that the claims were invalid because they covered materials and labor for which they had not contracted. With seeming deliberate intent the claimants failed to state that the labor was performed for and the materials were furnished to the builder under express contracts with him and without any privity with the owners.

[2] The claims of liens were received in evidence but have not been sent up with the record. But each complaint alleged that the labor was performed, or the materials were furnished under the contract with the defendants at their request. In each case the trial court found that these allegations were not true. The evidence fully supports these findings.

[3] The appeals are controlled by Hogan v. Bigler, 8 Cal.App. 71, 72, 96 P. 97, where the court said: "Plaintiffs sold the lumber directly to Hambleton; that is, Hambleton was the party who went to them and ordered the lumber. They knew him, and no matter what he stated as to the party for whom he was purchasing the lumber, they could easily have complied with the law by stating the fact, in their claim of lien, as to whom the lumber was furnished. The courts have uniformly held that the party who desires to avail himself of the provisions of the mechanics' lien law so as to charge the land or building of a third party with a debt incurred by another, and not by the owner, must comply substantially with the statutory requirements as to making out in writing and verifying his claim of lien. We have no power to dispense with the plain requirements of the statute. The Legislature saw fit to require that the claim should state the name of the person to whom the materials were furnished. The claim in this case does not do so; hence it cannot be the basis for the enforcement of a lien on the land of the defendant, Louisa Bigler."

Judgments affirmed.

GOODELL and DOOLING, JJ., concur.

105 Cal.App.2d 271

ROSCOE v. GOODALE et al.

Civ. 7931.

Sac. 6141.

District Court of Appeal, Third District, California.

July 2, 1951.

Proceeding by Stanley B. Roscoe against Harvey Goodale and others for alternative writ of mandate ordering defendant council men to rescind resolution authorizing Superintendent of Public Works to appoint supervisors for sewer and water project. From an order of the Superior Court, Humboldt County, Carl L. Christensen, Jr., J., denying the writ and dismissing the petition, petitioner appealed. The District Court of Appeal, Schottky, J. pro tem., held that as the project had been completed the question on appeal was moot.

Appeal dismissed.

1. Mandamus ⇐16(1)

A court of equity will refuse to issue a writ of mandamus when it is useless, unenforceable, or unavailing.

2. Mandamus ⇐187(1)

Where sewer and water project had been completed, accepted, and paid for by city at time of appeal from order denying petition for writ of mandate ordering councilmen to rescind resolution authorizing Superintendent of Public Works to appoint supervisors for project, the question on appeal had become moot. Business and Professions Code, § 6700 et seq.

Blaine McGowan, Eureka, for appellant.

Frank Thompson, Eureka, for respondents.

SCHOTTKY, Justice pro tem.

This is an appeal from an order denying an alternative writ of mandate and dismissing the petition therefor. After the briefs had been filed and prior to the date set for the oral argument, respondent filed a motion to dismiss the appeal upon the ground that the question presented has now become moot.

The petition for the writ alleged that the city of Eureka was organized and exists under a Freeholders' Charter and that the respondents are the duly elected councilmen; that petitioner, appellant here, is the duly elected, qualified and acting City Engineer and also a qualified and registered civil engineer; that one Woodcock is the duly elected, qualified and acting Superintendent of Public Works of the city but is not a civil engineer nor registered with the State Board under the Business and Professions Code, § 6700 et seq. Said petition alleged further that section 60 of the charter provides, among other things, that the city engineer shall "Make all surveys, inspections and estimates required by the Council. * * * He shall examine all public work done under contract, and report thereon in writing to the Council"; and that section 163 of the charter provides in part that "The Superintendent of Public Works shall have supervision of the construction * * * of all public utilities or public enterprises of every kind and nature, * * * not in this Charter assigned to another Department * * *"; that at an election held in 1949 the electors of the city voted bonds in the sum of $800,000 for improvement of the sewer system and $1,200,000 for the improvement of the water system and for the reconstruction of parts of both systems; that in accordance with the bond election the Council entered into a contract with Baldwin & Straub for the construction, repair and reconstruction of parts of the water system for $167,348.70, and Baldwin & Straub actually entered into the work and did actually dig up parts of Harris Street and installed certain pipes, and petitioner supervised and inspected the work; that petitioner, as city engineer, on April 18, 1950, submitted a written report setting forth in detail the defective work being done and pointing out where the plans and specifications had not been followed; that on April 18, 1950, after receiving the report, the Council passed Resolution No. 3958 by a four to one vote, authorizing the Superintendent of Public Works to appoint all supervisors and inspectors necessary in connection with the sewer and water project and fixing the rates of wages for said employees appointed by him; that the work of inspections on the project is engineering work and calls for the skilled and professional ability of an engineer to read blue prints, plans and specifications, and the application thereof to the work being performed; that petitioner is informed and believes and therefore alleges, that the Superintendent of Public Works has or will assume to perform such engineering work, notwithstanding he is not an engineer and not skilled in engineering work and not registered as such; that by the resolution the Council attempted to "deprive said City Engineer [petitioner] from his duties" required by section 60, subdivision 1, of the charter and place those duties in the office of Superintendent of Public Works; that the Council attempted to evade the provisions of the charter by establishing rates to be paid for inspectors and no funds were established for such inspectors; that the Council exceeded its authority in the further respect that it placed upon the Superintendent of Public Works the duty of doing civil engineering work contrary to the Business and Professions Code and contrary to the charter provisions that the Superintendent of Public Works should not do or perform duties assigned to another department, and that the duties under consideration are assigned to the Department of Engineering; that after the resolution was passed, petitioner, in writing, demanded of the Council and each member thereof that they rescind the resolution, a copy of which demand is attached to the petition; that the demand was argued before the Council and denied.

Petitioner prayed for an alternative writ of mandate ordering and directing respondents to rescind said Resolution 3958 and to provide funds and fix the number of inspectors for said water and sewer project, and their compensation.

The trial court in denying the petition held that "the Charter provisions construed together, coupled with the allegations of the petition, fail to show a refusal to perform any clearly established duty owing to petitioner, and by proper construction affirmatively show the vesting of discretion in the Council, and no abuse in the exercise thereof."

The appeal on the merits presents an interesting question and has been ably presented by counsel in their briefs. But as we have concluded that the motion to dismiss the appeal, upon the ground that the question has now become moot, should be granted, we deem it unnecessary to decide this question.

[1] It appears, without contradiction, from the documents and records filed in support of the motion to dismiss the appeal, that the contract and work referred to in the resolution and petition have been completed and accepted and paid for by the city of Eureka, and that even if we should agree with the main contention of petitioner and appellant, there is nothing that could be accomplished now by the issuance of a writ of mandamus. As this court said in Zagoren v. Hall, 122 Cal.App. 460, at page 462, 10 P.2d 202, at page 203: "It is the invariable rule that a court of equity will refuse to issue a writ of *mandamus* when it is useless, unenforceable, or unavailing. Spotton v. Superior Court, 177 Cal. 719, 171 P. 801; George v. Beaty, 85 Cal.App. 525, 260 P. 386; Voinich v. Poe, 52 Cal. App. 597, 199 P. 74; Gay v. Torrance, 145 Cal. 144, 78 P. 540; 38 C.J. 551, § 23." See, also, Crangle v. City Council of Crescent City, 219 Cal. 239, 26 P.2d 24; Chambers v. Ashley, 33 Cal.App.2d 390, 91 P.2d 932.

[2] We conclude, therefore, that the question presented upon this appeal has become moot, and that the appeal should be and is hereby dismissed.

PEEK and VAN DYKE, JJ., concur.

In re BUSTEED'S ESTATE.

CRANDELL et al. v. SULLIVAN et al.

No. 14587.

District Court of Appeal, First District, Division 1, California.

June 22, 1951.

Rehearing Denied July 13, 1951.

Hearing Denied Aug. 16, 1951.

Proceeding in the matter of the estate of Mary M. Busteed, also called Mary Busteed, also called Mary W. Busteed, wherein a petition was filed to determine heirship. From an adverse decree of the Superior Court in and for the City and County of San Francisco, T. I. Fitspatrick, J., Helen L. Crandell, executrix of the last will and testament of Rose M. Livingston, and others appealed, opposed by Margaret Murphy Sullivan, and others. The District Court of Appeal, Agee, J., held that the evidence supported finding of trial court that the appellants were not first cousins and heirs of the decedent.

Affirmed.

1. Appeal and error ⇐110

An order denying a new trial is not an appealable order.

2. New trial ⇐163(2)

Where trial court in reconsidering the evidence on a motion for a new trial reached a conclusion that part of its original opinion was wrong, and court then entered an order providing for the changing of a finding and a conclusion of law and stated that a motion for new trial was denied, the fact that the order also contained a statement to the effect that a motion for a new trial was granted as to a portion of the original opinion did not mean that the trial court granted the motion but rather showed that the court merely amended original decree. Code Civ.Proc. § 662.

3. Appeal and error ⇐1002, 1011(1)

An appellate court will not disturb a verdict of a jury or findings of a court when there is substantial conflict of evidence on material points and when there is some evidence to support the verdict or findings.

4. Descent and distribution ⇐71(6)

In proceeding to determine heirship, the evidence supported finding of trial

court that appellants were not first cousins of the deceased and therefore they were not heirs.

5. Depositions ⇐56(2)
Descent and distribution ⇐71(7)

In heirship proceeding, the admission of the deposition of a maternal cousin, which had been taken prior to the appearance of the appellants and without notice to them, and which dealt only with the maternal side of the decedent's family and did not in any way bear upon the paternal side or whether appellants were or were not heirs of decedent, was improper but not prejudicial to the appellants who claimed from the paternal side of the decedent.

6. Appeal and error ⇐1056(1)

In heirship proceeding, where after the litigation had commenced appellants' attorney prepared a diagram or chart showing the claimed relationship of appellants to the decedent according to the claims of the appellants, refusal of trial court to admit the chart in evidence as a family tree was not prejudicial.

7. Evidence ⇐285

In heirship proceeding, information appearing on a chart, which was obtained after the controversy arose and purported to be a family tree, was not admissible under the pedigree rule.

Hadsell, Sweet, Ingalls & Murman, San Francisco, for appellants.

W. C. McDonnell, San Francisco, for respondents John Sheehan, William Sheehan and Margaret Sheehan.

Andrew F. Burke, Henry J. O'Connor, San Francisco, for respondent Gladys Cheleen, as assignee of the aforesaid respondents.

Molkenbuhr & Molkenbuhr, John B. Ehlen, San Francisco, for respondents Margaret Murphy Sullivan and Daniel Murphy, executor of last will and testament of Michael Murphy, deceased.

Brandenburger & White, Sacramento, for respondent Michael Busteed.

AGEE, Justice pro tem.

Mary M. Busteed died intestate on July 16, 1945, leaving an estate of about $96,000. A petition to determine heirship was filed on April 21, 1948. The court appointed a referee to take testimony and report back. After numerous hearings the referee filed his report. The court found, as did the referee, that decedent's heirs at law consisted of thirteen first cousins, five on the maternal side and eight on the paternal side. The paternal cousins were designated as Group I (appellants) and Group II (Michael Busteed). The maternal cousins were designated as Group A and Group B. A decree determining heirship was entered in accordance with the foregoing. Group A moved for a new trial. The court in ruling upon the motion concluded that the claimants in Group I were not first cousins of the decedent and ordered counsel for respondents to prepare changed findings and an amended decree eliminating appellants as heirs at law. This was done and they "Modified and Amended Decree Determining Heirship" was subsequently entered. This action by the court was taken under section 662 of the Code of Civil Procedure which provides: "In ruling on such motion [for new trial], in a cause tried without a jury, the court may, on such terms as may be just, change or add to the findings, modify the judgment, in whole or in part, vacate the judgment in whole or in part, and grant a new trial on all or part of the issues, or, in lieu of granting a new trial, may vacate and set aside the findings and judgment and reopen the case for further proceedings and the introduction of additional evidence with the same effect as if the case had been reopened after the submission thereof and before findings had been filed or judgment rendered. Any judgment thereafter entered shall be subject to the provisions of sections 657 and 659 of this code."

The minute order on the motion for a new trial reads: "Motion for a new trial is granted upon the ground of insufficiency of evidence to sustain that portion of Finding VIII and Conclusion of Law there-

on, declaring that * * * [appellants] are first cousins of decedent, and in so far as Findings VIII and the Conclusion of Law and Judgment thereon are concerned, the same are modified and changed so as to provide that decedent left her surviving as her sole heirs at law the following named first cousins: * * * [respondents]; and that, otherwise, said motion for a new trial is denied. Counsel to prepare modified Findings of Fact and Conclusions of Law and Judgment in accordance herewith."

[1] Appellants' first contention is that the foregoing order granted a new trial and that the court could not thereafter, without a new trial being had, hold that they were not heirs. Respondents contend that the effect of the order and the intention of the court was to deny a new trial; but an order denying a new trial is not an appealable order. It is obvious that the trial court, upon reconsidering the evidence, reached a conclusion as to appellants which was contrary to its original opinion and therefore desired to amend its findings and decree accordingly. The court did not desire any new or further trial as is evidenced by the final part of the order which directs counsel to prepare findings and judgment "in accordance herewith." The question arises because the order recites that "a new trial is granted" despite the later words "otherwise, said motion for a new trial is denied," and despite the evident intention of the court to conclude its decision upon the record as it then existed without the introduction of any additional evidence or any new trial being had.

Under section 662 of the Code of Civil Procedure, the court had a right to reverse its original finding and conclusion as to Group I and deny a new trial. See, for example, Spier v. Lang, 4 Cal.2d 711, 714, 53 P.2d 138, 140, where it was said: "The obvious purpose of the statute, discerned from the language employed, was to give to the court, on denying the motion for a new trial, the broad power to change its findings and to modify its judgment and thus avoid the necessity of a new trial. This was to subserve the ends of justice and to prevent unnecessary delays in cases where the court deemed itself mistaken as to its previous view of the evidence or in the application thereto of the law." In Clarke v. Fiedler, 44 Cal.App.2d 838, 113 P.2d 275, the court originally signed findings and judgment in favor of plaintiff. On motion for a new trial the court changed its findings and held for defendant. The opinion on appeal states, 44 Cal.App.2d at pages 847–848, 113 P.2d at page 281: "Under the broad power conferred upon the court in this regard by section 662 of the Code of Civil Procedure, the trial court was empowered, in ruling upon the motion for a new trial, if it deemed itself mistaken as to its previous view of the evidence or in the application thereto of the law, to set aside the previous findings and the judgment predicated thereon." See, also, Wyman v. Monolith Portland C. Co., 3 Cal.App.2d 540, 545, 39 P.2d 510. Appellants in their opening brief concede that the court did what it had the right to do under section 662 (assuming no abuse of discretion) if it had "*denied* the motion for new trial on all grounds."

But, appellants argue, having *granted* a new trial on the ground that the evidence was insufficient to support appellants' claims, it could not readjudicate this issue without allowing appellants a new trial. The same contention was decided adversely to appellants in Estate of Perkins, 21 Cal. 2d 561, 134 P.2d 231. There the heir of the decedent's predeceased spouse claimed the entire estate under section 229 of the Probate Code, on the contention that it had come to decedent from the separate property of said predeceased spouse. The court originally found against claimant. On motion for a new trial, the court changed its findings and judgment to give him all of the estate, except the sum of $4,313.16, which sum decedent had inherited from her relatives. Dealing with the contention of appellant in that case that the court had granted a new trial, the Supreme Court said, 21 Cal.2d at pages 567–568, 134 P.2d at page 235: "When, upon such a motion [for new trial], the court follows the procedure authorized by section 662 of the Code of Civil Procedure, and either chang-

es the findings or modifies the judgment without reopening the case for further proceedings and the taking of additional evidence, no new trial is allowed. [Citing cases.]

"But, it may be argued, the form of the minute order made by the court following the hearing of the respondent's motion for a new trial compels a contrary conclusion. This order recites that it is granted insofar as certain findings of fact and conclusions of law are concerned; that these findings and conclusions of law and the judgment are modified and changed to provide that the entire distributable estate, less the sum of $4,313.16, be distributed to the respondent, and that otherwise the motion for new trial is denied. Nevertheless, the action of the court was to deny the motion. A similar situation was presented in Bureau of Welfare etc., v. Drapeau, 21 Cal.App.2d 138, 68 P.2d 998, where it was held that an order in substantially the same terms as the one now before the court was, in effect, a ruling denying the motion and granting alternative relief. The same construction has been placed upon other orders in this form. Roraback v. Roraback, 38 Cal.App.2d 592, 101 P.2d 772; Garcia v. Bechtol, 134 Cal.App. 615, 25 P.2d 987." In the Drapeau case (Bureau of Welfare etc. v. Drapeau, 21 Cal. App.2d 138, at page 150, 68 P.2d 998, at page 1004), the court said: "While the trial court used the expression 'granted in part' in the order and the expression 'granted as to that point' in the memorandum, these expressions were followed immediately by the order for the change and amendment of the findings and judgment to conform to its corrected views with respect to the legal effect of the applications and agreements. It is therefore clear that the trial court merely intended to grant the alternative relief under said section 662 in ruling upon the motion for new trial. We are therefore of the opinion that regardless of the form of the trial court's order, it constituted in substance and effect an order denying the motion for new trial and granting such alternative relief."

[2] We are likewise of the opinion that the order in the instant case was in effect a denial of the motion for new trial. Therefore, appellants' contention that the court abused its discretion in *granting* a new trial necessarily fails. It should also be noted that appellants apparently realized that the court intended to deny them a new trial. If they had thought otherwise, they could have moved for a new trial after the amended decree was entered in accordance with the last sentence of section 662.

The second contention of appellants is that, "having granted respondents' motion for a new trial, * * * the trial Court had no power thereafter to modify and amend its findings, conclusions of law and decree of heirship." As we have held, the court did not grant, but instead denied, a new trial. Upon such denial, the action taken by the trial court is clearly permitted by section 662.

[3] Appellants also appeal from the "Modified and Amended Decree Determining Heirship." Under their contention that the court erred in "granting" a new trial, they argue that the evidence required a finding that they were heirs and that the evidence is insufficient to support the court's contrary finding. This necessitates a consideration of the evidence, keeping in mind that "an appellate court will not disturb a verdict of a jury or findings of a court when there is a substantial conflict of evidence on material points and when there is some evidence to support the verdict or findings." 2 Cal.Jur. § 543, p. 921.

The decedent's father was Thomas Busteed and her mother was Ann (or Anna) Murphy. She had three brothers who predeceased her, Thomas Busteed, Michael Busteed, and William Busteed. Her heirs at law and next of kin were her first cousins. Her maternal grandparents were Michael Murphy and Margaret Manning. Group A consists of Michael Murphy (who died after decedent) and Margaret Murphy Sullivan, children of Daniel Murphy, who was a brother of decedent's mother. Group B consists of John Sheehan, William Sheehan and Margaret Sheehan, who are the children of Catherine Murphy Sheehan, a sister of decedent's mother. Appellants do not contend that the evidence

is not sufficient to support the finding that Groups A and B are maternal first cousins and heirs at law, other than to contend that a deposition which was the basis of the claims of Group A was improperly admitted into evidence.

Appellants (Group I) are grandchildren of Harry (or Henry) Busteed (or Bustard) and Mary Byrne, who, they claim, were the parents of Thomas Busteed, the father of the decedent. Group II is Michael Busteed; his father was John Busteed, whose parents were John Busteed and Mary Penny; John and Mary had another son, Thomas, who is claimed to be the father of the decedent. It will thus be seen that the claims of Group I and Group II are entirely inconsistent. Group I claims that the common grandparents of themselves and the decedent were Harry (or Henry) Busteed and Mary Byrne while Group II claims that they were John Busteed and Mary Penny. Hence the trial court could not consistently find in favor of both of these groups.

[4] Five of the appellants are children of Frank (Francis) *Bustard* and two are children of William *Bustard*. Appellants claim that Frank and William are brothers of Thomas *Busteed*, the father of the decedent; that these three and a fourth brother, Harry, are children of Henry *Busteed* and Mary Anne Byrne. One of Francis' children testified that the change from Busteed to Bustard occurred because of an error in her father's enlistment record in the Confederate Army during the Civil War. She testified that he enlisted in 1864 at St. Louis, Missouri. However, no Confederate forces existed in Missouri after 1862. Encyclopaedia Britannica, Vol. 18, p. 613, 13th Ed. Respondents produced an enlistment record of a Francis *Bustard* showing enlistment in the First Missouri Regiment of the Union Army on April 4, 1864. The stated occupation and place of birth (Dublin, Ireland) corresponded with statements made by said daughter of Francis as to her father. No satisfactory explanation was offered as to why, assuming Francis became known as Bustard by error, his brothers Harry and William also became Bustards. It will be noted that decedent's father, Thomas, whom appellants claim was the brother of Francis, William and Harry, was never known as Bustard. When Francis died, his widow gave the information requested for the death certificate and stated that his father was Henry Bustard. This information was given in the presence of one of appellants, who was the chief witness for her side. There were many other circumstances too numerous to set forth here which cast substantial doubt upon the claims of appellants. There was not one single bit of documentary evidence such as birth, baptismal, marriage or death records, tombstone inscriptions, et cetera, to indicate that the family name had ever been anything other than Bustard. Having in mind the rule quoted above, it is certainly an understatement to say that there was "a substantial conflict of evidence" on the question of whether appellants are heirs and, therefore, the finding that they are not should not be disturbed by this court.

Appellants point to the weakness of Michael Busteed's case. But they would only be concerned with this if they are heirs. If they are not heirs, it can make no difference to them who inherits. The maternal cousins have not questioned the finding as to Michael Busteed.

[5] The third contention of appellants is that the deposition of a maternal cousin was improperly admitted into evidence over the objection of appellants. It had been taken prior to the appearance of appellants and without notice to them. Its admission was improper but not prejudicial to appellants because it dealt only with the *maternal* side of the decedent's family and did not in any way bear upon the *paternal* side or whether appellants were or were not heirs. If appellants had been able to establish themselves as heirs, then they would have legal cause for complaint because the more heirs there were found to be, the less there would be for each, whether on the maternal or the paternal side.

[6, 7] The final contention of appellants is that the court erred in refusing to admit a "family tree." After the litigation was commenced, appellants' attorney pre-

pared a diagram or chart showing the claimed relationship of appellants to decedent according to the claims of appellants. No mention of this chart was made on the direct examination of Nellie Tonkinson, one of the appellants and their chief witness. But on cross-examination it was brought out that such a chart had been made by her attorney. The chart was produced and marked for identification and Nellie was cross-examined thereon. The chart was, in effect, merely a summary of the testimony introduced by appellants to support their claims. At best, it would merely make it more convenient for the trier of the facts to understand the claims of appellants and to trace their claimed lines of relationship more easily. The failure to admit the chart was not prejudicial. Moreover, some of the information appearing on the chart was obtained after the controversy arose and therefore would not be admissible under the pedigree rule. Estate of Walden, 166 Cal. 446, 448, 137 P. 35.

The appeal from the order on the motion for a new trial is dismissed; the amended decree determining heirship is affirmed.

PETERS, P. J., and BRAY, J., concur.

105 Cal.App.2d 134

In re DOBRZENSKY'S ESTATE.

Civ. 7846.

Sac. 6109.

District Court of Appeal, Third District, California.

June 25, 1951.

As Modified June 29, 1951.

Hearing Denied Aug. 23, 1951.

Willard H. Dobrzensky contested the probate of the purported will and codicil of Bertha Dobrzensky, deceased, offered for probate by Milton W. Dobrzensky and others. The Superior Court, Stanislaus County, B. C. Hawkins, J., denied probate and proponents appealed. The District Court of Appeal, Van Dyke, J., held that the evidence was insufficient to sustain jury findings of lack of testamentary capacity, improper execution and undue influence.

Judgment reversed with instructions.

1. Wills ⇐55(1), 166(1), 302(1)

In contest of will and codicil, evidence was insufficient to sustain jury's findings of lack of testamentary capacity, improper execution and undue influence.

2. Wills ⇐47

Old age, feebleness, forgetfulness, and physical disability do not furnish grounds for holding that testatrix lacked testamentary capacity.

3. Wills ⇐21, 50

Testamentary capacity requires that testatrix at time of executing will had sufficient mental capacity to understand nature of act being performed, extent and character of property involved and her relations with natural objects of her bounty.

4. Wills ⇐98

Where codicil, admittedly written, signed and dated by testatrix, expressly referred to and sufficiently identified her formal will, codicil operated to incorporate formal will by reference as part of codicil.

5. Wills ⇐98

A will or codicil executed in accordance with the requirements of statute may, by appropriate reference, incorporate within itself a document or paper not so executed.

6. Wills ⇐98

Doctrine of incorporation by reference applies to holographic wills, the extraneous writing being considered to be incorporated in such will although not in decedent's handwriting.

7. Wills ⇐98

Incorporation by reference requires that the instrument being incorporated into will be designated as an existing instrument and so described as to be identifiable from reference or made capable of identification through extrinsic proof.

8. Wills ⇐98, 289

Under principle of incorporation by reference, proof of holographic codicil dispensed with necessity of any proof that formal will, incorporated by reference within the holographic codicil, had been properly executed.

9. Wills ⇐302(7)

Where testatrix requested aid from attorney in changing will, fully complied with mailed instructions from attorney in writing codicil and mailed it back to attorney, jury could not legally find that document was executed without testamentary intent.

10. Wills ⇐155(1)

Proof of undue influence in execution of will requires evidence of exertion of pressure which overpowered the mind and volition of testator at time of execution of will and that the undue influence prevented the will from expressing testator's own desires.

11. Wills ⇐163(2)

Where attorney aided testatrix in execution of will and codicil, and was named as cotrustee and coexecutor under will, fees earned by attorney through practice of law in carrying out his duties under will did not constitute undue profits raising presumption of undue influence in execution of testamentary instruments through confidential relationship.

Vernon F. Gant, Modesto, for appellants.

Cleary & Zeff, Modesto, Margaret A. Flynn and James A. Cobey, Merced, for respondent.

VAN DYKE, Justice.

Bertha Dobrzensky, a resident of Newman in Stanislaus County, died, leaving a purported will and codicil thereto which were proposed for probate. Her son Willard contested the probate of the documents upon the following grounds: That she was not of sound and disposing mind when the documents or either of them were executed; that the will, as distinguished from the codicil, was not properly executed, and that the will and codicil were procured by the undue influence of the proponent Milton W. Dobrzensky, a nephew of decedent. The jury found in favor of these grounds of contest. The proposed documents were denied probate and proponents appeal.

[1] The appellants contend that the evidence is insufficient to justify any of the findings of the jury affecting the validity of the proposed documents and that prejudicial error was committed by the trial court in the matter of instructions to the jury. We think it unnecessary to discuss this last assignment of error, as we have concluded that the evidence was insufficient to support the jury's findings.

Decedent was seventy-seven years of age when the matters with which we are here concerned occurred. Her husband had predeceased her. After his death, and on December 11, 1946, she made a will, giving $5,000 each to her two grandchildren, the children of respondent, and the residue, with the exception of some jewelry, to her son, if he survived her; otherwise to his issue. On May 14, 1947, a niece of decedent, who was the sister of appellant Milton Dobrzensky, telephoned to him from decedent's home. He is a practicing attorney with his offices in Oakland. She informed him her aunt wanted him to come to Newman and draw a will for her. He acquiesced and told his sister that he would come to Newman on the following Saturday. He then received a letter from decedent, expressing her pleasure that he would come down to make her will and stating that she wanted her son Willard to have everything as long as he lived, when it would go to his children. She said, "Can't I turn it all over to you so that you can see that it goes the way I want it. You know how I want it fixed so please draw up the will for me." Before going to Newman Milton prepared a partial draft of a will placing the estate mainly in trust, the income to go to Willard during his lifetime, and to his children after his death, the trusts for the children to terminate on their reaching thirty-two years of age. With this draft, and accompanied by his secre-

tary with her typewriter, and his son they went to the home of decedent. There the will was completed, signed by the decedent, witnessed by the son and the secretary and taken back to Milton's law office. Willard appeared at the home during these proceedings and was informed by Milton that he was preparing decedent's will. Milton testified that decedent was concerned lest after her death the son's wife might divorce him and she wanted to make sure that the wife could not get her hands on any of the property. The will was signed by decedent on May 17, 1947 and so dated. On June 6th Milton received a letter from testatrix in her handwriting and she thereby informed him that she wanted to change her will by making a different distribution of some jewelry. She wanted to give a diamond brooch to the son's wife, a bar pin to his daughter, one of her earrings to her son and the other to his daughter. She stated that "the rest can be as it is"; that her son had been lovely to her and that she thought the jewelry should go to his family. She said, "As long as she cannot get her hands on the rest—let her have the 'rocks'." On June 12th the nephew wrote decedent, enclosing a form for a codicil. He instructed her that the codicil must all be in her handwriting, that she was to copy the form upon a sheet of ruled paper which he enclosed with his letter, and that when she had finished she should simply put the handwritten document in an envelope he also enclosed and send it to him. He stated that he would attach it to her will and "that is all you will have to do about it." However, the form of codicil enclosed did not measure up to the instructions he had received. It purported to give to the son's wife the diamond bar pin and made no other dispositions. But the decedent did in part copy the form, making it conform substantially to the letter she had written Milton. This document, entirely written, dated and signed by decedent, was received by the nephew, along with a letter from decedent referring to his preceding letter to her. She wrote: "Just received your letter and am enclosing this to you", and she added some matters not material here. This codicil read as follows:

"California
Newman June 14, 1947

"I, Bertha Dobrzensky, make this codicil to my annexed will dated May 17, 1947—. I hereby change part Third paragraph (3) thereof to read as follows: (3) To my daughter-in-law, Blanche Dobrzensky, my diamond broach pin.

"To Adella,—my grandchild my bar diamond pin and one diamond earring.

"To Willard my son—one diamond earring and diamond stickpin.

"To Willard my grandson a diamond ring.

Bertha Dobrzensky"

The nephew placed the document between the last page of the will and the cover page, folded the two together and placed it in his safe. These were the two documents proposed for probate.

With regard to the testamentary capacity of decedent we can repeat respondent's own analysis as it appears in his brief:

"* * * She [decedent] was a tiny old lady just under five feet in height and weighing under 90 pounds. She had suffered from arthritis for about twenty years prior to her death and as a result she was stooped over from curvature of the spine and the joints of one hand were quite swollen. For a number of years prior to her death her health was poor. She was hospitalized at the time of her husband's death on December 3, 1946 and as they had always been very devoted to each other she never really recovered from the shock of his death. In the eleven months she survived him she was in and out of hospitals and rest homes constantly and when she was at her home in Newman physicians visited her every two or three days.

"In short, during the last eleven months of her life she was an invalid. In addition to her arthritis and the various complications from it she had a heart condition. These ailments gave her more or less constant pain, made her very weak (she was intermittently bedridden), short of breath and quite nervous. She slept only with the aid of sleeping pills and then neither well nor sufficiently. On the morning the purported will was presented to her she

said that she had not slept at all at night for weeks. She would cry a lot because she never became reconciled to the loss of her husband.

"These conditions markedly impaired her memory. She was quite forgetful at times and kept repeating things over and over again, such as a prospective buyer's inquiry about some of her property. She would have visitors and completely forget about their having been there and she falsely claimed and believed that certain household articles had disappeared after her son Willard had told and showed her that they were there. The testatrix herself was disturbed about this failing and remarked, 'I don't know what's the matter with my noggin.'"

[2] We think the foregoing statement taken from the brief of respondent contains all and in some respects more than can fairly be gathered from the extensive transcript. Concerning it, respondent says that these facts, particularly the impairment of decedent's memory, furnish a legally sufficient basis for the jury's verdict of testamentary incapacity. They also point to the conflict or differences between the will proposed for probate and the preceding will, claiming that, by virtue of the trust provisions as opposed to the outright gift to Willard which the earlier will had contained, the jury could infer an unnatural disposition of decedent's property. They point to the lengthy trust provisions contained in the will proposed for probate, which may be summed up as the usual granting of broad powers to a testamentary trustee where the trust is to endure for a considerable time and is to involve trusteeship of fairly extensive property. But with respondent's conclusion that all of this adds up to substantial support for the verdict of the jury that this decedent did not possess testamentary capacity we disagree. As this Court said in Estate of Selb, 84 Cal. App.2d 46, 49, 190 P.2d 277, 279: "It has been held over and over in this state that old age, feebleness, forgetfulness, filthy personal habits [not present here], personal eccentricities [not present here], failure to recognize old friends or relatives [not present here], physical disability, absent mindedness and mental confusion [if present at all only to a limited degree] do not furnish grounds for holding that a testator lacked testamentary capacity."

[3] In the cited case numerous supporting authorities are analyzed and we think upon this point we need do no more than has been done to demonstrate that the jury's finding that decedent did not possess the testamentary capacity is completely without any evidentiary support. While it is not determinative, nevertheless it is remarkable that in this case no intimate acquaintance nor qualified physician, not even respondent, saw fit to testify that in his or her opinion the decedent lacked testamentary capacity. This case appears to be another example of a jury finding a testator incompetent because the jury did not like what was done. There is nothing in the evidence here that will even approach a showing that at the time the witnessed will was signed by decedent she did not have sufficient mental capacity to understand the nature of the act she was doing, the extent or character of her property and her relations to the natural objects of her bounty. That is what is required and nothing more is required in order that a person may exercise a statutorily conferred right in disposing of property by will. Estate of Arnold, 16 Cal.2d 573, 589, 107 P.2d 25; Estate of Perkins, 195 Cal. 699, 703, 235 P. 45. On the contrary, there is much to indicate that this will and the codicil thereto were the product of mature consideration on the part of decedent. Respondent contends that the evidence demonstrates the unreliability of any and all testimony given by proponent, Milton Dobrzensky. It is unnecessary to discuss this, for if we leave it out there is still ample to support what has heretofore been said. Undeniably and by letter written by herself, decedent requested her lawyer nephew to draw her will. Undeniably, as shown by her statements in her own handwriting, she knew she had made a will, knew the general purport thereof and made specific changes therein. She was able to carry in mind that she had made a will. Undeniably she did so and, thinking it over afterward, decided upon changes she desired made. We

think it is idle to contend under the circumstances here that this woman was incompetent to make either her will or the codicil thereto.

The jury found that the holographic codicil dated June 14, 1947, and also the alleged will dated May 17, 1947, were not duly and properly executed by decedent. Preliminary to the trial before the jury of the issues raised by the contest, the court took evidence to establish prima facie the validity of the testamentary instruments offered for probate. This was done in the absence of the jury following the procedure indicated in such cases as Estate of Relph, 192 Cal. 451, 458, 221 P. 361; Estate of Black, 199 Cal. 257, 262, 248 P. 1015; Estate of Latour, 140 Cal. 414, 73 P. 1070, 74 P. 441. At the close of this preliminary proof the court announced that it was satisfied by the prima facie case thus made and the trial then proceeded before the jury as to the issues tendered by the pleadings, wherein, as we have said, there was placed in issue the testamentary capacity of the decedent, the execution of the proffered instruments as testamentary documents and the issue of undue influence. This preliminary proof consisted of the following: It was shown that the codicil was entirely written, dated and signed in the handwriting of the decedent. That document, with the accompanying proof, was introduced in evidence along with the formal will referred to in the codicil and the court thereupon announced its satisfaction with the preliminary proof and stated that pending the outcome of the jury's determination of the issues to be submitted to it it would consider the documents entitled to probate as the last will of decedent. The attesting witnesses to the formal will were not sworn, though present in court. It was and is here the position of respondent, contestant in the court below, that the codicil was not executed with testamentary intent and that, although complete in form as an holographic codicil, the jury were entitled to find from the evidence that it had not been executed with the intent that it should operate as a codicil, but on the contrary had been sent in to Milton Dobrzensky as merely an indication of what the decedent desired him to place in a codicil to be drawn by him, transmitted to her and then executed by her.

[4–6] Turning first, to the want of proof of the due execution of the formal will, it is to be observed that the codicil, admittedly written, dated and signed in the handwriting of the decedent, operated to incorporate the formal will by reference as a part of the codicil. "* * * it has long been settled that a will or codicil executed in accordance with the requirements of statute may, by an appropriate reference, incorporate within itself a document or paper not so executed." Estate of Plumel, 151 Cal. 77, 79, 90 P. 192, 193. And this principle of incorporation by reference "applies to holographic wills, the extraneous writing being considered to be incorporated in such a will although not in decedent's handwriting." Estate of Martin, 31 Cal. App. 501, 507, 88 P.2d 234, 237. As said in 57 American Jurisprudence, sec. 635, p. 434: "* * * There is good reason, moreover, for permitting a testator in a holographic will to incorporate an extrinsic document as a part of the will by a sufficient reference thereto in the will, notwithstanding the extrinsic document does not itself meet the statutory requirement of a holographic will that it be entirely in the handwriting of the testator."

[7–9] The sufficiency of the reference herein cannot be questioned. The codicil declares it to be such, which term in itself implies that it is an addition to or modification of some testamentary paper, and it expressly refers to the formal will in this, that the decedent declares: "I, Bertha Dobrzensky, make this codicil to my annexed will dated May 17, 1947." This fully meets the requirement for incorporation by reference in that it describes the formal will as a then existing instrument and does so in such terms that it is capable of being ascertained from the reference alone. "'It is established by a long line of authorities that any testamentary document in existence at the execution of a will may, by reference, be incorporated into and become a part of the will, provided the reference in the will is distinct and clearly identifies, *or renders capable of identification, by the*

aid of extrinsic proof, the document to which reference is made.'" Estate of Plumel, supra, 151 Cal. at page 82, 90 P. at page 194. Under the principle of incorporation by reference, therefore, proof of the execution of the codicil, that is, proof that it was entirely written, dated and signed in the handwriting of the decedent, dispensed with the necessity of any proof that the formal will had been properly executed. We have chosen to treat the matter in this rather technical way notwithstanding it is not disputed that in fact the formal will was properly executed. But respondent contends further that there was evidence from which the jury could infer that the testatrix did not execute the codicil with testamentary intent. This contention cannot be sustained. It was the decedent who wrote to Milton Dobrzensky, who was custodian of her formal will, indicating that she desired to make changes. He replied by forwarding to her a form with instructions that she complete it in her own handwriting and mail it back to him when he would attach it to the formal will. He told her that nothing further need be done to effect the changes in her will which she desired to make. She followed these instructions, save only that she in effect corrected his draft of the changes she desired, to make them conform to her prior instructions to him which he had mistakenly failed to follow. She also left out a sentence in the form he furnished which was a statement that, except as modified by the codicil, decedent thereby republished her formal will. This sentence, while commendable as a matter of form, was unnecessary as a matter of law and her omission of it from the instrument written by her did not weaken the legal effect of her act. It is undisputed that decedent wrote to Milton Dobrzensky requesting his aid in effectuating changes to her will, that he replied, sending her the form referred to, along with a letter of transmittal which contained the instructions which we have noted; and that she wrote the codicil in the form required by the statute and mailed it back to him. Upon this record the jury could not legally find that the document was executed without testamentary intent.

But respondent, urging his contention of lack of testamentary intent, points to certain evidence which may be stated as follows: Upon receipt of the codicil, Milton Dobrzensky wrote to decedent, telling her she would have to write it over again because of some confusing reference to one part of the formal will. He said to her that his form had been right, but that if she wanted something like what she sent him he would go to Newman and draft it in proper form. She replied that she did not want him to come down and repeated the changes she wanted made. Thereafter, following an interval of approximately two months, her nephew did draft a formal codicil to be executed and attested by witnesses, and sent his son to the hospital where the decedent was then staying, to have it executed. When the son arrived at the hospital, however, decedent had already gone back to her home and nothing further was done. From this respondent says that it was established beyond the shadow of a doubt that the testatrix did not execute the holographic codicil with testamentary intent, but wrote it purely and simply as another memorandum of instructions to her attorney regarding changes she wanted made. We think the statement of the argument is its own refutation. No other inference could be drawn from the matters preceding the execution of the codicil and its transmittal to Milton Dobrzensky than that she did execute it with testamentary intent and that the things that occurred after did not affect the matter in any degree.

[10] Turning now to the contention of appellants that there is no evidence to support the finding of the jury that the will and codicil were procured by the undue influence of Milton Dobrzensky, we hold that this contention must likewise be sustained. For respondent to sustain his pleadings upon this issue it was incumbent upon him to prove that there was exerted by Milton Dobrzensky, whom he charges with having procured the execution of the instruments by undue influence, "'a pressure which overpowered the mind and bore down the volition of the testator at the

very time the will was made'", Estate of Arnold, supra, 16 Cal.2d at page 577, 107 P.2d at page 27, and to show that not only had undue influence been exercised, but also that it had produced an effect upon the mind of the testator by which the will she executed was not the expression of her own desires. Estate of Hinde, 200 Cal. 710, 714, 254 P. 561. He had to show that "the influence was such as, in effect, to destroy the testator's free agency and substitute for his own another person's will." Estate of Arnold, supra, 16 Cal.2d at page 577, 107 P.2d at page 27. To be sure, Milton Dobrzensky was present when the formal will was executed, but there is no evidence whatsoever that he practiced undue influence upon decedent. Furthermore, and this is conclusive, the decedent herself initiated the changes in the will which brought about the execution by her of the holographic codicil. Milton Dobrzensky was not present at any time material to the effect of that instrument. But respondent argues that undue influence may be found for the following reasons: Decedent had executed a will shortly after the death of her husband, in which she gave her property to her son in main part; that she wanted this changed to a life estate in the son with remainder to his children. Respondent says that this was what she wanted when she requested her nephew Milton Dobrzensky to prepare another will for her. He also says that Milton, desiring to have control of the probating of her will and of the property devised by it, conceived the idea of the trust which appears in the will with those purposes in mind; that in her enfeebled condition the decedent was easily led into the adoption of that plan and that this dominance over her by her trusted adviser and relative continued throughout, affecting both the formal will and the codicil. But this is sheer speculation. There is no evidence that in any way Milton Dobrzensky substituted his will for that of decedent or that he influenced her unduly in adopting the trust plan which admittedly would carry out her fundamental desire as expressed to him that her son have the benefit of the property while he lived; that his children should have it thereafter and that her son's wife could not get her hands upon any of it. Once again, respondent argues that he successfully attacked the credibility of Milton Dobrzensky, so that the jury could disbelieve what he had to say concerning the facts and circumstances surrounding the execution of the formal will. We need not discuss that matter, for if respondent did discredit Milton in the eyes of the jury, that did not prove respondent's case. His burden was to prove his case, not merely to discredit his adversary. As we have said, the final testamentary act in question was the execution of the holographic codicil which incorporated the formal will by reference as a part thereof, and the record discloses not the slightest ground for holding that this vital testamentary act could have been or was the product of the undue influence of Milton Dobrzensky.

[11] One further point made by respondent should be discussed. He argues that the jury's findings as to undue influence may rest upon the rule that a testamentary instrument actively procured by one who stood in confidential relationship to decedent and by which such person unduly profited will be presumed to have been the product of undue influence. Respondent contends such a situation was here presented and argues that the undue profit to Milton will arise under the trust provisions. Both Milton and Willard were made co-trustees and co-executors. So fees may be earned both by Milton and by his associates in the practice of law. But such rewards for labor do not constitute undue profits. The right to receive them and the amount of them is controlled by the court in which the accounts will be filed and to which applications for allowance must be made. It cannot be assumed that undue allowances will be forthcoming. See In re Kilborn's Estate, 162 Cal. 4, 11, 120 P. 762.

The judgment and orders appealed from are reversed with instructions to the trial court to admit the proffered testamentary documents to probate.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; CARTER, J., dissenting.

105 Cal.App.2d 85

QUIRK v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. 14628.

District Court of Appeal, First District, Division 2, California.

June 25, 1951.

Vivienne Quirk sued the City and County of San Francisco, a municipal corporation, to recover for injuries incurred while riding as a passenger on a streetcar. The Superior Court in and for the City and County of San Francisco, Frank T. Deasy, J., rendered judgment for plaintiff for $500 and she appealed. The District Court of Appeal, Nourse, P. J., held that the verdict was not inadequate.

Judgment affirmed.

1. Damages ⇐185(1)

In action against city for injuries incurred while plaintiff was riding as a passenger on a street car evidence sustained finding that there was no causal connection between plaintiff's knee injury allegedly sustained when she struck her knee against one of the stanchions on street car when street car gave a sharp jerk, and the incidents of child birth.

2. Damages ⇐131(6)

$500 verdict to street car passenger who sustained knee injury which was quickly cured by minor treatment was not inadequate.

3. Appeal and error ⇐1004(1)

When an appeal is based on ground that verdict is inadequate a reviewing court may not reverse unless it appears that verdict is so grossly disproportionate to any reasonable view of evidence as to raise a strong presumption that it is based on prejudice or passion.

4. Carriers ⇐347(11)

In action against city for injuries sustained by plaintiff while riding as a passenger on a street car, whether plaintiff was guilty of contributory negligence in endeavoring to alight from street car when it was in motion without using safeguards maintained for that purpose was question for jury.

5. Appeal and error ⇐928(4)

Where an appellant fails to show by record how error occurred it will be presumed that instruction complained of was given at his request.

6. Appeal and error ⇐882(12)

No one may claim trial court erred in giving an instruction which such person requested and one who claims error must produce a record which shows the error.

7. Appeal and error ⇐882(12)

In action against city for injuries sustained by plaintiff while riding as a passenger on a street car where instruction stating duty of city to exercise highest degree of care for plaintiff's transportation erroneously used word "plaintiff" instead of "defendant" as to exercise of the highest degree of care but it could not be determined from record that challenged instruction was either requested by defendant, or that any of instructions were given by trial judge on his own motion, District Court of Appeals could not presume error that record did not disclose.

James C. Purcell, San Francisco, for appellant.

Dion R. Holm, City Atty., Joseph F. Murphy, Deputy City Atty., San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued for personal injuries incurred while riding as a passenger on a street car. The cause was tried to a jury and plaintiff had a verdict for $500. She appeals on two grounds—inadequacy of the damages awarded, and errors in instructions.

The plaintiff testified that, as she was riding on one of defendant's street cars she notified the conductor of her desire to alight at the next stop and that, as she stepped from the floor of the car down to the rear platform, the car gave a sharp jerk causing her to strike her knee against one of the stanchions. She was pregnant at the time and testified that the injury caused premature birth of her child. Con-

trary evidence was offered showing that no such accident occurred, and medical testimony was given, by both her attending physicians and those called by defendant, showing that the alleged accident had no effect upon her pregnancy or in the premature birth. The doctor attending at the birth certified: "Pregnancy complications —None; Labor complications—None." The child was born prematurely on February 2nd and the mother returned to her home on February 7th. A medical expert testified that the plaintiff had theretofore been treated for hyperthyroidism and that the premature birth was not caused by the accident. Though the child was born prematurely it was in good health as was the mother at the time of the trial.

[1–3] From this evidence the jury presumably found that there was no causal connection between the knee injury and the incidents of child birth and awarded a verdict to cover the former only. It must be conceded that the evidence supported that finding. There is no merit in appellant's argument that the damages were inadequate because the patient showed no objective symptoms of knee injury after a few weeks and the jury could have concluded that the injury to the knee was a minor bruise which was quickly cured by other minor treatments. When an appeal is based on the ground that the verdict is inadequate (as where it is claimed to be excessive) a reviewing court may not reverse unless it appears that "[I]t is so grossly disproportionate to any reasonable view of the evidence as to raise a strong presumption that it is based upon prejudice or passion." Koyer v. McComber, 12 Cal. 2d 175, 182, 82 P.2d 941, 945.

[4] Appellant complains that no charge on the subject of contributory negligence should have been given because contributory negligence was not proved; also that one charge on that subject was erroneous. There was some slight evidence of contributory negligence in that it appeared that plaintiff endeavored to alight from the car when it was in motion and without using the safeguards maintained for that purpose. It was a defense, however meagerly proved, but a defense on which defendant was entitled to go to the jury.

The objectionable instruction on this subject reads: "If you should find from the evidence in this case that Mrs. Quirk was a passenger of a street car operated by the defendant City and County of San Francisco at the time of the accident, then I instruct you that the *plaintiff* was required to exercise the highest degree of care for her transportation *and is responsible for injuries received by her* while in the course of transportation which might have been avoided by the exercise of such care. As the law is otherwise expressed, *carriers of passengers bind themselves* to carry safely those whom they admit as passengers into their street cars, as far as human care and foresight will go, and they are responsible for any negligence, even the slightest." (Emphasis ours.)

The instruction is palpably erroneous in the use of the word "plaintiff" instead of "defendant" as to the "exercise of the highest degree of care." Whether the error in the use of the word plaintiff instead of defendant was prejudicial presents the debatable question. Since the jury rendered a verdict for $500 in damages for the injury it must be assumed that it found her not guilty of contributory negligence and hence that it was not misled by this error in the instruction. This is so because if she were guilty of contributory negligence she would not have been entitled to any damages, either general or special.

[5, 6] However, the record does not permit a technical analysis of the instruction. It covers the rule of res ipsa loquitur—manifestly adverse to the defendant. And the record does not show that it was not proposed in writing by plaintiff and so read to the jury, whether the error was in the judge's reading, or in the reporter's transcription. It is settled law that when an appellant fails to show by the record how the error occurred it will be presumed that the instruction complained of was given at his request. Buckley v. Shell Chemical Co., 32 Cal.App.2d 209, 216, 89 P.2d 453; Deevy v. Tassi, 21 Cal.2d 109,

124, 130 P.2d 389. In the Buckley case the court said, at pages 216, 217 of 32 Cal. App.2d at page 456, of 89 P.2d: "Neither does the record suggest that any instruction was given by the trial judge on his own motion. Under such a state of the record it is held that 'on appeal and in support of the judgment, it will be assumed that, if any one of the instructions was erroneous, it was given at the request of the defendants.' (Appellants here.) Fitzgerald v. Quinn, 131 Cal.App. 457, 21 P.2d 656, 658. 'It is the settled law of this state that no one may claim the trial court erred in giving an instruction which such person requested, and that one who claims error must produce a record which shows the error.' Craig v. Boyes, 123 Cal.App. 592, 11 P.2d 673."

[7] "As it cannot be determined from the record that the challenged instructions were either requested by defendants, or that any of them were given by the trial judge on his own motion, we cannot presume error that the record does not disclose."

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

105 Cal.App.2d 89

ESQUER et al. v. TERESI et al.

Civ. 14683.

District Court of Appeal, First District, Division 2, California.

June 25, 1951.

Rehearing Denied July 25, 1951.

Rose Esquer, and others, by their guardian ad litem, Mary Esquer, and Mary Esquer, brought action against Daniel Teresi, Thomas Teresi, and others, to recover for death of Francisco Esquer, deceased. The Superior Court in and for the County of Santa Clara, John D. Foley, J., entered judgment for plaintiffs and second named defendant appealed. The District Court of Appeals, Nourse, P. J., held that question of whether deceased was employee of second named defendant so that plaintiffs could proceed only under Workmen's Compensation Act, or whether deceased was independent contractor, should have been submitted to jury.

Reversed.

1. Workmen's compensation ⇐235

Right to control and direct activities of alleged employee or manner and method in which work is performed, whether exercised or not, gives rise to employment relationship.

2. Workmen's compensation ⇐335

Where beet farmer hired truck owner, who furnished truck, gas, oil and maintenance, to haul beets from ranch to receiving station, and farmer fully controlled and supervised all truck loading operations and delivery, and had full right of discharge, and truck owner could quit at any time, truck owner was "employee", and therefore heirs could not sue farmer for death but should have proceeded under Workmen's Compensation Act. Labor Code, §§ 3351, 3353.

See publication Words and Phrases, for other judicial constructions and definitions of "Employee".

3. Workmen's compensation ⇐734

Where transportation is furnished by an employer, as an incident of employment, to convey employee to and from place of employment, injury or death suffered by employee going or coming in vehicle so furnished, and under control of employer, whether operated by employer personally or by one acting under his directions or orders, arises out of and is in the course of employment within Workmen's Compensation Act, and Industrial Accident Commission has exclusive jurisdiction of action for injury or death. Labor Code, §§ 3351, 3353.

4. Workmen's compensation ⇐2138

In death action by heirs of truck owner against beet farmer, issue of whether deceased was an employee or an independent contractor should have been submitted to jury, and applicable requested instructions should have been given. Labor Code, §§ 3351, 3353.

5. Workmen's compensation ⇐2138

Where there is conflict of evidence as to whether relation of master and servant existed between parties at time of injury, or evidence thereon is reasonably susceptible of more than one inference, question should be submitted to jury, but where evidence is not conflicting, and is reasonably susceptible of but one inference, question as to existence of relation is one of law for court to determine.

Campbell, Hayes & Custer, Frank L. Custer, San Jose, Edward J. Niland, Santa Clara, of counsel, for appellant.

Manny C. Gomez, James F. Boccardo, San Jose, Jean M. Blum, San Jose, of counsel, for respondent.

NOURSE, Presiding Justice.

Plaintiffs sued as the surviving wife and children of Francisco Esquer who was killed in a collision while riding to his home from his place of employment with the son of defendant and appellant Thomas Teresi, who provided that means of transportation. The facts of the collision are not disputed and the negligence of the driver may be taken for granted. The defendant Thomas Teresi owned 160 acres of sugar beet land near the town of Coyote. In his harvesting operations he employed four persons on an hourly basis and three truckmen to haul the beets from the ranch to a receiving station. The truck drivers were paid seventy-five cents a ton and a bonus of twenty-five cents per ton if they worked throughout the harvesting season. Defendant Thomas Teresi supervised all operations at the ranch and instructed his drivers where and how to load the trucks, when to move out and where to deliver the beets and when to move the empty trucks in for another load. He had the full right to discharge these drivers at any time if their work was unsatisfactory, if they failed to appear at the ranch at the proper time, or failed to keep the work moving to his satisfaction. Each truck driver furnished his own truck and paid for the gas, oil and maintenance. Two of the other drivers used their own automobiles in going from their homes to the ranch while the deceased drove his own truck home each night. After the work had been in progress for some time defendant Thomas Teresi arranged with deceased that the latter should leave his truck at the ranch so that it would be in readiness for early loading in the mornings and volunteered to have his son Daniel drive deceased to his home and pick him up the next morning. This arrangement was continued for about three weeks before the accident which occurred when the son Daniel was driving deceased to the latter's home. Following the accident the defendant Thomas Teresi reported it to his compensation insurance carrier but the plaintiffs refused to proceed under the Workmen's Compensation Act and brought this action to trial before a jury which returned a verdict in their favor for the sum of $25,000.

Thomas Teresi alone has appealed from the judgment following the verdict and this appeal presents these two issues:

I. "The Industrial Accident Commission had exclusive jurisdiction of plaintiffs' claim, since the evidence established, as a matter of law, that the death of Francisco Esquer arose out of and in the course of his employment."

II. "If it was a question of fact whether Esquer's death arose out of and in the course of his employment, the trial court erred in refusing to submit this issue to the jury."

Appellant cites and relies on sections 3351 and 3353 of the Labor Code which read: Sec. 3351. "'Employee' means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, * * *." Sec. 3353. "'Independent contractor' means any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished."

Admittedly if the deceased had been an employee of appellant as defined in the Labor Code, his heirs could not sue in

the superior court for damages. As evidence that the relation here was that of employer and employee the appellant refers to these facts: That he had full control of the manner in which the work was performed by deceased and exercised that right by directing deceased as to when and when not to load, and left the deceased no discretion as to the manner in which, the time at which, and the place at which the work was to be done. Also that appellant had and exercised the right to fix the hours of work to be done by deceased and retained the right to discharge him at any time if the work was done unsatisfactorily. Furthermore, that the deceased had the right to quit work at any time and in doing so would not have breached any contract or obligation with the appellant.

[1, 2] Supporting appellant's contention is the statement found in Industrial Indemnity Exchange v. Industrial Accident Comm., 26 Cal.2d 130, 135, 156 P.2d 926, 929: "The right to control and direct the activities of the alleged employee or the manner and method in which the work is performed, whether exercised or not, gives rise to the employment relationship. Riskin v. Industrial Acc[ident], Com[m.], 23 Cal.2d 248, 144 P.2d 16; Guarantee Ins. Co. v. Industrial Acc. Com[m.], supra, [22 Cal.2d 516, 139 P.2d 905]; Press Pub. Co. v. Industrial Acc. Com[m.], 190 Cal. 114, 210 P. 820. And, although in distinguishing between an employment and an independent contractor relationship it has been said that 'The test of "control", * * * means "*complete* control"' (Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 811, 159 P. 721, 723; S. A. Gerrard Co. v. Industrial Acc. Com[m.], 17 Cal.2d 411, 414, 110 P.2d 377), it is settled that 'a general and special employer relationship is present if there exists in each some power, not necessarily complete, of direction and control * * *.' National Auto. Ins. Co. v. Industrial Acc. Com[m.], 23 Cal.2d 215, 219, 143 P.2d 481. See, also, Diamond Drill Contracting Co. v. Industrial Acc. Com[m.], 199 Cal. 694, 260 P. 862; Famous Players Lasky Corp. v. Industrial Acc. Com[m.], 194 Cal. 134, 228 P. 5, 34 A.L.R. 765." To these citations might be added Baugh v. Rogers, 24 Cal.2d 200, 148 P.2d 633, 152 A.L.R. 1043, and Perguica v. Ind. Acc. Comm., 29 Cal.2d 857, 859, 179 P.2d 812.

More pertinent is the decision of the District Court of Appeal in Chapman v. Edwards, 133 Cal.App. 72, 77, 24 P.2d 211, 213, where one Klein owning and operating his own truck, as is the case here, undertook to haul dirt from an excavation being made by the defendant, payment to be made for a fixed price per load. All the work was carried out under the direction of defendant's foreman. In holding that he was an employee the court said: "There was no work that Klein could do independent of the employer, inasmuch as, the latter being in exclusive control and management of the shovel, there would be no dirt to remove until the shovel furnished the load. There was no discretion vested in Klein other than to get under the shovel in his turn with the other trucks of the employer and get his load."

The right of the owner to determine the manner in which the work was to be done and to fix the hours of labor for the deceased and the right of the owner to discharge and the right of the employee to quit at his pleasure are all conceded.

The disposition of the second question posed by appellant does not seem to be difficult. If the status of employer and employee did not exist as a matter of law under the decisions heretofore cited, then the determination of that question of fact should have been made by the trial jury pursuant to proper instructions. Anticipating that the respondents would contest this issue of the relationship, appellant tendered a number of instructions giving the definitions heretofore quoted from the Labor Code and the judicial definitions of that relationship found in the cases which we have heretofore cited. All these instructions were refused.

[3] Finally appellant submitted a request for an instruction reading: "Where transportation is furnished by an employer, as an incident of the employment, to convey an employee to and from the place of employment, an injury or death suffered by

the employee going or coming in the vehicle so furnished by the employer, and under the control of the employer, whether it is operated by the employer personally or by one acting under his directions or orders, arises out of and is in the course of employment, within the meaning of the Workmen's Compensation Act; and under the provisions of the said act, the Industrial Accident Commission is given exclusive jurisdiction of actions arising out of such injury or death." This is a correct interpretation of the law and the instruction should have been given particularly since there was no dispute that the employer furnished transportation to his employee as an incident of the employment.

[4] The refusal to give defendant's proposed instructions on the employer-contractor issue was error. Unquestionably the evidence was in conflict, though the weight of the evidence shows an employer-employee relation. When this evidence is conflicting the question is one of fact for the jury.

[5] The correct rule is given in 57 C.J.S., Master and Servant, § 530, pp. 148–150 as follows:

"Where there is a conflict of evidence as to whether the relation of master and servant existed between the parties at the time of the injury, or the evidence thereon is reasonably susceptible of more than one inference, the question ordinarily should be submitted to the jury. Conversely, where the evidence is not conflicting, and is reasonably susceptible of but one inference, the question as to the existence of the relation is one of law for the court to determine. Where the contract of employment is in writing, the question ordinarily is for the court.

"Thus, where the evidence is susceptible of more than one inference, or there is a conflict of evidence * * * whether the person injured was a servant or an independent contractor * * * is a question for the jury."

There are few California cases relating directly to the jury question because the question whether the status of the injured person is a matter of law or of fact mostly arises in Industrial Accident Commission cases. The following two however relate to jury cases: In Moore v. Pacific Coast Steel Co., 171 Cal. 489, 491, 153 P. 912, it is said that, "Of course wherever the facts are in dispute the question [whether plaintiff was a servant of defendant at the time he received his injuries] is one of fact for the jury." However in that case the fact pleaded by plaintiff that he was an employee was not denied and under those circumstances it was held no error to refuse to give instructions on how to determine whether plaintiff was an employee and to instruct that he was.

In Umsted v. Scofield Eng. Const. Co., 203 Cal. 224, 227–228, 263 P. 799, 800, it is said: "By taking the case from the jury and making the special finding that decedent was the special employee of the construction company, upon which finding the judgment for defendant was entered, the court below adopted the respondent's theory of the case. Unless it can be said that, as a matter of law, no other reasonable conclusion was legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that an appellant court would be impelled to reverse it upon appeal, or a trial court to set it aside, it must be held that the court erred in taking the case from the jury and itself rendering the decision."

The Supreme Court decisions with respect to Industrial Accident Commission cases show the same position as to what is matter of law and what of fact. In Schaller v. Industrial Acc. Comm., 11 Cal. 2d 46, 50–51, 77 P.2d 836, 839, it is said: "The question of whether a worker is an employee within the meaning of the Compensation Act * * * is referred to as a question of mixed law and fact to be proved like any other question. * * * It is a question of fact upon which the judgment of the commission is conclusive where the facts are in dispute. It becomes a question of law only when but one inference can reasonably be drawn from the facts."

In Perguica v. Industrial Acc. Comm., 29 Cal.2d 857, 859, 179 P.2d 812, 813, the rule is stated as follows: "Generally speak-

ing, it is a question of fact to be determined by the commission, from the evidence adduced, whether the essential employer-employee relationship exists, and the commission's finding on that issue will not be disturbed where it is supported by substantial evidence. * * * But 'if from all the facts only a single inference and one conclusion may be drawn, whether one be an employee or an independent contractor is a question of law.'"

In Isenberg v. California Emp. Stab. Comm., 30 Cal.2d 34, 40, 180 P.2d 11, 16, it is said: "The contention that the question whether a person is an employee under section 6.5 of the Unemployment Insurance Act is wholly one of fact, even when the evidence is not in conflict and not reasonably susceptible of conflicting inferences, is untenable. Under such a rule there would be nothing to prevent conflicting interpretations of identical facts by the various trial courts * * *."

Judgment reversed.

GOODELL and DOOLING, JJ., concur.

105 Cal.App.2d 319

PEOPLE v. PARRY.

Cr. 4588.

District Court of Appeal, Second District, Division 2, California.

July 6, 1951.

Floyd Augustus Parry was convicted in Superior Court, Los Angeles County, Thomas L. Ambrose, J., of burglary with prior convictions of rape and robbery, and he appealed from judgment and order denying motion for new trial. The District Court of Appeal, Wilson, J., held that the evidence was sufficient to sustain conviction.

Judgment and order denying new trial affirmed.

1. Criminal law ⇐1159(2, 4)

It is not the function of an appellate court to consider the credibility of witnesses or the weight to be accorded their testimony.

2. Criminal law ⇐260(11)

The findings of the trial court on the subject of credibility of witnesses and weight to be given evidence are conclusive upon District Court of Appeals.

3. Criminal law ⇐1159(3)

Neither variances, inconsistencies nor contradictions in the proof of a crime are of avail on appeal.

4. Criminal law ⇐1044

Objections as to sufficiency of evidence taken at preliminary hearing and that defendant was committed without probable cause, not raised by motion to set aside information in trial court, could not be considered on appeal from conviction.

5. Criminal law ⇐698(2)

Court which had sustained objections in certain instances to improper questions although no objections had been made thereto, acted within scope of its duty.

6. Criminal law ⇐1166½(12)

Remarks by trial judge in prosecution for burglary, after telling defendant defending himself without an attorney that defendant had a right to argue his case, that matter would not be discussed further at that time because defendant denied all participation in burglaries, did not prejudice defendant, where defendant was given an opportunity to argue and did so.

7. Criminal law ⇐666(1)

The prosecution is not compelled to call any particular witness so long as there is fairly presented to the court the material evidence bearing upon the charge upon which the defendant is on trial.

8. Criminal law ⇐1166½(12)

Remark of trial judge in prosecution for burglary that there was not much time so if defendant had some short witnesses court would allow ten minutes, obviously made in anticipation of regular adjournment and not to restrict defendant from

presenting witnesses and testimony, was not prejudicial, especially since record failed to show that court tried to or did restrict defendant in presenting all his witnesses.

9. Criminal law ⇐1171(3)

Remarks of District Attorney in closing argument relating to sale in presence of defendant of third television set alleged to have been stolen that "This is the last time that we find two men. There is a reason for it, but it isn't in the record", was not misconduct warranting reversal of conviction of burglary, where record failed to show that court considered any matters not included in the record or that defendant was in any way injured by the remark of the District Attorney.

10. Burglary ⇐41(1)

Evidence was sufficient to sustain burglary conviction.

Floyd Augustus Parry, pro se.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

WILSON, Justice.

Defendant was charged by information with four counts of burglary and with prior convictions of rape and robbery. He pleaded not guilty and denied the prior convictions. After trial by the court sitting without a jury he was found guilty on all four counts. The court also found prior convictions as charged. Defendant's motion for new trial and his application for probation were denied and he was sentenced to the state prison. This appeal is from the order denying his motion for new trial and from the judgment.

Defendant contends as grounds for reversal that (1) certain of the witnesses committed perjury and their testimony was conflicting and contradictory and not worthy of belief; (2) the charges against him should have been dismissed at the preliminary hearing for lack of probable cause; (3) the court erred in sustaining objections; (4) the court erred in limiting the argument; (5) the prosecution failed to produce certain evidence allegedly in their possession; (6) the court improperly limited him in the presentation of his evidence; (7) the district attorney was guilty of misconduct; (8) the evidence was insufficient to sustain a conviction.

At the commencement of the trial defendant dismissed his attorney and defended himself. His appeal has been taken in propria persona.

On four different dates television sets were stolen from homes while the owners were absent. Within a few hours of the theft in each instance defendant was seen in an automobile in which there was a television set of the type stolen in each burglary; on three occasions the automobile used was similar to the one owned by defendant in which he was arrested. In three of the instances while defendant remained in the car a man entered a bar owned by one Ross and offered the television sets for sale. Three of the sets were sold respectively to Ross and two of his bartenders and were subsequently recovered by the police. On one of the three dates in question a colored man wearing a hat and sunglasses, whose actions, walk height and build were exactly like those of defendant, was seen near the back door of the house from which a television set had been stolen. The fourth burglary was effected by breaking a window. When the owner returned he found blood on the window curtain and on the sidewalk. On the same day defendant entered Ross' bar and offered to sell a television set of the same make and model as that which had been stolen. At the time defendant had a handkerchief wrapped around his right hand which was bleeding. He stated he had scratched it on some glass in North Hollywood. A police officer saw defendant enter Ross' bar and he saw in defendant's car a television set of the same make as that which had been stolen on the same day.

Defendant was arrested the following day. At that time he had a fresh cut on his thumb which he stated he got the preceding day from a screw driver while he was changing a tire. When asked where he was living he said he had no address but was sleeping in his car. He later took the officers to his address on Second Avenue where they found blood-stained clothes

in a shopping bag. Defendant at first denied and then admitted the clothes were his.

At the trial defendant testified he got the cut on his hand in a fight. He denied he had ever been in the Ross bar or that he had a television set in his car on the day it was seen there by the police officer.

There is no merit in any of defendant's contentions.

[1–3] It is not the function of an appellate court to consider the credibility of witnesses or the weight to be accorded their testimony. People v. Hills, 30 Cal.2d 694, 701, 185 P.2d 11; People v. Ash, 88 Cal. App.2d 819, 825, 199 P.2d 711. The findings of the trial court on the subject of credibility of witnesses and the weight to be given evidence are conclusive upon this court. People v. Stanhope, 37 Cal.App.2d 631, 635, 99 P.2d 1075; People v. Carlisle, 66 Cal. App.2d 874, 876, 153 P.2d 401. Neither variances, inconsistencies nor contradictions in the proof of a crime are of avail on appeal. People v. Boyce, 87 Cal.App.2d 828, 830, 197 P.2d 842.

[4] Defendant cannot now interpose objections as to the sufficiency of the evidence taken at the preliminary hearing nor may he complain that he was committed without probable cause. Such objections can be raised only by a motion to set aside the information and cannot be raised upon appeal where such a motion was not made in the trial court. Ex parte Tedford, 31 Cal.2d 693, 694, 192 P.2d 3; People v. Phillips, 12 Cal.App. 760, 762–763, 108 P. 731; Pen.Code, secs. 995, 996. No such motion was made.

[5] Defendant contends the trial court erred in sustaining objections in certain instances where no objection was made by the district attorney and if objection was made it was incomplete. The questions asked were improper and the court acted within the scope of its duty when it refused to allow them to be answered whether or not objections had been previously made thereto. People v. Yuen, 32 Cal.App.2d 151, 160, 89 P.2d 438, 90 P.2d 291.

[6] Defendant asserts he was not given a fair trial because the court after telling him he had a right to argue his case stated "* * * we will not discuss the matter further at this time because you deny all participation in these burglaries." After the remark was made defendant was given an opportunity to argue and did so. He has not pointed out in what manner he was injured by the comment of the court.

[7] Defendant complains that no evidence was offered of the information which caused the police department to watch him; no fingerprint evidence was introduced although the police officer told him he had found defendant's fingerprints at the scene of one of the crimes and a jacket which a police officer testified was a stolen garment which had been found in defendant's room was not introduced. The prosecution is not compelled to call any particular witness so long as there is fairly presented to the court the material evidence bearing upon the charge on which the defendant is on trial. People v. Tuthill, 31 Cal.2d 92, 98, 187 P.2d 16; People v. Simpson, 66 Cal. App.2d 319, 329, 152 P.2d 339.

[8] It is defendant's contention that he was limited in the presentation of his evidence. When the People rested the court stated: "All right, Mr. Parry, we haven't much time, if you have some short witness that we can dispose of in a few minutes." Defendant replied: "I have six witnesses but it won't take very long, they will be very short." The court then stated: "You have about ten minutes." Defendant thereupon called his first witness and after she had testified the court recessed until the following day, when defendant's witnesses resumed their testimony. Since the prosecution had presented its entire case and numerous witnesses had been heard prior to the time the court made the remark complained of it is obvious that the court was anticipating the time of regular adjournment and was merely advising defendant that court would adjourn in about ten minutes, suggesting that he put on a witness whose testimony might be completed on that day. It does not appear from the record that the court tried to or did restrict defendant in any way in presenting all the witnesses and testimony he desired.

[9] Defendant asserts the district attorney was guilty of misconduct because in

his closing argument as he reviewed the facts which had been presented by the People, and in speaking of the third sale of a television set in the presence of the defendant, he said: "This is the last time that we find two men. There is a reason for it, but it isn't in the record." Defendant contends the statement could only mean that the district attorney knew who the guilty men were but that he wanted to convict defendant. There is nothing in the record to indicate that the court considered any matters not included in the record or that defendant was in any way injured by the remark of the district attorney.

[10] There is no merit in defendant's contention that the evidence is insufficient to connect him with the burglaries. He gave three different explanations of the injury to his right hand; he made false statements to the effect that he had no place of residence and that the bloody clothes were not his. Notwithstanding defendant was identified as having been in the automobile with the stolen television sets on four different occasions he did not explain such presence but denied that either he or the television sets had been in the automobile at the times established. All such circumstances point to defendant as the perpetrator of the crimes and the evidence is sufficient to sustain the conviction on each charge.

Judgment and order denying new trial affirmed.

MOORE, P. J., and McCOMB, J., concur.

105 Cal.App.2d 10

NEALIS v. GUIDOTTI.

Civ. 7933.

District Court of Appeal, Third District, California.

June 21, 1951.

Charles Henry Nealis, and another, heirs, brought action against Janet A. Guidotti, beneficiary under will, to recover amounts allegedly due under agreement to refrain from contesting will, and alleged that executor, as agent of beneficiary, had delivered cashier's checks to heirs on a contingency which had been met, but that executor and beneficiary had cancelled checks. The Superior Court, Sonoma County, Hilliard Comstock, J., rendered judgment against plaintiffs, and they appealed. The District Court of Appeal, Schottky, J., pro tem., held that there was no substantial difference between the action and prior actions in which judgments adverse to heirs had been entered, and that everything alleged either was or could have been determined in first actions, and therefore, judgments in first actions were res judicata.

Affirmed.

1. Judgment ⇐713(2)

Where judgments went against heirs in actions against beneficiary of will to recover amounts allegedly due under agreement to refrain from contesting will, where heirs alleged that beneficiary and executor had purchased cashier's checks for that purpose but had failed to deliver them, and heirs brought second action against beneficiary and alleged same agreement and also that executor, as agent of beneficiary, had delivered checks to heirs on a contingency which had been met, but that executor and beneficiary had cancelled checks, there was no substantial difference between the actions, and everything alleged in subsequent action was or could have been determined in the first actions, and therefore, judgments in the first actions were res judicata. Code Civ.Proc. § 527.

2. Judgment ⇐713(2), 720

Even though causes of action be different, if second action involves right, title or issue as to which judgment in first action is a conclusive adjudication, first judgment is res judicata so far as that right, title or issue is concerned in every matter which was or might have been urged to sustain or defeat determination actually made.

Robert E. Hatch, San Francisco, for appellants.

Murphy & Brownscombe, Santa Rosa, for respondent.

SCHOTTKY, Justice pro tem.

Appellants are the children of Carl H. Nealis who died testate on May 6, 1946. Being dissatisfied with the provision made for them in their father's will, appellants filed two separate actions, containing substantially the same allegations, which may be summarized as follows: That the respective plaintiffs were the only children of Carl H. Nealis, deceased; that under the terms of the will of said deceased $20,000 was bequeathed to Charles Henry Nealis, $10,000 to Margaret Nealis Benstein, and the remainder of decedent's property was given to defendant Janet A. Guidotti; that grounds of contest of the will existed and were known to plaintiffs; that plaintiffs agreed orally with defendant not to contest the will in consideration of which she agreed to pay plaintiff Charles H. Nealis $150,000, and plaintiff Margaret Nealis Benstein $100,000; that defendant and the executor of decedent's will purchased cashier's checks payable to the respective plaintiffs in said amounts; that plaintiffs refrained from contesting the will and have lost their right to do so; that defendant failed to deliver the cashier's checks to the respective payees; that there is due from defendant to plaintiff Charles H. Nealis $150,000, and to plaintiff Margaret Nealis Benstein $100,000.

The two actions were consolidated for trial and tried together, and on March 22, 1949, judgment in each case was entered in favor of defendant, the respondent here.

Thereafter, on May 7, 1949, appellants filed the complaint in the present action, which alleges the same kinship of appellants and deceased; the same provisions of decedent's will; the same oral agreement not to contest the will; the same purchase by respondent of the cashier's checks; the same performance by appellants of their covenant not to contest; the same loss of their right to do so; the same failure of respondent to pay to appellants, respectively, the sums of $150,000 and $100,000, and the same prayer for relief. The complaint alleged further that respondent appointed the executor of decedent's will as her agent and that in such capacity said executor delivered the checks to appellants subject only to the condition that the money represented by the checks was to be used to pay decedent's income taxes, if required for that purpose. It is alleged further that, without notice to or consent of appellants, respondent and her said agent surrendered the checks to the bank and caused them to be cancelled notwithstanding that the money represented by them was not required for the payment of decedent's income taxes.

In answer to the complaint in the present action respondent pleaded the defense of res adjudicata, and in accordance with section 527 of the Code of Civil Procedure this special defense of res adjudicata was tried in advance of a trial upon the merits. The court found that the judgments in the previous actions barred the cause of action alleged in the present action. This appeal is from the judgment entered in accordance with such finding.

Appellants argue that the difference between the two suits is a substantial one. They assert:

"The first suit sounded entirely upon a supposed oral contract between the parties, entered into on Friday, May 10, 1946. (C.T. 20) This was that in consideration of plaintiffs not contesting the supposed last will and testament of their father, Carl H. Nealis, the defendant (residuary beneficiary thereunder) would pay plaintiffs the sum of $250,000.00; that thereafter defendant failed to pay said sum, or any part thereof and it therefore remained due plaintiffs in its entirety. (C.T. 20)

"To the contrary, the second suit alleged a contract between the parties that was made at a later date, i. e. Wednesday, May 15, 1946. (C.T. 2) At that time, according to paragraph V et seq., defendant purchased $250,000.00 in cashier's checks, payable to plaintiffs; then she delivered and passed title to them to plaintiffs; this was subject only to the condition that Thomas M. Carlson as her agent was to hold the checks with the right to use so much of them, if any, as might be necessary to discharge the income tax liability of the decedent. The complaint completes the cause of action in alleging the contingency had been met, that is the income taxes in fact there-

after were discharged without resorting to any part of the funds represented by the cashier's checks, but regardless thereof, defendant repudiated the agreement, cancelling the checks instead of releasing them to plaintiffs."

[1] We are unable to agree with appellants' contention that the difference between the present action and the earlier actions is a substantial one. A reading of the respective complaints convinces us that the basis of both actions was that appellants claimed that respondent agreed orally to pay them $150,000 and $100,000, respectively, in consideration of their agreeing not to contest the will of decedent. Everything that was alleged in the present action either was or could have been determined in the previous action.

In Smith v. Schuler-Knox Co., 85 Cal. App.2d 96, at page 100, 192 P.2d 34, 36, this court said:

"The real issue upon which the appellants rely is the assertion that the amended complaint alleges a cause of action based on their right to redeem the property from the constable's sale in 1933, which they claim was not an issue in the subsequent suit quieting title against them, the judgment of which was rendered in 1937, and that it therefore is not res judicata as to that undetermined issue. But we are of the opinion that issue of the right to redeem the property was based on their interest in the property which could and should have been determined in that suit to quiet title, and that the judgment therein must therefore be deemed to be res judicata of that issue. Moreover, Section 702 of the Code of Civil Procedure provides that the judgment debtor may redeem the property from sale 'within twelve months after the sale', upon specified conditions mentioned. That section prescribes a limitation of time within which the property must be redeemed. It was not so redeemed, and no effort was made to comply with the statute in that regard.

"It has been repeatedly determined that res judicata applies not only to the issues which were actually pleaded and determined by the former judgment, but also to all issues which could have been properly tendered and determined thereby. [Citing cases.]"

And in Scarbourough v. Briggs, 81 Cal. App.2d 161, at page 167, 183 P.2d 683, 687, the court said:

[2] "Appellants, however, apparently have a misconception of this rule. They seem to contend that an issue heard and determined in a former case is binding only as to such grounds supporting or opposing said issue as were actually urged and litigated. But an issue may not be thus split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result. In other words, when an issue has been litigated all inquiry respecting the same is foreclosed, not only as to matters heard but also as to matters that could have been heard in support of or in opposition thereto. This rule has been aptly stated as follows: 'It is important to note in this connection, however, that even though the causes of action be different, if the second action involves a right, title or issue as to which the judgment in the first action is a conclusive adjudication, the estoppel so far as that right, title or issue is concerned must likewise extend to every matter which was or might have been urged to sustain or defeat the determination actually made.' [Citing cases.]"

See, also, McManus v. Bendlage, 82 Cal. App.2d 916, at page 922, 187 P.2d 854.

In view of the foregoing we conclude that the trial court correctly determined that the cause of action alleged in the instant action was barred by the judgment in the previous actions.

The judgment is affirmed.

PEEK, Acting P. J., and VAN DYKE, J., concur.

HILLER et al. v. KING et al.

Civ. 14606.

District Court of Appeal, First District, Division 1, California.

June 29, 1951.

Hearing Denied Aug. 23, 1951.

Stanley Hiller and Opal Perkins Hiller brought action against Joseph H. King and others for rescission of contract for sale of realty by defendants to plaintiffs, to cancel trust deed and notes given in connection with the purchase, to recover moneys already paid seller, and to recover damages. The Superior Court, in and for the County of Alameda, O. D. Hamlin, Jr., J., entered judgment for the defendants, and the plaintiffs appealed. The District Court of Appeal, Peters, P. J., held that evidence sustained finding that refusal of defendants to approve plaintiffs' plan for release of portions of tract from lien of trust deed, was not unreasonable.

Judgment affirmed.

1. Vendor and purchaser ⇐123

In action by purchasers of 50 acre tract of land against vendors to rescind contract of sale on ground that vendors breached provisions in contract that if purchaser should desire to obtain release of any portions of tract from lien of trust deed, the minimum sum payable by purchasers to secure such release shall be on such basis as shall be mutually agreed on by the parties, evidence sustained finding that refusal of vendors to approve release plan submitted by purchasers was not unreasonable and was not a breach of the contracts.

2. Vendor and purchaser ⇐123

In action by purchasers of 50 acre tract of land against vendors to rescind contract of sale on ground that vendors breached provisions in contract that if purchaser should desire to obtain release of any portions of tract from lien of trust deed, the minimum sum payable by purchasers to secure such release shall be on such basis as shall be mutually agreed on by the parties, purchasers could not complain that vendors failed to make a counter proposal after rejecting purchasers' proposed lease plan which court, under sufficient evidence, found was properly rejected by vendors.

3. Contracts ⇐312(1)

The attaching of an unwarranted condition to an offer of performance of a contract amounts to a refusal to perform.

4. Vendor and purchaser ⇐110

In action by purchasers of 50 acre tract of land against vendors to rescind contract of sale on ground that vendors breached provisions in contract that if purchaser should desire to obtain release of any portions of tract from lien of trust deed, the minimum sum payable by purchasers to secure such release shall be on such basis as shall be mutually agreed on by the parties, evidence that vendors suggested that city and state approval of subdivision plan be secured by purchasers before a release plan would be approved by vendors, did not establish a breach of the contract by the vendors.

Sherman & Peters, San Francisco, for appellants.

Huovinen & Koford, Oakland, for respondents, Joseph H. King, Pearl King Tanner, and C. H. King Estate Co.

PETERS, Presiding Justice.

The Hillers, as purchasers of a 50-acre tract of land from the Kings, alleging that the Kings had breached the contract, brought this action for its rescission, to cancel the deed of trust and promissory notes given by them in connection with the purchase, to recover moneys already paid, and to recover damages. The trial court gave judgment for the defendants, and plaintiffs appeal.

In the year 1934 appellants purchased from the respondents three and one-half acres of land adjoining the Tunnel Road in Oakland, and appellants constructed a home on this parcel. Adjoining this property was another parcel consisting of 50 acres owned by the respondents. Mrs. West, also referred to as Mrs. McGowan, and admittedly the manager and agent of the respondents, tried to interest the appellants in purchasing this parcel as a protection to their home property. These discussions

were rather desultory until 1944 and 1945 when they became serious. During these discussions Hiller told Mrs. West that any purchase agreement would have to contain a release clause so that Hiller could sell the land in parcels if he so desired. Mrs. West agreed to this on condition that any release plan must be satisfactory to respondents. In fact, Mrs. West suggested that the agreement embody a specific release plan, and suggested the basis for such a plan, but Hiller objected because he did not want to tie himself down to any one plan until he had decided what he wanted to do with the tract.

On May 10, 1945, the C. H. King Estate Company, the owner of the property, by proper resolution, authorized Mrs. West to offer the property to Hiller for $67,500, payable $5,000 down, $10,000 within six months, and the balance within five years, deferred payments to be secured by a deed of trust and promissory note drawing interest at 4½%, payable quarterly. The resolution also authorized Mrs. West to make provision in the agreement "for partial release of any portion or portions of the property sold on such basis as may hereafter be mutually agreeable to the corporation and to said Stanley Hiller." Under date of May 16, 1945, Hiller and the King Corporation entered into an agreement embodying the terms set forth in the above-mentioned corporate resolution. Clause 5 of this agreement, which was apparently drafted by Hiller, reads as follows: "It is understood and agreed that in the event first party, from time to time, desires to obtain release from the lien of said deed of trust any portion or portions of the property hereunder, the minimum sum payable by first party to secure such release will be on such basis as may hereafter be mutually agreed upon by the parties hereto, and all payments on account of portions of the property so released will be credited upon the said purchase price and upon the note given in evidence thereof."

After the agreement was entered into Hiller started to develop the property. He was informed by an architect that a prior plan that had been worked out by the Kings was impractical, and another plan was suggested by the architect. Pursuant to this plan, in 1946, certain roads were constructed on the property. During that summer Hiller employed attorney Franklin Brown to work out with respondents an acceptable plan of releases consistent with clause 5 of the contract so that Hiller could sell several parcels to persons who had evidenced an interest. Pursuant to this employment Brown had several conversations with Mrs. West and with Harold Huovinen, the attorney for respondents. Brown and Huovinen arrived at what appeared to them to be a fair release agreement covering the entire 50 acres. This plan, for release purposes, divided the 50 acres into 29 parcels, and fixed a price for each parcel for releasing that parcel from the underlying deed of trust. The prices so fixed in the aggregate totalled 140% of the balance owed on the property, which balance was then $52,500. On September 18, 1946, Brown wrote to Huovinen as follows:

"I enclose herewith draft of a proposed agreement for release of individual parcels of property from the deed of trust held by the King heirs, following the lines of our discussions on the telephone. A map and schedule of proposed release prices are attached. You will note that the total of the release prices is $73,550.00. This is approximately 140% of $52,500.00, which is, I am advised, the amount at present unpaid on the Hiller's note.

"Although Mr. Hiller intends to retain the 12.13 acres adjoining his home, a release price has been entered for each of these acres in order to allocate the release amounts over the entirety of the property subject to the deed of trust.

"The enclosed draft is merely a suggestion and I shall be glad for your comments."

On September 20, 1946, Huovinen wrote to Brown as follows:

"In reply to your favor of September 18th, please be advised that I have this day forwarded the proposed release agreement to one of the three King heirs. I will submit it to each of the other heirs in due course and after I have the views of each of them pertaining to the proposal I will get into further communication with you.

"Personally, I think the agreement in its proposed form is just about satisfactory."

The respondents, however, were unwilling to approve the proposed release plan mainly because they believed that the roads already constructed had adversely affected the value of the property, and they were afraid that the most attractive parcels would be sold and the less attractive parcels would not be sold, thus imperilling the security for the balance of the purchase price. Under date of October 2, 1946, Huovinen wrote to Brown as follows:

"After receipt of the proposed form of releasing Agreement I forwarded the same to Mr. Charles H. King, one of the owners of the Hiller note, for his consideration. He considered the same together with his sister, Pearl King Tanner, and they both agreed that they did not wish to enter into a releasing Agreement at this time. Because of this reaction, I did not deem it necessary to submit the agreement to the third co-owner, Joseph H. King.

"It seems that Mr. Charles H. King and Mrs. Tanner feel that since the note contains provisions allowing Mr. Hiller to pay off the same before its due date that he should do so if he intends to carry out his decision to subdivide.

"Under the circumstances, it would appear that Mr. Hiller will have to refinance his note with some bank or other lending agency in the event that he goes forward with the subdivision."

Brown, under date of October 9, 1946, wrote to Huovinen as follows:

"This will acknowledge receipt of your letter of October 2nd conveying the refusal of the King heirs to enter into any release agreement respecting the property sold Mr. Stanley Hiller.

"I have advised Mr. Hiller of the contents of your letter, and he has drawn my attention to an agreement dated May 16, 1945, entered into with the Kings contemporaneously with the sale of the above property. It is possible that you did not know of this agreement, and I would like to direct your attention to paragraph five thereof, which reads as follows: [Here follows clause 5 of the original agreement.]

"As you know, it is both a practical and a legal impossibility to subdivide property without providing for the release of any parcels sold from an over-all deed of trust. The Kings knew that Mr. Hiller intended to subdivide the above property when they sold it to him. One of the things which induced Mr. Hiller to buy the property was their promise that they would enter into a release agreement; in fact, Mr. Hiller would never have bought the property if he had not had an assurance from the Kings that they were willing to enter into such an agreement. The only possible use for a large and expensive piece of residential property like this was subdivision, which would have been impossible without the Kings' agreement to enter into a release arrangement.

"I am advised that the Kings repeated their promise to enter into a release agreement earlier this year when Mr. Hiller was formulating plans for subdividing the property. Mr. Hiller relied on their promises and went forward with improvements for subdivision purposes. The Kings have known of this work for some time. Mr. Hiller has already paid out large sums on improvements, and has committed himself to expend further amounts.

"My negotiations with you, as the Kings' attorney, have been carried on since I first talked to you on September 3rd on the assumption that the Kings were agreeable to entering into an equitable release agreement. I know you would not have put Mr. Hiller to the expense of having a complicated release agreement drafted except on that basis.

"The purpose of this letter is to advise Pearl King Tanner, Joseph H. King and Charles H. King that Mr. Hiller does not desire to waive or relinquish any rights he may have by virtue of the foregoing events.

"Mr. Hiller expects the Kings to live up to their agreement.

"Would you kindly lay this matter before the Kings at your earliest convenience and advise me of their decision so that Mr. Hiller may formulate his plans accordingly."

Mrs. West testified that she discussed the release plan submitted by Hiller with

Charles King and with Huovinen, and that the plan was rejected because under it the security of the respondents would have been practically destroyed. She also testified that, after Huovinen had rejected the plan, she told Hiller, over the telephone, that the plan was worthless, and that Hiller had replied that "it was this plan or no other." Hiller denied that this conversation had taken place.

Mrs. West, upon inquiry made both before and after the Hiller plan had been rejected, ascertained that the city planning commission had never approved the road system constructed by Hiller nor any subdivision plan of Hiller's. It was stipulated that all plans submitted by appellants to the planning commission had been rejected. Mrs. West denied that she ever told Hiller that approval of a release plan was conditioned upon approval of a subdivision plan by the city and state agencies involved. To the contrary she told Hiller, according to her testimony, that the submitted release plan was unsound because the release of any one of the twenty-nine parcels might cut off or impair the right of access to some of the retained parcels, thus impairing the security of the Kings.

On October 16, 1946, Mrs. West wrote to the State Real Estate Commission informing it that the Kings had sold the 50-acre tract to the Hillers subject to a deed of trust; that the Hillers had requested a release of portions of the tract as parcels were sold; that the property had been surveyed and roads installed; and that no plan for roads or for subdividing had been approved by the city commission. The letter closed with the following paragraph: "We would like to know whether Mr. Hiller has made application to subdivide this tract and if you have approved it. We would also like to know if it is a fact that he can sub-divide without a permit providing he sells no more than five lots in any one year. His tentative map shows 29 lots."

Under date of October 30, 1946, Lewis, a deputy of the commission in the Oakland office, wrote to the Kings in part as follows:

"You state in your letter that Stanley Hiller purchased a fifty acre tract from you on the Tunnel Road and that he is requesting release prices from you covering your deed of trust.

"We have written Mr. Hiller previously for his report but have failed to hear from him to date. We would appreciate your cooperation in this matter, and inform Mr. Hiller that until such time as he produces evidence to your office to the effect that he has or is about to file a report with this Division, you will not agree to a schedule of release prices for lots in this parcel."

On November 18, 1946, Mrs. West wrote to Huovinen, enclosing a copy of the Lewis letter, and stated in part:

"I also asked in that letter if he could sell five or less lots per year without a permit from the Real Estate Commission. Mr. Lewis failed to answer this last question, so I phoned him to discuss the matter. He replied that they could not subdivide any tract that had six or more lots, no matter how many or how few were sold in a year, until such time as he has filed and had approved by the Division, a report on the tract.

"Mr. Lewis said further that if we granted Mr. Hiller a schedule of release prices now it was possible we might be enjoined in a suit against him if he sold lots without the permission to do so."

Under date of November 19, 1946, Huovinen wrote to Brown, enclosing copies of the Lewis and the last-quoted letter from Mrs. West, and stated:

"In view of the request of Mr. Lewis, it is the present position of the three successors in interest of the C. H. King Estate Company that until such time as Mr. Hiller produces evidence to the effect that he has filed, or is about to file, a report with the Division of Real Estate, they will not agree to any specific schedule of release prices for lots in the Hiller property.

"As soon as a definite plan acceptable to the Division of Real Estate has been completed, then—of course, the successors in interest of the C. H. King Estate Company will be glad to comply with the commitments heretofore given relative to the

working out of a schedule of release prices."

This correspondence all took place in 1946, but the negotiations between the parties did not cease in that year. In February of 1947 Brown discussed with Huovinen a possible plan of dividing the 50-acre tract into four parcels and fixing a release price for each parcel. These discussions were caused by the fact that a Mr. Pedemonte was interested in buying one such parcel. However, no specific release plan was ever submitted in reference to this four-parcel suggestion. Brown also talked to Huovinen, very generally, about the possibility of a release plan based upon a release price for each individual acre. However, no specific plan was ever suggested in these discussions; in fact, the only release plan ever submitted by Hiller was the original 29-parcel plan. The Kings did not submit any release plan. Brown admitted that in the discussions with Huovinen about the 4-parcel and single-acre plans Huovinen did not break off discussions, but testified that they never seemed able to agree.

In the early fall of 1948 Hiller conceived the idea of constructing a group of cooperative apartments on the property. He discussed the plan with one of his attorneys and had a plan drafted. Shortly thereafter, under date of October 25, 1948, he wrote to Huovinen as follows:

"I have not given up hope of subdividing and marketing the property which I purchased from the King Estate and believe that with an improved market for building lots we could come to a final agreement on the release of lots sold from the deed of trust on the plan previously discussed with you by my attorney, Mr. Brown. If you can advise me whether the Kings are now willing to proceed with the making of a release agreement as originally intended, I shall refer the matter again to Mr. Brown to conclude the matter on my behalf. However, I do not wish to incur unnecessary expense if your clients have reached a final decision not to enter into any release arrangement.

"Please advise me what I may expect in this connection as I wish to avoid further expense in building roads, etc., if it is necessary for me to refinance or otherwise dispose of the property.

"I would appreciate your early reply giving me your clients' final word in the matter."

This letter elicited the following reply from Huovinen dated October 28, 1948:

"I have been advised by my clients that they would not consider the matter of releases on the property purchased by you until you have presented a subdivision plan which has been approved by both the City of Oakland and the State of California.

"My attention has been called to the fact that apparently you previously totally ignored the advice or rulings of both in the matter of construction of roads. This is one of the reasons that the interested parties do not wish to entangle themselves in a plan which would in any way weaken their security.

"In light of the foregoing may I suggest that if you desire to take up the matter of a release plan you first get full approval of a subdivision plan as indicated."

This letter provoked a letter dated November 5, 1948, from the Hillers to the Kings giving the Kings notice of intention to rescind. The notice states that the Kings have now improperly added the condition to the contract that before a release plan will be approved by the Kings the Hillers must secure approval of a subdivision plan, and that such was not contemplated by the parties when the contract was entered into.

Dated November 18, 1948, Huovinen replied to this letter, refusing to accept the proffered rescission, and denying that the Kings had violated, in any way, the terms of the existing contract. He also included a notice of default, because the Hillers were then three months behind in their required payments.

There is some other evidence to which reference should be made. Brown testified that the State Department of Real Estate requires that before a piece of land can be sold from a larger piece covered by a deed of trust there had to be a plan whereby the purchaser of the parcel could

get his parcel free and clear of the underlying deed of trust when he paid the purchase price of his parcel. If a large area is to be cut up into more than five parcels, the seller must answer a questionnaire giving certain required information to the state, and must attach a copy of the release plan. Admittedly, such a questionnaire was never filed by the Hillers, for the reason, according to Brown, that a release plan had never been agreed upon. Brown and Hiller admitted that the roads constructed by the Hillers on the tract had been constructed without prior or any approval of the city planning commission. Hiller knew at all times here relevant that state and city approval were conditions precedent to any subdivision plan.

There was expert testimony to the effect that the road work done by the Hillers adversely affected the value of the entire tract, but the roads could have been widened and the turning areas enlarged. Four witnesses testified that they were ready, able and willing to purchase lots from Hiller, had Hiller been able to sell.

On this evidence, so far as pertinent here, the trial court made four basic findings:

1. That on September 18, 1946, the Hillers submitted to the Kings a written release plan, to which the Kings refused to agree; that such refusal was not unreasonable; that this was the only release plan submitted;

2. That no basis for the releases was ever mutually agreed upon;

3. That the Kings never refused to enter into a reasonable release agreement in accordance with the basic contract; and

4. That the Kings have, at all times, been ready and willing to perform all obligations under the agreement.

Judgment was entered in favor of the Kings, and the Hillers appeal.

In their answer to the appellants' complaint the respondents had averred that the release agreement contained in clause 5 of the contract of sale was merely an agreement to agree in the future and, therefore, unenforceable. This allegation, say the appellants, demonstrates that respondents repudiated clause 5 and had no intention of complying with it. The trial court made no findings as to the legal effect of clause 5.

Not as a question of fact but as a matter of law, there is grave doubt as to whether clause 5 imposes an enforceable obligation on respondents. The parties entered into a complete contract of purchase and sale. Then, by clause 5 they provided that if appellants wanted to resell, "from time to time" the parties would agree upon a release price to be then "mutually agreed upon by the parties." This would appear to be no more than a provision that if the contingency arose the parties would get together and try to agree upon a release plan that would be acceptable to both parties. Certainly the Kings did not agree to approve any release plan that might be submitted. It would appear that the clause contains nothing more than an agreement to try to agree upon a release plan sometime in the future if the Hillers decided to subdivide. There is grave doubt as to whether such an agreement is enforceable. In Autry v. Republic Productions, Inc., 30 Cal.2d 144, 180 P.2d 888, there was a paragraph of an employment contract that provided that, in the event Autry should enter the military service, the parties "will agree upon their mutual rights and obligations hereunder in view of such military service." 30 Cal.2d at page 151, 180 P.2d at page 893. In commenting on this paragraph the court stated: "There is no dispute that neither law nor equity provides a remedy for breach of an agreement to agree in the future. Such a contract cannot be made the basis of a cause of action. [Citing three California cases.] The court may not imply what the parties will agree upon. [Citing one California case.]" The rule was stated as follows in Dillingham v. Dahlgren, 52 Cal.App. 322, 330, 198 P. 832, 835: "An agreement that parties will, in the future, make such contract as they may then agree upon amounts to nothing. An agreement to enter into negotiations and agree upon the terms of a contract, if they can, cannot be made the basis of a cause of action. Where a final contract fails to express some matter, as, for instance, a

time of payment, the law may imply the intention of the parties; but where a preliminary contract leaves certain terms to be agreed upon for the purpose of a final contract, there can be no implication of what the parties will agree upon." See, also, Kerr Glass Corp. v. Elizabeth Arden Corp., 61 Cal.App.2d 55, 141 P.2d 938.

[1] However, even if clause 5 did impose an obligation upon the Kings to approve a reasonable release plan, the finding that the Kings' refusal to approve the plan submitted was not unreasonable is fully supported by the evidence.

The appellants argue that respondents simply arbitrarily refused to enter into any over-all release plan; that their final refusal attempted to add a new condition to any release plan, namely, approval of a subdivision plan by the city and state authorities; that such refusal resulted in a partial failure of consideration, which entitled them to rescind, § 1689, subd. 2, Civil Code; see cases collected 6 Cal. Jur. p. 391, § 235; that the release plan submitted by Brown to Huovinen was not a subdivision plan at all, and did not require city or state approval; that it was simply a chart setting up values for the release of the designated parcels when and if any such parcel was sold; that this plan would be useable whether the 50-acre tract was sold in several parcels or many, up to 29 parcels; that the plan was fair and reasonable because it provided release prices that amounted to 140% of the balance owed the Kings; that Huovinen had approved the submitted proposal; that after Huovinen had submitted the plan to the Kings, by his letter of October 2, 1946 the refusal to approve was not based on any contention that the submitted plan was unreasonable, but constituted an outright refusal to "enter into a releasing Agreement at this time," and demanded that Hiller, if he wanted to sell the tract in parcels, "refinance his note"; that this was an outright refusal to perform a promise that was the primary inducement to appellants to enter into the contract; that this resulted in a material failure of consideration justifying a rescission; that although clause 5 sets no time for performance, a reasonable time is implied under section 1657 of the Civil Code.

Most of these arguments are based on appellants' interpretation of the facts, and completely disregard the conflicting evidence and the reasonable inferences therefrom. Undoubtedly there is evidence, and inferences from the evidence, to support findings that clause 5 was a substantial and material covenant, and that respondents' refusal to approve the submitted plan was unreasonable. But the difficulty with all of appellants' arguments is that the trial court found that respondents' refusal to approve the submitted plan was not unreasonable, and there is evidence to support that finding.

Before directly discussing this point, however, there are certain portions of appellants' argument that should be first mentioned. Although Huovinen stated that, in his opinion, the submitted plan was satisfactory, it was not within his power to make the final decision, and his letter expressing his personal approval stated that the proposal would be submitted to the Kings. It is true that Huovinen's letter of October 2, 1946, definitely stated that the Kings "did not wish to enter into a releasing Agreement at this time," and indicated that Hiller would have to refinance his note if he wanted to subdivide. That looks, on its face, as if respondents absolutely refused to enter into any release agreement, reasonable or otherwise. If suit had been brought shortly after October 2, 1946 (assuming that clause 5 contains an enforceable covenant), there would be much force in the argument that respondents had violated the clause, had refused to enter into any release agreement, and that there was a failure of consideration. But the parties did not interpret nor treat the letter of October 2, 1946, as an outright refusal. For two years, thereafter, they continued to negotiate and to attempt to arrive at an agreement on a reasonable plan. For these reasons the letter of October 2, 1946, cannot be construed as an absolute refusal to enter into a reasonable release plan because the parties did not so interpret it. Moreover, there is the testimony of Mrs. West that she conveyed to Hiller the information

that the Kings believed the plan to be unreasonable, and gave the reasons for such belief, but was told by Hiller that respondents had to approve the submitted plan and no other.

[2] It should be also pointed out that the only plan ever tendered by appellants was the one contained in the letter of September 18, 1946. In more than over two years of subsequent negotiations no other plan was submitted by appellants. Certainly, appellants cannot complain that respondents failed to make a counter-proposal. Not only did clause 5 not impose any such obligation upon respondents, but the very nature of the clause makes it clear that the burden of working out the details of a release plan was imposed on appellants, for whose benefit the clause had been inserted. Moreover, respondents were never requested to submit a counter-proposal. It must be remembered that, before the agreement of purchase and sale had been entered into, Mrs. West did suggest that the contract should contain a definite release plan, but Hiller objected and refused to tie himself down to one plan.

On the key question as to whether the finding that respondents' refusal to enter into the release plan of September 18, 1946, was not unreasonable, the evidence is clearly in conflict. In the first place, it is very doubtful if respondents ever obligated themselves to approve a single all-inclusive release plan covering the entire tract. Clause 5 refers to releases "from time to time" of "any portion or portions of the property." A reasonable interpretation of the agreement is that the parties intended that if Hiller decided to sell a portion of the 50-acre tract, the parties would agree upon a release price for that parcel, and not that respondents would agree in advance to an over-all release plan. Thus, respondents, as appellants made their proposal for a specific parcel, could determine upon a release price for that parcel that would not adversely affect their security.

In the second place, the finding that respondents' refusal to approve the proposal of September 18, 1946, was not unreasonable, even if an over-all release plan was contemplated, is supported by convincing evidence. Attached to the proposal was a map showing a system of roads which had not been approved by the city, which provided no means of ingress and egress from certain of the parcels, and which made possible selective selling that would have adversely affected the security of respondents. These roads were constructed before the release plan was submitted.

[3] But, say appellants, Huovinen's letter of October 28, 1948, imposed a new and unwarranted condition, that is, that no release plan would be entered into unless a subdivision plan had been first approved by the city and state authorities. It is contended that under the law, §§ 11000, 11010 and 11013 of the Business & Professions Code, approval of a subdivision plan could not be secured until the subdivider first secured a binding release plan. Therefore, say appellants, respondents actually attached a condition to further negotiations that they knew could not be fulfilled. Based on these premises, reliance is placed on those cases stating the well-settled rule that attaching an unwarranted condition to an offer of performance amounts to a refusal to perform. Steelduct Co. v. Henger-Seltzer Co., 26 Cal.2d 634, 160 P.2d 804; Loop Building Co. v. DeCoo, 97 Cal.App. 354, 275 P. 881.

[4] We think it undoubtedly is the law that the release plan must be secured before a subdivision plan will be finally approved, and sales of separate parcels permitted. But that does not mean that by the letter of October 28, 1948, the respondents, under the facts, acted unreasonably in suggesting that city and state approval be secured before a release plan would be approved. The actual facts existing must be considered. Here, respondents had sold 50 acres of unimproved land to appellants and had accepted quite a small down payment. They had a material financial interest in protecting their security for the balance of the purchase price. The appellants had constructed roads on the property in violation of the law, in that approval of the city authorities had not been secured. There was positive evidence that the system of roads attached to the release plan of September 18, 1946, and the system of roads actually

constructed by appellants, resulted in making the value of the entire tract less than it was before the roads were constructed. While it is true that the plan of September 18, 1946, was not a subdivision plan, but simply a schedule of release prices, in view of the fact that if respondents approved the release plan appellants could have then attempted to get approval of a subdivision plan based on the release plan, and in view of the fact that a road system aimed at carrying such a plan into effect had been constructed, it was not unreasonable for respondents to suggest that city and county approval be secured before a release plan would be approved. It would have been a meaningless gesture to have approved a release plan if the subdivision plan were unacceptable. Moreover, respondents had been informed by the state real estate department that the department had requested a report from Hiller, but that he had not responded. The deputy requested respondents to cooperate with the department by informing Hiller that, until such time as he produced evidence that a report had been filed with the department, no release plan would be approved. The deputy also informed Mrs. West that if Hiller tried to sell lots without permission, respondents might be subject to an injunction suit. These facts were conveyed to Brown on November 19, 1946. Under the circumstances, the proposed condition was not unreasonable.

Some objection is made to the findings. Thus, it is urged that there is no express finding as to the reasonableness of the valuations set forth in the letter of September 18, 1946. But finding VII is to the effect that respondents' "refusal was not an unreasonable refusal." That finding, by necessary implication, includes a finding that the proposal was not reasonable. The findings could have been more specific on this and on some other issues, but the court did find on the key issues, and that is all that is indispensable. As we read this record, Hiller has brought the difficulties under which he now labors on his own shoulders. He went ahead and constructed roads without proper approval, thus jeopardizing the security of respondents. That is what caused respondents to be suspicious and quite critical of any release plan. Hiller never did get out of the difficulties caused by his proceeding to construct the roads without government approval.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

105 Cal.App.2d 332

PEOPLE v. YNOSTROZA.

Cr. 4626.

District Court of Appeal, Second District, Division 3, California.

July 6, 1951.

Henry Joseph Ynostroza was sentenced to imprisonment in the penitentiary on his plea of guilty of unlawfully possessing flowering tops and leaves of Indian Hemp, and he filed a petition for a writ of error coram nobis. From an order of the Superior Court, Los Angeles County, Charles W. Fricke, J., denying the petition, defendant appealed. The District Court of Appeal, Wood, J., held that resolution of a conflict between allegations in defendant's affidavit supporting the petition and his attorney's testimony as to whether such attorney, through coercion, fraud, pressure and duress, induced defendant to withdraw his plea of not guilty and plead guilty, was for the trial judge.

Order affirmed.

1. Criminal law ⇐997

The mere fact that defendant's private attorney advises and persuades defendant to plead guilty of crime does not constitute sufficient basis for issuing writ of error coram nobis to review judgment imposing sentence on such plea.

2. Criminal law ⇐997

On petition for writ of error coram nobis to review judgment sentencing petitioner to imprisonment on his plea of guilty of unlawfully possessing marijuana, evidence supported trial court's finding that

defendant did not enter such plea because of coercion or fraud practiced on him by his attorney. Health and Safety Code, § 11500.

3. Criminal law ⇐1158(1)

Resolution of conflict between allegations in defendant's affidavit, supporting his petition for writ of error coram nobis to review judgment sentencing him to imprisonment on his plea of guilty of unlawfully possessing marijuana, and his attorney's testimony, as to whether attorney, through coercion, fraud, pressure and duress, induced defendant to withdraw plea of not guilty and plead guilty, was for trial judge, not District Court of Appeal on appeal from order denying petition. Health and Safety Code, § 11500.

Altagen, Rubin & Umann and Harry M. Umann, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Gilbert Harelson, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Appeal from an order denying petition for writ of error *coram nobis*.

Defendant was charged with violation of section 11500 of the Health and Safety Code, in that, he unlawfully had in his possession flowering tops and leaves of Indian Hemp. At all proceedings in court he was represented by an attorney at law. At the arraignment he pleaded not guilty. On the date the case was set for trial he pleaded guilty. He was sentenced to imprisonment in the penitentiary.

About two months after he had been sentenced, he filed in the trial court a petition for a writ of *coram nobis*, which petition stated in part as follows: That his attorney "through coercion, fraud, pressure and duress" induced him to withdraw his plea of not guilty and to plead guilty; that defendant was not guilty of the crime charged, and he would have been able to establish his innocence if the matter had been tried on its merits. In his affidavit in support of said petition he stated in part as follows: That he was arrested at home; about two hours before he was arrested he had left his wife's car at a nearby garage to be repaired; the officers took him to the garage and "pulled out of the car an inner tube" containing marijuana and accused him of owning the marijuana; he denied the accusation; he at all times stated to his attorney that he was not guilty; at the time set for the trial the judge who usually presided in said department of the court was on vacation and another judge was presiding; his attorney told him that because he had been a defendant in the "Sleepy Lagoon case" it would be better for defendant, although he was not guilty, to plead guilty before the judge then presiding and he would probably receive a suspended sentence; that he replied that he was innocent and he would prefer to let the court decide the case; his attorney then insisted that he plead guilty, and if he did not plead guilty he would no doubt be punished very severely if he were found guilty; that through the pressure, insistence and demands of his attorney he was induced to plead guilty when in truth he was not guilty; that the transcript of the preliminary examination shows that the car in which the marijuana was found was out of the possession of defendant at least two hours, that during that time many persons entered the garage premises, that the car was parked on a lot outside the garage and any one could have placed the marijuana therein; he related said facts to his attorney, but the attorney kept insisting that he plead guilty; the car belonged to his wife; the officers threatened to arrest his wife and entire family unless he admitted that the marijuana belonged to him; he would not have pleaded guilty if he had not been induced by the coercion, fraud and duress practiced upon him by his attorney.

[1, 2] This appeal is wholly without merit. The mere fact that a defendant's private attorney advises and persuades him to plead guilty does not constitute a sufficient basis for issuing a writ of error *coram nobis*. See People v. Gilbert, 25 Cal.2d 422, 443, 154 P.2d 657, 667, 668; People v. Morton, 100 Cal.App.2d 269, 270, 271, 223 P.2d 259, 260; People v. Martinez,

88 Cal.App.2d 767, 772, 199 P.2d 375, 378. Furthermore, the trial court found as a fact that defendant did not enter his plea of guilty by reason of coercion or fraud practiced upon him by his attorney. The attorney testified at the hearing that when defendant first came to him he told him (attorney) that he had had about 36 pounds of marijuana in the two tire tubes in the car which was in a public garage; the officers who found the marijuana told the attorney that it took them an hour to find the secret compartment; defendant told him that he (defendant) had told the officers that the marijuana was his; the attorney then told defendant that under those circumstances "you have just hung yourself, there is nothing you can do"; the attorney told defendant he had no defense, and the defendant replied, "No, I have no defense"; the plea of not guilty was entered because the defendant wanted to stay out of jail as long as possible; they (attorney and defendant) always contemplated that defendant would plead guilty at the time of trial; defendant said, on several occasions, that he wanted the case moved to another department because he knew that Judge Fricke (the judge who usually presided in the department where the case was set for trial) recognized him as one of the defendants in the Sleepy Lagoon case; he (attorney) told defendant on the date set for the trial that it might be to his advantage "to enter a plea before Judge Bull [the judge then presiding], because he may not recognize you and he may not know anything about the Sleepy Lagoon case"; he told defendant that he assumed that Judge Bull "would do the sentencing," and that he was hopeful that would be the outcome of it, "but we don't always get our hopes"; he reminded defendant that defendant had been sentenced to a year in the county jail for selling heroin and that he had been out of jail about four months when he was found with this marijuana; he also told defendant that "because of the amount of marijuana that was found that he could not expect too much leniency"; and he did not promise defendant that the court would give him leniency if he pleaded guilty.

[3] The resolution of the conflict in the evidence, between the allegations of defendant in his affidavit and the testimony of the attorney, was for the determination of the trial judge. People v. Kirk, 98 Cal. App.2d 687, 694, 220 P.2d 976, 981. The trial judge stated that he did not believe the statements of defendant.

The order is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

105 Cal.App. 2d 256

PEOPLE v. NIXT et al.

Cr. 4623.

District Court of Appeal, Second District, Division 1, California.

July 2, 1951.

Roy Allen Nixt, and others, were prosecuted. Thomas Timothy Frawley was convicted in the Superior Court, Los Angeles County, Kurtz Kauffman, J., of robbery and he appealed. The District Court of Appeal, Doran, J., held that evidence was sufficient to sustain conviction.

Judgment affirmed.

Robbery ⇐24(1)

Evidence was sufficient to sustain conviction for robbery.

Charles Hollopeter, Pasadena, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent

DORAN, Justice.

Appellant was adjudged guilty by a jury of the crime of robbery; the jury also found that defendant was armed at the time of the commission of the offense. Defendant admitted the prior conviction of a felony which was also alleged. The

appeal is from the judgment and the order denying motion for a new trial.

Appellant and two others were accused of the crime. The evidence reveals that they entered the clothing store of one George L. Berger in Pasadena. There were two clerks and six customers in the store at the time of the robbery. All were robbed; the amount totaled about one thousand dollars. Considerable clothing was also taken.

It is contended on appeal that: "I. The evidence is insufficient to justify the verdict. II. Prejudicial error was committed by the trial court in its rulings on the admissibility of evidence. III. Prejudicial misconduct was committed by the District Attorney."

It would serve no useful purpose to review the evidence; that it was sufficient in the light of well-known rules governing such situations there can be no question. The law does not require the identity of a defendant to be positive. As pointed out by respondent, "In the instant case we have ample identification of Frawley as one of the participants in the robbery of the Berger store in Pasadena. The witnesses identified him and it was for the jury to determine the weight to be accorded to their identification. Of significance also was the fact that the defendant Frawley was arrested in the company of the two men who were positively identified as participants in the robbery. Also, there was testimony that they had all three returned from San Diego where they had gone to commit a robbery. Frawley had the fruits of the Berger robbery on his person. There was testimony that the three defendants always divided the fruits of their robberies equally between them. Another robbery, the one in Huntington Park, was admittedly committed by Nixt and Cox and the fruits of this robbery was found in Frawley's apartment at the time of his arrest. Frawley failed to take the stand to deny the accusations made against him. It is submitted that in view of this evidence implicating the defendant Frawley, the jury had no other choice but to return a verdict of guilty of robbery in the first degree."

With regard to appellant's contention that "prejudicial error was committed by the trial court on its rulings on the admissibility of evidence", the record does not support the argument that such rulings were prejudicial. It may be conceded, which is not uncommon in such circumstances, that the validity of such rulings are technically open to argument but it does not follow that the result was prejudicial. The observation applies to appellant's contention as to alleged prejudicial misconduct. In the light of the record appellant's contention in this connection cannot be upheld.

The judgment and order denying motion for new trial are affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

WEST KEY NUMBER SYSTEM

NATIONAL UNIVERSITY LIBRARY
3 1786 10047 7006

NATIONAL UNIVERSITY LIBRARY

SAN DIEGO

NON-CIRCULATING